

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Travelers Casualty Insurance)	
Company of America, BMB)	
Investment, LLC, and Brenda)	
Barfield,)	
)	
Plaintiffs and Appellees)	Supreme Court No.: 20140020
)	
v.)	Cass Civil No.: 09-2011-cv-03724
)	
Williams Company Construction, Inc.,)	
SKL, Inc. D/B/A Home Heating,)	
Plumbing & Air Conditioning, Inc., and)	
McIntosh & Associates, Inc.,)	
)	
Defendants)	
-----)	
Williams Company Construction, Inc.,)	
Appellant)	

APPEAL FROM THE CASS COUNTY DISTRICT COURT'S ORDER
DENYING WILLIAMS COMPANY CONSTRUCTION, INC.'S MOTION FOR
NEW TRIAL, AS WELL AS THE JUDGMENT FOR PLAINTIFF AGAINST
WILLIAMS COMPANY CONSTRUCTION, INC., ENTERED IN THE
ABOVE-COURT ON AUGUST 7, 2013

BRIEF OF APPELLANT
WILLIAMS COMPANY CONSTRUCTION, INC.

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STATEMENT OF ISSUES:

¶1. Whether the Trial Court committed prejudicial error in not giving Williams' requested jury instruction regarding "independent contractor-distinction."

¶2. Whether there was insufficient evidence and therefore, whether it was against the substantial weight of the evidence at trial for the jury to find and place 70% causal fault on the part of Williams for the plaintiffs' damages in this case.

¶3. Whether the District Court committed prejudicial error by refusing to give the jury Williams' requested Pattern Civil Jury Instruction C-80.30 – "Failure to Produce [Witness]".

STATEMENT OF THE CASE

¶4. Jury trial was held in the above matter on April 30, 2013. The amount of plaintiffs' damages had been stipulated. Based on the jury special verdict, judgment was entered on August 7, 2013 awarding judgment in favor of Plaintiffs Travelers Casualty Insurance Company of America, BMB Investment, LLC, and Brenda Barfield ("Plaintiff") against Williams Company Construction, Inc. (Williams) in the amount of \$154,032.26, together with interest, costs and disbursements of \$39,214.64, for a total judgment of \$193,246.90 against Williams. See Jury Special Verdict and Judgment (App. 68 and 73).

¶5. Notice of entry of the judgment against Williams was served on Williams' counsel on August 8, 2013. Williams served and filed a motion for new

trial on October 2, 2013. By order dated and entered November 22, 2013, the District Court, Honorable Frank L. Racek, presiding, denied Williams' motion for new trial. (App. 77).

¶6. Williams appeals to this Court from the District Court Order denying its motion for new trial and the judgment entered against Williams in the District Court. The appeal was timely filed and this Court has jurisdiction pursuant to Rule 4, N.D.R.App.P. (App. 81).

STATEMENT OF THE FACTS

¶7. In February of 2008, Williams agreed to remodel a certain portion of a commercial building in Fargo, North Dakota, that Dr. Brenda Barfield ("Barfield") owned and in which she operated her dental practice. (App. 66).

¶8. Williams performed no actual, physical construction work as a part of the remodeling project. Instead, Williams acted as more of a "construction manager" and hired and paid the various and several subcontractors, the latter of whom actually performed the physical, hands-on construction work. (Tr.274-5).

¶9. One of the subcontractors that Williams hired for this remodeling project was defendant SKL, Inc., d/b/a Home Heating, Plumbing & Air Conditioning, Inc. ("SKL"). (Tr.275.)

¶10. SKL was hired as the plumbing subcontractor and decided where to, and in fact placed and installed the plumbing pipe, including ventilation and water supply pipe, in the remodeled portion of the building. (Tr.275, 432-3).

¶11. On December 16, 2008, a portion of a water supply pipe installed by SKL in the plaintiffs' building, as part of the remodeling project, froze and burst, causing only minor damage that is not involved in this litigation. SKL patched that pipe and left a hole in the wall so that warm air from the interior of the building could conceivably flow into the space where the damaged water pipe ran, in order to keep that pipe from freezing and bursting again. (Tr.387)

¶12. Barfield and her staff still felt that the air not only in the interior occupied space of her building was cold, but so too was the space in the plumbing wall where the water supply pipes installed and located by SKL, ran. (Tr.106-7, 198, 200). Because of this, Barfield and her staff called SKL on numerous occasions after December 16, 2008, to determine the cause of the cold air in the space where the water supply pipes ran and do something to prevent that pipe from freezing again. (Tr.107, 201-2). It is undisputed that SKL ignored all of these repeated requests and never sent somebody over again to look at the pipe and the area where it was housed, despite the fact that SKL's business was just across the street from Barfield's dental business. (Tr. 128)

¶13. On December 22, 2008, the same water supply pipe, that had frozen and burst earlier (on December 16, 2008), froze and burst again, this time causing a very substantial amount of damage to the plaintiffs' building, resulting in this litigation. (App. 9, ¶ 10).

STANDARD OF REVIEW

¶14. Regarding the refusal of the District Court to give the two jury instructions at issue in this appeal, the standard is whether or not the trial court abused its discretion in refusing to give those instructions.

¶15. Concerning the issue regarding the allocation of fault assessed by the jury to Williams, the standard of review would be whether or not that jury finding was supported or substantiated by the greater weight of the evidence in this case and therefore, whether or not the Trial Court abused its discretion in refusing to grant Williams a new trial.

LAW & ARGUMENT

I. THE COURT ERRED IN NOT GIVING WILLIAMS'S REQUESTED JURY INSTRUCTION REGARDING INDEPENDENT CONTRACTOR.

Standard of Review:

Abuse of Discretion.

¶16. The Court erred in not giving Williams's requested jury instruction regarding the independent contractor distinction. Williams, specifically and in writing, requested the Court to give to the jury North Dakota Civil Pattern Jury Instruction C-55.25 regarding the independent contractor distinction instruction. See App. 60. See also Transcript ("Tr.") at 23.

¶17. As the note to the instruction states, the word "employer" is generically used in the instruction to cover and apply to many different types of relationships.

¶18. In Williams's Requested Jury Instructions, counsel specifically requested that the independent contractor jury instruction be given to the jury in this case, by reference to its ND pattern jury instruction number pursuant to N.D.R.Civ.P. 51(a)(3). In addition, at trial, Williams specifically objected to the Court's failure and refusal to submit that instruction to the jury. Tr. at 23. The Court noted Williams' objection and stated the record was present on that issue. Tr. at 23.

¶19. The refusal to give this instruction deprived Williams of a fair trial. More specifically, the refusal by the Court to give the instruction resulted in the inability of the jury to distinguish SKL, Inc., d/b/a Home Heating Plumbing & Air Conditioning, Inc. ("SKL") as an independent contractor when assessing the fault of SKL and Williams in this case for plaintiffs' damages. Thus, Williams is entitled to a new trial.

¶20. N.D.R.Civ.P. 59(b)(7) states that on the motion of an aggrieved party, the court may vacate the former verdict or decision and grant a new trial if "errors in law occurring at trial, and when required, objected to by the moving party, materially affect the substantial rights of the party." *Id.*

¶21. The jury must be provided with jury instructions which fairly inform them of the applicable law. Amyotte ex rel. Amyotte v. Rolette County Housing Authority, 2003 ND 48, ¶ 5, 658 N.W.2d 324. One purpose of jury instructions is to "inform the jury of the various permissible ways of resolving the issue in the case, and a party is entitled to an instruction on its theory of the case so long as it

is legally correct and there is factual evidence to support it.” Thornton v. First State Bank of Joplin, 4 F.3d 650, 652 (8th Cir. 1993).

¶22. Jury instructions should “fairly cover the claims made by **both** sides of the case.” Cartier v. Northwestern Elec., Inc., 2010 ND 14, ¶ 11, 777 N.W.2d 866 (citing Harfield v. Tate, 1999 ND 166, ¶ 6, 598 N.W.2d 840) (emphasis added). “Only scant evidence may be needed to support a jury instruction. Where there is no evidence to support a particular theory, there should be no instruction on it, but if the evidence admits of more than one inference, an instruction is proper.” Id.

¶23. “While a trial court may properly refuse a requested instruction not applicable to the evidence, a party **is** entitled to an instruction on a valid applicable theory if there is some evidence to support it.” Amyotte, 2003 ND 48, ¶ 5 (emphasis added); Gowin v. Trangsrud, 1997 ND 226, ¶ 9, 571 N.W.2d 824; Munro v. Privratsky, 209 N.W.2d 745, 751 (N.D. 1973) (“[e]rror cannot be based upon refusal to give instructions not warranted by the evidence”).

¶24. The district court is not required to define a commonly understood word to the jury unless there is a specific request for the definition; once such a request has been made, the court should use appropriate discretion in deciding whether the definition is necessary. Case Credit Corp. v. Oppegard’s, Inc., 2005 ND 141, ¶ 10, 701 N.W.2d 891. “As a general rule, a new trial will not be granted because of refusal of a proffered instruction if the general charge fairly and correctly states the applicable law.” Gleeman v. Triplett, 222 N.W.2d 787, 788

(Minn. 1974). However, “[i]f an erroneous jury instruction destroys the substantial correctness of the charge, causes a miscarriage of justice, or results in substantial prejudice, a new trial is warranted.” Youngquist v. Western Nat. Mut. Ins. Co., 716 N.W.2d 383, 386 (Ct. App. Minn. 2006). If there is a “reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury,” the error is [in not giving the instruction] prejudicial. Id.

¶25. Moreover, errors in instructions as to one theory of a case cannot be held harmless if it is impossible to determine upon which of the two theories the jury based its verdict. Powers v. Martinson, 313 N.W.2d 720, 724 (N.D. 1981).

¶26. The failure of the trial court in this case to instruct the jury regarding the independent contractor distinction was a prejudicial error on the part of the trial court. This failure to include the requested jury instruction deprived Williams of a fair trial and denied Williams and its counsel a fair and full opportunity to argue and submit its case to the jury for a full and fair determination by the jury on the crucial liability issues in this case. Accordingly, Williams’s Motion for New Trial should have been granted and this Court should reverse the District Court’s Order denying Williams’s motion for a new trial and return this case to the District Court for a new trial on liability.

¶27. The evidence and testimony at trial, that fully and adequately supported Williams’ request that the Independent Contractor jury instruction be given, will be summarized hereafter.

¶28. The plaintiff, Brenda Barfield, testified that she considered Williams to have been the “general contractor” with respect to the remodeling work done at the plaintiffs’ office building that was the subject of this lawsuit. (Tr. at 64, 102).

¶29. Barfield testified (and her counsel argued at length throughout the trial, e.g. Tr.15, 17) that she considered Williams to have been the general contractor for the remodeling work and that she looked to Williams to oversee the whole project and make sure it was all done correctly and everything was followed the way it should be. (emphasis added). Tr. at 64.

¶30. Mr. Tom Spaeth, (“Spaeth”) Plaintiffs’ construction expert, testified at the trial on behalf of Plaintiffs. Spaeth testified that the role of a general contractor is to not only hire subcontractors for certain things, but also to get bids and prices from subcontractors and hire them and manage them and work along with them to get the project done. Tr. at 227. Spaeth also testified that a general contractor would visit the construction site every day when the subcontractors are working and answer questions. Spaeth said that a general contractor would also do “trouble shooting” if you have to put something somewhere else if it doesn’t properly go where it is supposed to, things like that. Tr. at 227-228. Spaeth testified that as a general contractor, if there is a change or something came up that was uncovered during the construction process, that’s when he, as a general contractor, would always step in and talk to the customers and technicians on what should be done, how it should be done, and then change the way it is being done. Tr. at 228 and 229.

¶31. Regarding the plumbing wall where the water supply pipe was placed and ran by SKL, that froze - causing Plaintiffs' damage, Spaeth testified that Williams possibly failed to oversee the last phases of the plumbing wall where the pipes were ran and ensure that everything was sealed up and done properly in that regard. Tr. at 247. Spaeth also testified that, in his opinion, Williams failed to exercise ordinary and reasonable care as the "general contractor" as it relates to events that happened in Barfield's building after December 16, 2008, because there was a water break or a pipe break that caused damage to a building that he (Williams) had worked on and nothing was done and that was outside the ordinary and reasonable standard that a contractor should abide by. Tr. at 249 and 250.

¶32. Spaeth testified that there was a hole or opening on the exterior (cold side) of the plumbing wall that was right next to the exterior insulation of the building which caused cold air to get into the interior of the plumbing wall and cause the pipes to freeze. Tr. at 261. Spaeth testified, and it was undisputed, that SKL installed not only the ventilation pipes that ran behind or on the cold side of the plumbing wall, but also the water supply pipes that ran inside the plumbing wall. Tr. at 261, 262 and 263. Spaeth, however, does not know who caused the hole or gap that was not sealed up where the outside ventilation pipes stubbed through the plumbing wall space and then to the interior of the building to connect up to the sinks in the interior of the building. Tr. at 261, 263 and 264.

¶33. Spaeth testified that the manner in which the ventilation or waste plumbing pipe was installed, (i.e, behind or outside of the plumbing wall and then

come or stub through the plumbing wall to connect up to the inside sinks and vanity of the building) could have been done differently by placing that pipe, as well as the water supply pipe, inside the warmer plumbing wall. According to Spaeth, doing that would have put the vent or waste pipe inside the warm space of the plumbing wall along with the water lines and doing that would have taken out the problem with the penetrations through the wall into the cold area. Spaeth testified that doing that would have totally avoided cold air from the outside penetrating into the plumbing wall where the water supply lines ran and thus would have prevented the freeze up of the water lines. Tr. at 249.

¶34. The upshot of Spaeth's testimony was that Williams should not only be responsible for its own direct work, but also for the unsatisfactory, unworkmanlike and inappropriate manner in which the plumber, SKL, installed the ventilation pipe during the remodeling project. It was also Spaeth's opinion that, whoever put in the sheetrock or left the gap or space around where the ventilation pipe protruded through the plumbing wall sheet rock on the cold side, without properly sealing that to prevent cold outside air from infiltrating into the plumbing wall and freezing the water pipe, would also ultimately be the responsibility of Williams because again, according to Spaeth, Williams had the overall responsibility to make sure the project was done properly, trouble shoot and fix or correct any problematic work of contractors it hired. Tr. at 249.

¶35. There are several problems and issues regarding these claims of plaintiff, her attorneys and her expert, particularly in light of North Dakota law

and the manner in which the jury was instructed in this case.

¶36. Duffy Williams, (“Duffy”), President and sole owner of Williams, testified that neither he nor his company did any actual hands-on construction work or labor in this remodeling project for Barfield. Tr. at 274-275. Rather, Duffy testified that “I subcontract all my work”, and that he did so in this case with Barfield. Tr. at 275.

¶37. With specific reference to the construction issue at the heart of this case, namely the plumbing work performed by defendant SKL, Duffy testified that he (Duffy) hired SKL to do the plumbing work and that he did not instruct or tell SKL how to do their job, nor did he direct the means, manner or methods of how SKL performed its plumbing work and services for the remodeling project involved in this case. Tr. at 275. Duffy specifically stated, “I told them what I wanted and let them figure out how to do it.” Tr. at 275. Duffy testified that his approval was not needed for where the plumbing pipes were placed or ran by the plumber, SKL. Tr. at 310.

¶38. Duffy testified that he did not know anything about plumbing and that, in fact, “the only plumbing I’ve ever done, I’ve screwed up.” Tr. at 309-310. Duffy testified that he hired SKL to do the plumbing work for the Barfield remodeling project in this case (Tr. 275), did not instruct or tell SKL how to do their job and instead only told them what needed to be done and then left it up to SKL to determine the means and methods of their work (Tr. 275) and relied upon SKL to do their plumbing work properly and correctly. Tr. at 310.

¶39. Apart from where the plumbing waste/vent piping was ran and placed as a part of the remodeling project, the other aspect of this case as it pertains to the cause of the freezing of the water pipe and the water damage in Barfield's building, was the construction of the sheet rock for the plumbing wall and gaps or holes left in that sheet rock where the waste/vent pipe was stubbed through the plumbing wall from the cold space behind it. Duffy testified that he (Duffy) did not put up that sheet rock or build that plumbing wall, but rather, a company by the name of Hauck and Buchholz constructed the sheet rock for the plumbing wall and that Williams did none of that work itself. Tr. at 276.

¶40. Duffy testified that he was not even in the room when the plumbing wall was built and relied upon Hauck and Buchholz to do that. Tr. at 276 and 277.

¶41. Duffy testified that he did not even know that the exterior wall of the plumbing wall had been penetrated by the waste or vent pipe and never saw or observed SKL running or placing its waste/vent and water supply pipes in the area of the building that was remodeled. Tr. at 306. In fact, this would not have been necessary as even Spaeth, plaintiffs' expert witness, testified that it is the plumber (SKL in this case) who controls where they put all their pipes. Tr. at 271.

¶42. The aforementioned testimony of Duffy was contradicted by any witnesses at trial, particularly the plumber, SKL's, witnesses. In fact, none of the SKL plumbers or employees who actually performed plumbing work and services for SKL and the plaintiff, during the remodeling project, testified at trial.

¶43. Roger Bauch, an employee of SKL, testified that he responded to the

first plumbing pipe break at Barfield's building and went there on December 16, 2008, and repaired the break in the water-supply plumbing pipe. Tr. at 386. Bauch testified that when he was there that day and performed that repair work for Barfield, Duffy was not present. Tr. at 388. Bauch testified that Duffy did not supervise the manner in which Bauch performed the plumbing work and repair of the water pipe at Barfield's premises that day. Tr. at 399. Bauch did not ask Williams for any instructions on how to fix the pipe. Tr. at 399. In any event, Bauch testified that he was the plumber and did not need to be told by Williams how to perform plumbing work or fix a broken pipe. Tr. at 400.

¶44. Moreover, when Bauch repaired the broken water pipe at Barfield's premises, he could feel that the air inside the plumbing wall where the broken pipe was, was cool and because it was, Bauch had a concern that because of the coldness of that air, that water pipe could freeze again. Tr. at 387. Bauch testified that while he told somebody at Barfield's office about that concern, he never voiced that concern, that is, that the space in the plumbing wall where the water pipe was was cold and could freeze again, to Williams. Tr. at 388. In fact, Bauch testified that when he got back to his office (which was just across the street from Barfield's dental office) he doesn't know if he told anybody at his office about this concern and that the water pipe could freeze again. Tr. at 389.

¶45. Additionally, even though Plaintiff contends that Williams should be held responsible and accountable for the work of the plumber (SKL) to whom it subcontracted the plumbing work for the remodel, it is undisputed that SKL billed

BMB Investments (Dr. Barfield) directly for the work to fix the break on December 16, 2008, and did not send that bill to or through Williams. Tr. at 385 and 386. See, also trial exhibit 132.

¶46. There was really no dispute or contradiction at trial of Duffy's testimony that he and Williams Company relied upon the knowledge and expertise of SKL regarding the performance of the latter's plumbing work for the remodeling project for the plaintiff. Williams relied upon the knowledge and expertise of SKL in knowing how to perform their plumbing work suitably and properly, as he had worked with them in the past and considered them to be knowledgeable and competent plumbers. Tr. at 310. This was not contradicted at trial.

¶47. Additionally, there was no dispute at the trial that Williams did not direct, instruct, supervise, or control the means, methods, procedures and work of SKL regarding the plumbing work it did for plaintiff in the remodeling project. Tr. at 275. Again, Williams was not a plumber, SKL was. Tr. at 309-10. Williams relied upon SKL's knowledge and expertise in knowing how to perform their plumbing services correctly and properly. Tr. at 310.

¶48. We also note to the Court that the only written contractual agreement between plaintiff and Williams was the one page document received and entered into evidence as Exhibit 102. (Trial Exhibit 102, Appendix 66). As the Court will note from that document, that agreement does not provide that Williams is supposed to be the so-called "general contractor" for the remodeling work for

Barfield. In fact, those words are not even used or mentioned in the agreement.

¶49. There were no written contractual agreements between Williams and any of the contractors that it received bids from and hired for various aspects of the remodeling work in this case, other than bids/estimates, invoices and related documents.

¶50. Certainly, this case did not contain any of the usual AIA construction documents typically found in a large construction project, wherein one party is named and assumes the responsibility of a “general contractor” and agrees to be responsible for the work of subcontractors it hires.

¶51. There were certainly no AIA written subcontract agreements between Williams and any of the other contractors it hired to perform the different and various aspects of the remodeling work for plaintiff.

¶52. It also is worthy of noting, and is significant that, even though Plaintiff contended at trial that Williams (as the general contractor) should be responsible for work if all the subcontractors, the District Court did not instruct the jury on the definition, effect or status of a “general contractor”. Williams does not believe that there is any North Dakota law on that issue. There are certainly no pattern North Dakota, civil or otherwise, jury instructions on the definition, status or consequence of being a so-called “general contractor”. For that reason none of the parties in this case proposed a requested jury instruction on “general contractor”, nor did the Court give one to the jury, as no such instruction exists under North Dakota law.

¶53. The Court did give general instructions on the duty of a “contractor”, and Williams does not have an issue with that. However, that instruction given by the Court, does not attempt to make any distinction between a “general contractor” on the one hand and a “subcontractor” on the other. Again, the instruction that the Court gave to the jury in this case, which was not opposed by any party, merely stated the general duty of any “contractor”. (App. 64).

¶54. As this Court is fully aware from the Transcript of the trial testimony and the record exhibits, this case essentially came down to a problem with the way in which the plumbing water-supply and ventilation pipes were installed in the part of the plaintiffs’ building that was remodeled.

¶55. As stated above, plaintiffs’ expert, Spaeth, testified that the ventilation plumbing pipes were improperly installed during the remodeling process and that caused the plaintiffs’ damages. Spaeth specifically opined that SKL could have put the ventilation pipes in the warm space (“plumbing wall”) with the water supply pipes and that would have avoided or prevented the pipe freezing. Tr. at 249. Spaeth claims Williams was liable, as the so-called “general contractor”, for that defective work of the plumber. Tr. at page 310. However, Williams had no control over the placement of the vent piping because SKL acted independently of Williams due to SKL’s expertise that Williams does not hold. Williams, as a construction supervisor, simply oversaw the project, and did not possess the expertise to ensure proper installation of plumbing pipes, hence the very reason SKL was hired – for its expertise in plumbing. Id. Tr.275, 309-10.

¶56. Spaeth testified that the plumbing ventilation/waste pipes should have been installed inside the “chase wall” where the water supply pipelines ran and doing so would have totally avoided any gaps allowing cold outside air to infiltrate into the “chase wall” and freeze the water supply pipes in that wall. Tr. at 249.

¶57. David Obermiller, (“Obermiller”), mechanical engineering expert of Williams, testified that SKL improperly installed the plumbing waste/ventilation pipes, during the remodeling project. Tr.185-187. Obermiller testified that the plumbing waste/ventilation pipes should have been installed within the same “chase wall” that the water supply plumbing pipes were installed in, and that that would have greatly reduced the chances of cold air getting to the water supply pipes and causing them to freeze and cause the water damage they did. Tr. at 186-87. Additionally, Obermiller testified that vent piping of the nature installed by SKL for Barfield’s office is typically enclosed within one plumbing or chase wall, along with the water supply pipes.¹ Tr. at 185.

¶58. Obermiller testified that by installing the waste/ventilation pipes in the wall or space outside of or behind the “chase wall”, the latter being the space where the water supply pipes were installed, SKL caused the integrity of the outside wall insulation to be compromised and its effect lessened, resulting in

¹ For purposes of the trial testimony and record, as well as for this appeal, the terms “plumbing wall” and “chase wall” are interchangeable and mean the same thing, i.e., the enclosure behind the interior wall of the remodeled room where the water supply pipes were located.

greater chances of freezing of the water supply plumbing pipes inside the “chase wall” in the remodeled portion of the building. Tr. at 182.

¶59. Obermiller testified that these were all issues and problems caused by the plumber’s installation of these various pipes. The plumber, of course, was SKL.

¶60. Defendant McIntosh and Associates, (“McIntosh”), expert testified similarly to Obermiller, however, he went even further. Mr. Geoffrey Jillson (“Jillson”) of Guy Engineering, McIntosh’s expert, testified that, in his opinion, the plumbing waste/ventilation pipes installed by SKL should have been installed inside the plumbing wall or “chase wall”, along with the water supply plumbing pipes. Jillson said that the failure to install the ventilation/waste pipes inside the plumbing wall with the water supply pipes constituted a violation of the Uniform Plumbing Code. Tr. at 432 and 433. Jillson testified that had the ventilation/waste pipes been installed inside the plumbing or “chase wall” along with the water supply pipes, the water supply pipe would not have frozen and burst causing the damage to plaintiffs’ building. Tr. at 432.

¶61. Jillson also testified that the plumber would decide where to put those pipes, i.e., the waste/vent pipes and the copper water supply pipes. Tr. at 432 and 433.

¶62. Accordingly, and the reason for all of this discussion is that this case really came down to a plumbing issue and problem, specifically the location of the plumbing ventilation/waste pipes in relation to the water supply pipes.

¶63. There was testimony that, during the time Barfield rented the subject building for her practice, while it was still owned by Williams and before she bought the building from Williams, she had ongoing problem with the heating, draftiness and cold air in the building. Tr. at 60. Barfield in her testimony at trial stated that “pretty much through when we first opened up until after that second break.” Tr. at 60. However, it was undisputed that a water pipe never froze, burst and caused damage in Barfield’s building while she was a renter. A pipe never froze until only after the 2008 remodeling work was done and after SKL performed its plumbing work and chose the location for the ventilation/waste and water supply plumbing pipes in the remodeled area. Tr. at 123, 210. This was not disputed at trial.

¶64. In fact, as the trial testimony established, there was a working bathroom right next to the room in the building that was remodeled. Tr. 210. This bathroom was not installed as part of the remodel. Tr. at 67, 210. It was already there. Id. Dr. Barfield in her testimony at trial stated that “we kept the bathroom where it was, and they ended up putting a vanity up against the wall.” Tr. 68. That bathroom, even during the time that Barfield rented the building from Williams, and claimed that she had ongoing problems with cold air, etc., before the remodel, was always operational and was always connected to water supply pipes and lines. Tr. 210. However, it is undisputed that, even though plaintiffs’ claim that Williams was negligent in not having that part of the building (or probably any other part as well) properly insulated, it is undisputed that the water

supply pipes that connected up to the working toilet and sink in that bathroom, and which connected to the newly installed water pipes installed in the remodeled area, never froze, burst and caused damage, until after SKL installed piping in the 2008 remodel. Tr. at 123, 210, 211.

¶65. Again, it is completely undisputed in this case that no water supply pipes in that part of the building (or any other part of the building for that matter) ever froze, burst and caused damage in plaintiffs' building until after SKL performed its plumbing work and services during the 2008 remodel and made the decision to locate the plumbing waste/ventilation pipes in a different wall or location than the water supply line pipes in the remodeled area. Tr.123, 210, 211.

¶66. As discussed earlier, the plumbing work for the remodeling job was performed by SKL. Id. The pipe that froze and burst twice in December of 2008, was pipe installed, placed and located by SKL. Id. Duffy testified that not only did he not control the means, methods or procedures of SKL's work, but he also did not instruct or tell SKL where to place the water supply and ventilation/waste plumbing pipes during the remodeling job. Tr. at 275. He left that completely up to SKL to decide because they were the licensed and experienced plumbers and the so-called plumbing experts, not Duffy or his company. Id. This testimony was not contradicted. Id.

¶67. Additionally, some very important testimony was given by Stacy Cosette, ("Cosette"), the office manager for Barfield's dental office, who testified on behalf of the plaintiff at trial. Cosette testified about the first plumbing pipe

break in the plaintiffs' building on December 16, 2008. Her testimony was that SKL was called because of that plumbing pipe break and the minor water leak therefrom, and came over and fixed the pipe. However, Cosette, as well as Barfield, continued to feel very cold air in the "plumbing/chase wall", as well as in the interior of the remodeled area that the pipe that broke, serviced. They were very concerned that that pipe would freeze and break again, causing more damage beyond the minor damage it caused the first time. Tr. at 106 - 107, 198, & 200. Cosette, as well as Barfield, testified that they repeatedly called SKL, whose offices were located just across the street from Barfield's offices, to come back, investigate and fix the problem because they were afraid that that pipe would freeze and burst again and cause more damage. Tr. at 107, 201, 202.

¶68. Despite these repeated requests and pleas for help, SKL never bothered to show up, investigate the cause of the problem, take care of it and prevent the pipe from freezing and bursting again. Tr. at 128. Unfortunately, the pipe froze again on December 22nd, this time causing the significant damage that resulted in the lawsuit below.

¶69. Barfield testified that she called SKL's office approximately 20 times between the first and second pipe breaks requesting them to send somebody over and investigate and fix the problem with the cold air and the pipe. Tr. at 106-107. Cosette and Barfield testified that on a number of occasions, when they called SKL, they got the "runaround" and SKL would "bounce" them around from one department to the other, each claiming that the other department was the one

responsible to address the problem. Tr. 104, 127, 202-3. Cossette and Barfield testified that despite the repeated phone calls to SKL, during the short span of time between the two pipe breaks, and despite SKL assuring them that they would send somebody over to look at the problem, SKL never did and the pipe burst again on December 22nd, this time causing a very substantial amount of damage. Tr. at 130, 202, 203, 212, 213.

¶70. Roger Bauch, (“Bauch”), SKL’s plumber who fixed the first pipe freeze and break at plaintiffs’ premises on December 16, 2008, testified that, after he fixed the pipe that day, he could still feel very cold air inside the “plumbing/chase wall” where that repaired water supply plumbing pipe was located, and was concerned that that pipe could freeze again. Tr. 387. In fact, presumably because of that concern, Bauch left a hole cut and open in the sheet rock in the area of the now-repaired plumbing pipe so that warmer interior air from the break room of the building could get into the more enclosed “plumbing/chase wall” where that water pipe was located in order to try to keep that “chase wall” space warm and hopefully prevent another freeze and pipe break. Tr. 397.

¶71. Bauch also testified that after he fixed the pipe on December 16, 2008, he went back to his office and did not remember mentioning it to anyone at SKL. Tr. at 389. Moreover, Exhibit 221, the job ticket for December 16, 2008 had no mention of Bauch’s concern about the pipes freezing again.

¶72. However, it is undisputed that – despite knowing that the water pipe

broke the first time – and despite their concern that because of the cold air in the chase wall space that that same pipe could freeze and break again – and cause water damage again – SKL did absolutely nothing about that problem that was known to them. Tr. at 392.

¶73. Bauch testified that the reason he did not investigate the cause or the reason for the freeze and breakage of the plumbing pipe SKL installed, when he was at plaintiffs' building on December 16, 2008, to fix the first pipe break, was because SKL was only paid to fix that broken pipe and not "play detective." Tr.390-392.

¶74. Williams contends that SKL put their concern for profit and revenue ahead of their obligation and duty to perform their work and services for their customer, Barfield, with reasonable care, diligence, and skill. Tr. at 393. The Court instructed the jury that it was SKL's duty (as a contractor) to exercise such care and skill Williams contends that SKL failed miserably in the exercise of that duty.

¶75. Again, Barfield and her office called, in fact begged and pleaded with SKL, many times between the first and second pipe breaks in their building, to come over and investigate the reason for the cold air in the wall where the water pipes were situated, because they feared that the pipes would freeze and break again and cause more damage. Id.

¶76. Despite these numerous calls and cries for help, SKL turned their back on their customer, Barfield, and ignored her pleas for help. Id.

¶77. Cosette may have said it best when she testified that she, on behalf of Barfield, repeatedly looked to SKL for help to solve the cold air problem, between the first and second pipe breaks, but that SKL let them down. Tr. at 212-13.

¶78. Therefore, the great weight of the evidence at trial, clearly showed that Williams did not direct, control, supervise, or instruct SKL as to how to do its plumbing work during the remodeling project involved in this lawsuit. Williams did not tell or instruct SKL where and how to place and locate the water supply and waste ventilation plumbing pipes that SKL installed. SKL determined all of those means, methods and locations themselves. Williams relied upon the expertise and knowledge of SKL as to how it should do their plumbing work properly as SKL was the licensed plumber, not Williams.

¶79. It was open to dispute at the trial of this case, and there was conflicting evidence presented, on the exact nature of Williams' role in this remodeling project for the plaintiff. Again, plaintiff, her attorneys, and their expert testified and argued that Williams was in fact the "general contractor" for the remodeling project and therefore, should be responsible for any defective workmanship of the subcontractors it hired, as well as its own negligence.

¶80. On the other hand, Duffy testified that his company did not actually perform any hands-on construction work in the project, his role was more to coordinate the work of the contractors he hired. Williams did not instruct, direct or tell the other contractors how to actually perform the means and methods of

their work or how to do their work itself. Williams left that up to the individual contractors, including SKL, to determine.

¶81. Because of the above testimony, and because a party is entitled to have the jury instructed on its theory of the case if there is evidence that supports that theory, and the law allows it, see Amyotte, *supra*, it was critically important for Williams that the Court give Williams' requested pattern civil jury instruction C-55.25 which defines the critical distinction between an employee and an independent contractor.

¶82. Williams took the position in this case that the contractors it hired for the remodeling work for the plaintiff, most importantly the plumber, SKL, were independent contractors of Williams, as opposed to being Williams' employees, agents, representatives or having some other status where Williams would have to answer and be held accountable for any defective work of the other contractors.

¶83. The jury instruction that Williams requested, regarding an independent contractor, provides that an independent contractor is one who is allowed to perform without being subject to the employer's supervision, orders or control, in respect to the details of the work and that an independent contractor has absolute control of the work – as well as when and how it will be done and who may do it. App. 64.

¶84. The pattern instruction requested by Williams goes on to further state that an employer is not responsible for the fault of an independent contractor.

App 64.

¶85. That instruction should have been given. Williams should have been allowed to argue that SKL was an independent contractor of Williams, as concerns SKL's work and that Williams cannot be held liable, at fault, or responsible for any defective work performed by SKL as an independent contractor. This case was tried and submitted to the jury on a comparative fault and several liability basis, adding to the importance of this instruction. See, N.D.C.C. § 32-03.2-02.

¶86. Pattern jury instruction C-55.25 is still an approved pattern jury instruction in this state. There was substantial evidence to support the giving of that instruction. It was Williams' theory of the case that it did not control the means or methods of SKL's work, including the decision of where to place and locate the plumbing waste ventilation and water supply pipes that were installed as a part of the remodel. It was Williams' theory, and more than sufficient evidence supported the argument, that the plaintiffs' damages were caused by deficient, unsatisfactory and unworkmanlike plumbing and placement of the plumbing pipes by SKL. Because Williams did not perform that plumbing and hired that out to a separate licensed and qualified plumbing contractor, whose work Williams did not direct or control, the jury should have been allowed to determine whether Williams should be held accountable for that plumbing work, or not.

¶87. The jury was simply never given that opportunity because they were not instructed on the crucial law of "independent contractor".

¶88. Based on the instructions given by the Court, the trial evidence and

testimony, and the Special Verdict, it is not possible to determine upon what theory or ground the jury assessed 70% of the fault on Williams for the plaintiffs' damages.

¶89. It is impossible to determine whether the jury believed and concluded that 70% of the causal fault for plaintiffs' damages was due to Williams' own independent fault or negligence regarding the remodeling work or based on its prior ownership of the building and the claimed problems that existed then, or whether Williams was also being held responsible and accountable for the patently defective work of SKL.

¶90. Under the above Powers decision, the failure to give an instruction that applies to one theory of the case, is presumed to be prejudicial when it is not possible to determine upon what theory or ground the jury decided the case.

¶91. Therefore, because the law of independent contractor is still a valid and viable jury instruction in this case; because the evidence at the trial of this case supported the giving of that instruction; because the jury should have been allowed to determine whether or not Williams should be held accountable for the negligence of SKL, even if Williams was a so-called "general contractor" for the job, and because it is not possible, based upon the evidence and testimony, the jury's verdict and the inadequate instructions as given by the Court, to determine exactly why the jury found the amount of causal fault against Williams that it did, the failure and refusal of this Court to give the independent contractor instruction requested by William was prejudicial to Williams, resulted in Williams not

obtaining a fair trial, and is grounds for a new trial for Williams.

¶92. Accordingly, based upon the Court's prejudicial failure and refusal to give the independent contractor instruction, C-55.25 Williams requested, which refusal was properly excepted to, Williams respectfully requests the Court vacate the jury verdict and judgment entered thereon against Williams, and order a new trial on the issue of the liability of Williams for plaintiffs' damages in this case. (case law C-55.25)

II. THERE WAS INSUFFICIENT EVIDENCE TO JUSTIFY THE JURY VERDICT FINDING 70% OF CAUSAL FAULT ON THE PART OF WILLIAMS FOR THE PLAINTIFF'S DAMAGES IN THIS CASE, AND THAT FINDING WAS AGAINST THE GREAT WEIGHT OF THE EVIDENCE AT TRIAL.

Standard of Review:

Whether there was sufficient evidence to justify the jury's assessment of 70% causal fault on the part of Williams and whether the District Court abused its discretion in denying Williams' motion or new trial based thereon.

¶93. As previously stated, the jury determined that Williams was 70% causally at fault for the plaintiffs' damages in this case, and SKL only 25%.

¶94. It is Williams' position that the evidence and testimony presented to the jury at trial was grossly insufficient to justify this verdict of fault against Williams for plaintiffs' damages in this case and that the verdict against Williams was against the great weight of the evidence in this case.

¶95. Williams contends that, because of the insufficiency of the evidence at trial to justify the verdict of 70% causal fault against Williams, that Williams is

entitled to a new trial on the issue of liability in this case.

¶96. The trial evidence and testimony outlined and summarized in Issue I, above, also applies to the argument on this issue. Williams contends that, based upon the trial testimony and exhibits, and the discussion in Issue I, above, that the jury verdict was perverse and the allocation of fault of 70% to Williams and only 25% to the plumber, SKL, was against the great weight of the evidence, was not supported by the evidence and is grounds to grant Williams a new trial on the issue of liability.

¶97. For the reasons advanced in Issue I, above, Williams respectfully requests this Court reverse the District Court's Order denying Williams a new trial, and remand this matter to the trial court for a new trial on the liability of Williams for plaintiffs' damages.

III. WILLIAMS IS ENTITLED TO A NEW TRIAL BY VIRTUE OF THE COURT'S REFUSAL TO GIVE THE JURY WILLIAMS' REQUESTED PATTERN CIVIL JURY INSTRUCTION C-80.30.

Standard of Review:

Whether the trial court's instructions, as a whole, were sufficient and did the trial court abuse its discretion in refusing to give the requested instruction.

¶98. Williams refers the Court to the above-discussion regarding a party's right to have the jury instructed on its theory of the case if the evidence supports the giving of the instruction. Williams adopts and incorporates by reference the discussion of those cases into this present discussion.

¶99. It is undisputed that none of the SKL plumbers who worked on

plaintiffs' remodeling project, testified at trial. There was a very significant amount of evidence that SKL performed its plumbing work improperly, both during the remodel and after the remodel was concluded (i.e., ignoring the plaintiffs' pleas for help), and that SKL's actions and omissions were the primary cause of plaintiffs' damages. The jury should have been given the "absent witness" instruction requested by Williams when assessing the liability claim against SKL. The refusal of the trial court to do so prevented Williams from arguing the effect that there were no SKL witnesses who testified at trial who had worked on the remodeling project.

¶100. Williams was prejudiced by this as is obvious from the absurd and irrational causal liability assessment by the jury of 70% on Williams and only 25% on SKL, despite the fact that SKL performed all of the plumbing work that resulted in plaintiffs' damages.

¶101. Williams is entitled to a new trial on the basis of the trial court's refusal to give this instruction.

¶102. Williams cites and incorporates by reference herein the trial testimony and discussion in Issue I in this brief as that is relevant to this issue.

CONCLUSION

¶103. Based upon the above and foregoing argument and authority, Williams respectfully requests that this Court, reverse the District Court's denial of Williams's motion for a new trial, vacate the verdict of the jury finding 70% causal fault on the part of Williams for plaintiffs' damages and grant a new trial to

Williams on the issue of its liability to plaintiffs.

Respectfully submitted this 2nd day of April, 2014.



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Travelers Casualty Insurance)
Company of America, BMB)
Investment, LLC, and Brenda)
Barfield,)
)
Plaintiffs and Appellees) Supreme Court No.: 20140020
)
v.)
)
Williams Company Construction, Inc.,)
SKL, Inc. D/B/A Home Heating,)
Plumbing & Air Conditioning, Inc., and)
McIntosh & Associates, Inc.,)
)
Defendants)
)
-----)
Williams Company Construction, Inc.,)
Appellant)

[illegible]

**Brief of Appellant Williams Company Construction, Inc.; and
Appendix of Appellant Williams Company Construction, Inc.**

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To the best of affiant's knowledge, the address above given is the actual post office address of the party intended to be so served. The above documents are e-filed in accordance with the provisions of the North Dakota Rules of Civil Procedure.


Toni Nicolson

SUBSCRIBED AND SWORN to before me this 2nd day of April, 2014.


Notary Public

My Commission Expires: 4.30.18

