estoppel, a promise must be of such a nature and made under such circumstances that the promisor should reasonably anticipate that it will induce action or forbearance of a definite and substantial character on the part of the promisee. Further, the promise must actually induce such action or forbearance and the circumstances must be such that injustice can only be avoided by enforcement of the promise. Restatement of Contracts §90 (1932). The remedy may be limited as justice requires. Restatement of Contracts §201 (Tent. Draft No. 2, April 30, 1965).

In the case before us, the district court found that, assuming that there had been authority to make a promise, the jury reasonably could have found that there was a promise upon which Universal had relied to its detriment. The court, however, concluded that Universal's reliance was unjustified. As we have already alluded, the court reasoned that Universal should have been aware of the federal procurement regulations and of their prohibition against the kind of service Gebert had agreed to perform for Universal. Thus, the court found Universal's reliance unjustified and declined to enforce the promise on principles of promissory estoppel. For the reasons we have stated above, however, we believe the court erred in concluding that Universal should have been aware of the applicability of federal procurement regulations to Gebert's promise to pick up their bid at the airport.

Nor do we believe that our holding is contrary to Stelmack v. Glen Alden Coal Co., 339 Pa. 410, 14 A.2d 127 (1940), and TMA Fund, Inc. v. Biever, 380 F. Supp. 1248 (E.D. Pa. 1974), as urged by Blue Shield.

In *Stelmack* the defendant coal company requested permission to enter upon the plaintiffs' land and erect supports about their building so as to protect it against damage from defendant's impending subsurface mining operations. Plaintiffs granted permission and the supports were erected. As the mining operations continued, the defendant made repairs to the building from time to time but later refused to restore it to its previous condition. The plaintiffs later brought an action, seeking to recover on various theories of contract and promissory estoppel. In rejecting the promissory estoppel theory, the court stated:

> The doctrine of promissory estoppel . . . may be invoked only in those cases where all the elements of a true estoppel are present, for if it is loosely applied any promise, regardless of the complete absence of consideration, would be enforceable.

339 Pa. at 416, 14 A.2d at 129. The court, however, proceeded to analyze the case under section 90 of the Restatement of Contracts. The court stated:

> Here no action was taken by plaintiffs in reliance upon the defendant's promise which resulted in disadvantage to them. They did not alter their position adversely or substantially. They have suffered no injustice in being deprived of a gratuitous benefit to which they have no legal or equitable right.

Id., 14 A.2d at 130.

The instant case is different, however. Here it is clear that plaintiff incurred a substantial detriment as a result of relying upon defendant's promise. Plaintiff has suffered an injustice in being deprived of the service promised by Blue Shield's employee, Gebert.

TMA Fund is also distinguishable. There, defendants were induced to sign a promissory note to support a failing business on the false representation that other financing had also been arranged. On an action against defendants to enforce the terms of the note, the court held the note unenforceable for lack of consideration. The court noted that TMA Fund "did not agree to do anything when the agreement and notes were executed in return for the payment on the notes. TMA Fund is to this day not required to do anything or to refrain from doing any act which it had a right to do under the terms of the purported agreement." 380 F. Supp. at 1254. In the instant case, however, Blue Shield promised to pick up the bid and Universal relied upon that promise to its detriment.

Accordingly, we believe that, under Pennsylvania law, the jury could reasonably have found that Gebert possessed apparent authority to make a promise binding upon Blue Shield, that Universal relied upon that promise to its detriment, and that that promise should be enforced on the basis of promissory estoppel.

III

We now turn to an examination of the damages issue raised by Blue Shield in its cross-appeal. The jury returned a verdict of $13,000 against Blue Shield. This was apparently based upon the jury's conclusion that, had Gebert's promise been carried out, Universal's bid would have been timely submitted and Universal would have been awarded the computer lease contract. The figure $13,000 seems to represent the jury's calculation of the amount of profits lost by Universal because of Blue Shield's failure to perform its promise. The district court held that the damages were proven with reasonable certainty and that the amount awarded was within the jury's discretion. Accordingly, the court denied Blue Shield's motion for judgment n.o.v. and the motion for a new trial on this basis. On its cross-appeal, Blue Shield argues that the jury's finding that Universal suffered damages by virtue of Blue Shield's failure to carry out its promise could only have been based on conjecture and speculation. Blue Shield argues that even if Universal's bid would have been the lowest, there is no guarantee Universal would have been awarded the contract because the final contract still had to be approved by the Federal Bureau of Health Insurance. Blue Shield points particularly to the low bid that was actually opened as not in fact having been selected for the contract which was awarded.

From our examination of the record, however, we believe that the jury could reasonably have concluded that, had Blue Shield carried out its promise, Universal's bid would have been timely submitted and it would have been awarded the contract. There is evidence, first, that had Universal's bid been timely received, it would have been the low bid. The record indicates that Universal's bid was approximately $450 per month

lower than the bid submitted by the company that was awarded the contract. Second, Gebert testified that had there been a lower bid received at a point earlier in time, all other things being equal, he would have recommended that negotiations be conducted with the lowest bidder. Ray Eichelberger, Administrative Assistant to the Controller, indicated in his deposition that, all other factors being equal, "the lowest bid price would be [the] sole determining factor as to acceptability." Finally, there is no evidence in the record of other factors which would have prevented an award of the contract to Universal. Eichelberger also stated in his deposition that if Universal's bid had been submitted in a timely fashion, it is likely that a contract would have been approved if the bid was the lowest on a cost basis. We therefore believe the jury could reasonably have concluded that had Gebert performed as promised and picked up Universal's bid at the airport, Universal would have been awarded the contract. Accordingly, we affirm the district court's judgment denying Blue Shield's motions for judgment n.o.v. and for a new trial on the issue of damages.

IV

The order of the district court denying Blue Shield's motions for judgment n.o.v. and for a new trial (No. 79-2401) will be affirmed. The court's order entering judgment n.o.v. for Blue Shield on the issue of liability (No. 79-2400) will be reversed and the case remanded to the district court with directions to reinstate the jury's verdict. Costs taxed against Blue Shield in both appeals.

NOTES

1. It has been argued that the first requirement for the application of the promissory estoppel doctrine is really part of the second because a promisor should expect every promise to induce the promisee's reasonable action or forbearance. "The real issue is not whether the promisor should have expected the promisee to rely, but whether the extent of the promisee's reliance was reasonable." 1A Corbin, Contracts §13 (1963). See also Eisenberg, Principles of Consideration, 67 Cornell L. Rev. 640, 659 (1982).

2. Section 90 of Restatement (Second) does not contain the first Restatement's requirement that reliance must be "of a definite and substantial character." The "definite" requirement was thought to add little. Corbin §200. But see Corbit v. J. I. Case Co., 70 Wash. 2d 522, 424 P.2d 290 (1967), in which the court relied on that language in finding no actionable reliance under the first Restatement. The "substantial" requirement was removed in the Second Restatement at least in part because of the Second Restatement's provision allowing the court to adjust remedies for actions based on §90. See Eisenberg, Principles of Consideration, 67 Cornell L. Rev. 640, 656-657 (1982).

3. The reliance interest is the plaintiff's interest in being reimbursed for loss caused by reliance on the contract — the plaintiff's out-of-pocket loss. In a famous reliance case, Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948), retailer A applied to distributor B for a franchise to sell radios. Such franchises were revocable at will. B erroneously informed A that the application was accepted and A would soon receive the franchise. A expended $1,150 in preparing to do business, but did not receive the franchise. The court awarded the $1,150 to A but no lost profits. Corbin has argued that reliance damages should be the preferred measure of damages for detrimental reliance because the "injustice" that should be avoided is the loss or minus quantity to the relying party. Corbin §205. Murray would award the expectancy in commercial contracts where it is possible to measure it. Murray, Contracts §66 (3d ed. 1990).

In protecting the restitution interest the court attempts to restore to the plaintiff any benefit the plaintiff has conferred on the other party. Illustration 12 to Restatement (Second) §90 gives the following example of the award of such damages in the estoppel case.

> A promises to make a gift of a tract of land to B, his son-in-law. B takes possession and lives on the land for 17 years, making valuable improvements. A then dispossesses B, and specific performance is denied because the proof of the terms of the promise is not sufficiently clear and definite. B is entitled to a lien on the land for the value of the improvements, not exceeding their cost.

4. There are specific sections of the Restatement (Second) that allow the use of the reliance doctrine to enforce an otherwise unenforceable promise. Section 87(2) of the Restatement (Second), relevant to the two cases that follow, expresses the drafters' impression of the law concerning the irrevocability of certain subcontractors' bids and similar offers when the offeree has detrimentally reasonably relied on the continued viability of the offer. Section 88 at times preserves the obligation of a surety without consideration where there has been reasonable reliance on the promise to be a surety. Section 89 upholds the modification of an executory contract even without consideration where the modification was fair and equitable and justice requires its enforcement in view of a material change of position in reliance on the new contract. Modifications will be discussed in some detail later.

JAMES BAIRD CO. v. GIMBEL BROS.
United States Court of Appeals, Second Circuit, 1933
64 F.2d 344

L. HAND, Circuit Judge. The plaintiff sued the defendant for breach of a contract to deliver linoleum under a contract of sale; the defendant denied the making of the contract; the parties tried the case to the judge

under a written stipulation and he directed judgment for the defendant. The facts as found, bearing on the making of the contract, the only issue necessary to discuss, were as follows: The defendant, a New York merchant, knew that the Department of Highways in Pennsylvania had asked for bids for the construction of a public building. It sent an employee to the office of a contractor in Philadelphia, who had possession of the specifications, and the employee there computed the amount of the linoleum which would be required on the job, underestimating the total yardage by about one-half the proper amount. In ignorance of this mistake, on December twenty-fourth the defendant sent to some twenty or thirty contractors, likely to bid on the job, an offer to supply all the linoleum required by the specifications at two different lump sums, depending upon the quality used. These offers concluded as follows: "If successful in being awarded this contract, it will be absolutely guaranteed, . . . and . . . we are offering these prices for reasonable" [sic], "prompt acceptance after the general contract has been awarded." The plaintiff, a contractor in Washington, got one of these on the twenty-eighth, and on the same day the defendant learned its mistake and telegraphed all the contractors to whom it had sent the offer, that it withdrew it and would substitute a new one at about double the amount of the old. This withdrawal reached the plaintiff at Washington on the afternoon of the same day, but not until after it had put in a bid at Harrisburg at a lump sum, based as to linoleum upon the prices quoted by the defendant. The public authorities accepted the plaintiff's bid on December thirtieth, the defendant having meanwhile written a letter of confirmation of its withdrawal, received on the thirty-first. The plaintiff formally accepted the offer on January second, and, as the defendant persisted in declining to recognize the existence of a contract, sued it for damages on a breach.

Unless there are circumstances to take it out of the ordinary doctrine, since the offer was withdrawn before it was accepted, the acceptance was too late. Restatement of Contracts, §35. To meet this the plaintiff argues as follows: It was a reasonable implication from the defendant's offer that it should be irrevocable in case the plaintiff acted upon it, that is to say, used the prices quoted in making its bid, thus putting itself in a position from which it could not withdraw without great loss. While it might have withdrawn its bid after receiving the revocation, the time had passed to submit another, and as the item of linoleum was a very trifling part of the cost of the whole building, it would have been an unreasonable hardship to expect it to lose the contract on that account, and probably forfeit its deposit. While it is true that the plaintiff might in advance have secured a contract conditional upon the success of its bid, this was not what the defendant suggested. It understood that the contractors would use its offer in their bids, and would thus in fact commit themselves to supplying the linoleum at the proposed prices. The inevitable implication from all this was that when the contractors acted upon it, they accepted the offer and promised to pay for the linoleum, in case their bid were accepted.

It was of course possible for the parties to make such a contract, and the question is merely as to what they meant; that is, what is to be imputed to the words they used. Whatever plausibility there is in the argument, is

in the fact that the defendant must have known the predicament in which the contractors would be put if it withdrew its offer after the bids went in. However, it seems entirely clear that the contractors did not suppose that they accepted the offer merely by putting in their bids. If, for example, the successful one had repudiated the contract with the public authorities after it had been awarded to him, certainly the defendant could not have sued him for a breach. If he had become bankrupt, the defendant could not prove against his estate. It seems plain therefore that there was no contract between them. And if there be any doubt as to this, the language of the offer sets it at rest. The phrase, "if successful in being awarded this contract," is scarcely met by the mere use of the prices in the bids. Surely such a use was not an "award" of the contract to the defendant. Again, the phrase, "we are offering these prices for . . . prompt acceptance after the general contract has been awarded," looks to the usual communication of an acceptance, and precludes the idea that the use of the offer in the bidding shall be the equivalent. It may indeed be argued that this last language contemplated no more than an early notice that the offer had been accepted, the actual acceptance being the bid, but that would wrench its natural meaning too far, especially in the light of the preceding phrase. The contractors had a ready escape from their difficulty by insisting upon a contract before they used the figures; and in commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves.

But the plaintiff says that even though no bilateral contract was made, the defendant should be held under the doctrine of "promissory estoppel." This is to be chiefly found in those cases where persons subscribe to a venture, usually charitable, and are held to their promises after it has been completed. It has been applied much more broadly, however, and has now been generalized in section 90, of the Restatement of Contracts. We may arguendo accept it as it there reads, for it does not apply to the case at bar. Offers are ordinarily made in exchange for a consideration, either a counter-promise or some other act which the promisor wishes to secure. In such cases they propose bargains; they presuppose that each promise or performance is an inducement to the other. Wisconsin, etc., Ry. v. Powers, 191 U.S. 379, 386, 387; Banning Co. v. California, 240 U.S. 142, 152, 153. But a man may make a promise without expecting an equivalent; a donative promise, conditional or absolute. The common law provided for such by sealed instruments, and it is unfortunate that these are no longer generally available. The doctrine of "promissory estoppel" is to avoid the harsh results of allowing the promisor in such a case to repudiate, when the promisee has acted in reliance upon the promise. Siegel v. Spear & Co., 234 N.Y. 479, 138 N.E. 414, 26 A.L.R. 1205. Cf. Allegheny College v. National Bank, 246 N.Y. 369, 159 N.E. 173, 57 L.R.A. 980. But an offer for an exchange is not meant to become a promise until a consideration has been received, either a counter-promise or whatever else is stipulated. To extend it would be to hold the offeror regardless of the stipulated condition of his offer. In the case at bar the defendant offered to deliver the linoleum in exchange for the plaintiff's acceptance, not for its bid, which was a matter of indifference to it. That offer could become a

promise to deliver only when the equivalent was received; that is, when the plaintiff promised to take and pay for it. There is no room in such a situation for the doctrine of "promissory estoppel."

Nor can the offer be regarded as of an option, giving the plaintiff the right seasonably to accept the linoleum at the quoted prices if its bid was accepted, but not binding it to take and pay, if it could get a better bargain elsewhere. There is not the least reason to suppose that the defendant meant to subject itself to such a one-sided obligation. True, if so construed, the doctrine of "promissory estoppel" might apply, the plaintiff having acted in reliance upon it, though, so far as we have found, the decisions are otherwise. Ganss v. Guffey Petroleum Co., 125 App. Div. 760, 110 N.Y.S. 176; Comstock v. North, 88 Miss. 754, 41 So. 374. As to that, however, we need not declare ourselves.

Judgment affirmed.

BRANCO ENTERPRISES, INC. v. DELTA ROOFING, INC.

Missouri Court of Appeals, 1994
886 S.W.2d 157

Branco (renovator) → Delta (subcontractor)

PARRISH, Judge.

Branco Enterprises, Inc. (Branco), brought an action against Delta Roofing, Inc. (Delta), to recover damages for Delta's refusal to install a roof on a Consumers Market building renovated by Branco. The trial court determined (a) the parties had a contract that required Delta to install the required roof at a price of $21,545, and (b) Branco was entitled to and did rely on Delta's bid of $21,545 to its detriment. Judgment was entered for Branco in the amount of $18,695.

Delta appeals contending the determination that the parties had a contract was erroneous and there was insufficient evidence for the trial court to have found that Branco was entitled to rely on Delta's bid of $21,545 as the cost for installing the required roof. Appellate review is undertaken in accordance with Rule 73.01(c). The judgment is affirmed.

D's claim

Branco desired to bid on a proposed renovation of a Consumers Market building in Neosho, Missouri. It undertook to subcontract part of the job. Branco requested bids from subcontractors for installation of a new roof on the Neosho store. The architectural specifications for the job required the new roof to be a modified bitumen roof using Derbigum, a product of Owens-Corning Fiberglass Corporation (Owens-Corning), or an approved substitute of equal quality. Any substitute was required to be approved by the architect. In order to obtain a manufacturer's warranty on a Derbigum roof, the roof had to be installed by a roofer who was certified by Owens-Corning to install the product.

Delta submitted a bid to Branco of $21,545 for installation, plus $1,200 for warranty of the roof. Delta's bid was significantly lower than other bids Branco received.

constitutes an offer

Branco's president, John Branham, called Delta to confirm its bid. He spoke to Cliff Cook, an estimator for Delta. Mr. Cook told Branham that

acceptance

Delta was seeking approval of alternative roofing from the architect; that if Delta could not get approval for its alternative roofing, Delta could get Owens-Corning certification.

Mr. Branham told Mr. Cook that Branco was relying on Delta's bid in placing its bid as general contractor for the project. Cook answered, "That's fine." Branco's bid was accepted. The contract was signed April 9, 1990.

On April 12, 1990, Branco sent three copies of a written subcontract agreement to Delta, together with a transmittal letter requesting Delta to execute and return all copies of the contract and to provide Branco certificates of insurance evidencing certain insurance coverage. Delta did not execute and return the contracts. It did send Branco a certificate of insurance. James Spears, president of Delta, explained why Delta sent the certificate of insurance to Branco. He testified, "We had intentions of doing the job."

On June 4, 1990, after the work on the project had begun, Mr. Branham had a telephone conversation with Mr. Cook. Cook told Branham, "We're not going to do the job." Cook explained that Delta had not gotten certified by Owens-Corning to apply Derbigum.

Branco then contracted with another roofing company for the work Delta was to have performed. The contract price with the new company was $40,240 — $18,565 more than Delta's bid.

The trial court's conclusions of law included: 1. That [Delta's] bids to [Branco] on March 6, 1990 were offers to perform. 2. That [Branco] conditionally accepted [Delta's] $21,545.00 bid on March 6, 1990, said acceptance being contingent only on the award of the prime contract for renovation of the Consumer's [sic] Market in Neosho, Missouri to [Branco]. . . .

4. That on March 19, 1990, the oral agreement between [Branco] and [Delta] became final when [Branco] signed said prime contract, creating a contractual obligation in [Delta].

5. That [Delta] breached its oral agreement with [Branco] by refusing to perform.

6. That in Missouri, detrimental reliance on an oral bid can be enforced under the doctrine of promissory estoppel. . . .

7. That [Branco] relied on [Delta's] March 6, 1990 bid to its detriment.

8. That [Delta] knew or should have known that [Branco] was relying on its bid.

9. That [Branco] had the right to rely on [Delta's] repreentations [sic].

10. [Branco's] reliance on [Delta's] bid and [Delta's] breach of agreement resulted in damage to [Branco] in the amount of $18,695.00 and it should have judgment on its petition and against [Delta] in that amount.

Delta presents two points on appeal. Both go to the question of whether there was an offer and acceptance between the parties that was sufficiently specific as to terms of a contract to manifest a common assent by them. If there was, a contract exists. If not, there was no contract. Bare v. Kansas City Federation of Musicians Local 34-627, 755 S.W.2d 442, 444 (Mo. App. 1988).

Point I contends the trial court erred in finding that there was a contract because there was "no unequivocal acceptance of Delta's bid by Branco." Point II claims the trial court erred in applying the doctrine of promissory

estoppel because "no unequivocal promise had been made by [Delta] in making its bid to [Branco] sufficient to permit [Branco] to unquestionably expect performance and to reasonably rely thereon." The facts relevant to each point are the same. The points will be discussed together.

Clifford Cook, the estimator for Delta who bid the roofing subcontract, testified by deposition. He testified that he had seen the plans or specifications for the job before he submitted Delta's bid. Based on the job requirements, he submitted an initial bid on behalf of Delta and, on the day Branco was compiling its bid, a revised bid. The representative of Branco with whom Mr. Cook talked told Cook that Branco was relying on Delta's bid in formulating its bid for the general contract with the owner.

In Delmo, Inc. v. Maxima Elec. Sales, Inc., 878 S.W.2d 499 (Mo. App. 1994), this court held that a contract may be effected between a general contractor and a subcontractor based on the general contractor's reliance on the subcontractor's bid for a component of the project being bid. The decision in Delmo was based on application of the doctrine Missouri courts refer to as promissory estoppel.[2] Id. at 504. The necessary elements for promissory estoppel are "(1) a promise, (2) foreseeable reliance, (3) reliance, and (4) injustice absent enforcement." Id.

Delmo is consistent with Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958), a case with facts similar to those in this appeal. Drennan was a general contractor. He sought bids from subcontractors and relied on them in computing his own bid. On the day bids had to be submitted, he received the bid from Star Paving Co. For paving work Drennan planned to subcontract. Star Paving Co.'s bid was the lowest bid for the paving. Drennan used it in his calculation of his bid on the general contract. Drennan was awarded the contract.

Star Paving Co. refused to perform the work it had bid. The California court, following the reasoning in Northwestern Engineering Co. v. Ellerman, 69 S.D. 397, 408, 10 N.W.2d 879, 884 (1943), held that Star Paving Co.'s bid became binding upon Drennan being awarded the general contract. The court explained:

> When [Drennan] used [Star Paving Co.'s] offer in computing his own bid, he bound himself to perform in reliance on [Star Paving Co.'s] terms. Though [Star Paving Co.] did not bargain for this use of its bid neither did [Star Paving Co.] make it idly, indifferent to whether it would be used or not. On the contrary it is reasonable to suppose that [Star Paving Co.] submitted its bid to obtain the subcontract. It was bound to realize the substantial possibility that its bid would be the lowest, and that it would be included by [Drennan] in his bid. It was to its own interest that the contractor be awarded the general contract; the lower the subcontract bid,

2. It has been suggested that the term "promissory estoppel" almost defies definition. See Corbin, Corbin on Contracts §204 (one vol. ed. 1952). Corbin suggests, "The use of this phrase made some headway, because it satisfied the need of the courts for a justification of their enforcement of certain promises in the absence of any bargain or agreed exchange." Id. at p.293 (footnote omitted). He suggests, "The American Law Institute was well advised in not adopting this phrase and in stating its rule in terms of action or forbearance in reliance on the promise." Id. at 293-94. See Restatement (Second) of Law of Contracts §90 (1979).

> the lower the general contractor's bid was likely to be and the greater its chance of acceptance and hence the greater [Star Paving Co.'s] chance of getting the paving subcontract. [Star Paving Co.] had reason not only to expect [Drennan] to rely on its bid but to want him to. Clearly [Star Paving Co.] had a stake in [Drennan's] reliance on its bid. Given this interest and the fact that [Drennan] is bound by his own bid, it is only fair that [Drennan] should have at least an opportunity to accept [Star Paving Co.'s] bid after the general contract has been awarded to him.

333 P.2d at 760.

Clifford Cook, Delta's representative, had seen the specifications for the required work. He knew that the specifications for the roof required use of the Owens-Corning product Derbigum with complete warranty that was available only when the material was installed by a roofer who was certified by Owens-Corning. A variance based on installation of other roofing material of equal quality could be granted only by the architect for the project.

The trial court heard testimony that Cook, knowing these things, told Mr. Branham, Branco's president, that if Delta could not get an alternative product approved, Delta could be certified by Owens-Corning. Branham testified he told Mr. Cook that Branco was relying on Delta's bid in seeking award of the general contract. There was testimony that Mr. Cook agreed on behalf of Delta. Deferring to the trial court's opportunity to judge the credibility of the witnesses, Rule 73.01(c)(2), this court holds the trial court's finding that an oral agreement was made on March 6, 1990, that became final when Branco signed the general contract is not erroneous.

Delta's contention, in Point I, that there was no "unequivocal acceptance of Delta's bid by Branco" fails. The fact that a written subcontract was not tendered to Delta by Branco until after the general contract was signed is of no significance under the facts of this case. As explained by Mr. Branham, "The [written] contract [was] just a confirmation." He further explained, "I had already committed to Delta that I was using them. I committed to them at 2:48 on the day of the bid letting. I specifically said, 'We are using your bid. If we get it, you will get the job.'"

Delta's contention in Point II also fails. Delta argues that Delta's bid did not make an unequivocal promise to Branco "sufficient to permit [Branco] to unquestionably expect performance and to reasonably rely thereon."

There was testimony that Mr. Branham was told that Delta would obtain a variance to permit it to substitute another product for Derbigum or would obtain Owens-Corning certification to permit Delta to apply Derbigum and provide a full warranty; that Delta would perform the roofing task for the amount of its bid. A promise was made by Delta to Branco.

Mr. Branham told Delta that Branco was relying on Delta's bid. Mr. Cook acknowledged that the reliance was acceptable to Delta. It was foreseeable that Branco would rely on Delta's promise to perform at the bid price.

Branco submitted its bid to the owner and included in its calculation Delta's bid for roofing. Branco relied on Delta's promise.

Delta refused to perform in accordance with its promise. Branco was required to expend a greater sum to get the work done than the amount to which Delta had agreed. Absent Branco obtaining reimbursement from Delta, an injustice would occur.

Missouri's doctrine of promissory estoppel applies. This court holds that the trial court's judgment is supported by substantial evidence and is not against the weight of the evidence; that it neither erroneously declares or applies the law. See Thurmond v. Moxley, 879 S.W.2d 709, 710 (Mo. App. 1994). Judgment affirmed.

NOTES AND QUESTIONS

1. *James Baird Co.* and *Branco* conflict, don't they? Which represents the best solution to the issue?

2. In resolving this problem, you should know something about the customary practices of the construction industry.

When the owner of property desires to improve it, the owner typically employs an architect to draw up plans and supervise the project. The construction is usually accomplished by inviting *general contractors* to bid on the project, which the generals do by submitting a bid that is a composite of the bids they in turn have received from the *subcontractors* ("subs" are specialists in such matters as electrical work, plumbing and heating, sheet metal and roofing, painting and decorating, and the like). General contractors may do some of the construction work themselves, or they may do none of it at all, being merely an office for organizing the concerted efforts of the subs. In some projects there is no general contractor; the owner in effect acts as the general and contracts directly with the subs. In such a case the subs are each called *prime contractors*.

3. As the above case shows, general contractors run the risk that reliance on the sub's bid by including it in the overall bid may be a mistake. The sub may try to back out after the general receives the bid but before the general has made a formal acceptance of the sub's offer. Absent legal adoption of the doctrine of promissory estoppel in this circumstance, the sub would appear to have the legal right to do so. Why don't the generals insist that the subs sign contracts for the amount quoted (with the contract contingent on the general being awarded the overall job)? When asked, the generals give a number of reasons. First, the subs' bids often come in at the last moment and the general simply hasn't time to set up formal contracts before the general must submit the overall bid. Second, the subs' bids are frequently complicated, proposing alternatives that must in turn be submitted to the architect and approved. Third, the construction industry relies in large part on a system of mutual trust, and the parties involved rarely resort to law. Reputation is very important, and subs who do not honor their bids are blacklisted thereafter.

Subcontractors would add a fourth reason. They maintain that it is not at all uncommon for the general contractor who has received the award to turn around and engage in a process known as "bid shopping," whereby the general shows the sub's low bid to other subs and asks them to try and beat it. If this is true (and of course it does go on), is it fair to use promissory estoppel to bind the sub to the price quoted?

4. In very large projects more attention is paid to legal relations, and a host of devices — contracts, "firm offers," bid bonds, and escalation clauses — are employed to fix the various responsibilities. Even in these big money transactions, however, an enormous number of the deals are informal and are based largely on trust and reputation.

5. Subcontractors bitterly complain that they do not have the bargaining position to protect their own interests, and that many of the generals do not play fair. They point to the substantial costs they incur in preparing their bids and maintain that this expense is often wasted. In a famous article on which these notes were in part based, Shultz, The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry, 19 U. Chi. L. Rev. 237 (1952), the author concluded that general contractors do not need the protection of a legal doctrine that would bind the sub to the original quotation (absent a formal contract doing so), and that the application of promissory estoppel in this situation was most often unfair to subcontractors.

6. In a jurisdiction not permitting the general contractors to use promissory estoppel as a way to bind the subcontractor, what can the general do to make sure that the sub will not back off from the original estimate?

C. *The Limits of the Doctrine*

HOFFMAN v. RED OWL STORES
Supreme Court of Wisconsin, 1965
26 Wis. 2d 683, 133 N.W.2d 267

Action by Joseph Hoffman (hereinafter "Hoffman") and wife, plaintiffs, against defendants Red Owl Stores, Inc. (hereinafter "Red Owl") and Edward Lukowitz.

The complaint alleged that Lukowitz, as agent for Red Owl, represented to and agreed with plaintiffs that Red Owl would build a store building in Chilton and stock it with merchandise for Hoffman to operate in return for which plaintiffs were to put up and invest a total sum of $18,000; that in reliance upon the above mentioned agreement and representations plaintiffs sold their bakery building and business and their grocery store and business; also in reliance on the agreement and representations Hoffman purchased the building site in Chilton and rented a residence for himself and his family in Chilton; plaintiffs' action in reliance on the representations and agreement disrupted their personal and business life; plaintiffs lost substantial amounts of income and expended large

sums of money as expenses. Plaintiffs demanded recovery of damages for the breach of defendants' representations and agreements.

The action was tried to a court and jury. The facts hereafter stated are taken from the evidence adduced at the trial. Where there was a conflict in the evidence the version favorable to plaintiffs has been accepted since the verdict rendered was in favor of plaintiffs.

Hoffman assisted by his wife operated a bakery at Wautoma from 1956 until sale of the building late in 1961. The building was owned in joint tenancy by him and his wife. Red Owl is a Minnesota corporation having its home office at Hopkins, Minnesota. It owns and operates a number of grocery supermarket stores and also extends franchises to agency stores which are owned by individuals, partnerships and corporations. Lukowitz resides at Green Bay and since September, 1960, has been divisional manager for Red Owl in a territory comprising Upper Michigan and most of Wisconsin in charge of 84 stores. Prior to September, 1960, he was district manager having charge of approximately 20 stores.

In November, 1959, Hoffman was desirous of expanding his operations by establishing a grocery store and contacted a Red Owl representative by the name of Jansen, now deceased. Numerous conversations were had in 1960 with the idea of establishing a Red Owl franchise store in Wautoma. In September, 1960, Lukowitz succeeded Jansen as Red Owl's representative in the negotiations. Hoffman mentioned that $18,000 was all the capital he had available to invest and he was repeatedly assured that this would be sufficient to set him up in business as a Red Owl store. About Christmastime, 1960, Hoffman thought it would be a good idea if he bought a small grocery store in Wautoma and operated it in order that he gain experience in the grocery business prior to operating a Red Owl store in some larger community. On February 6, 1961, on the advice of Lukowitz and Sykes, who had succeeded Lukowitz as Red Owl's district manager, Hoffman bought the inventory and fixtures of a small grocery store in Wautoma and leased the building in which it was operated.

After three months of operating this Wautoma store, the Red Owl representatives came in and took inventory and checked the operations and found the store was operating at a profit. Lukowitz advised Hoffman to sell the store to his manager, and assured him that Red Owl would find a larger store for him elsewhere. Acting on this advice and assurance, Hoffman sold the fixtures and inventory to his manager on June 6, 1961. Hoffman was reluctant to sell at that time because it meant losing the summer tourist business, but he sold on the assurance that he would be operating in a new location by fall and that he must sell this store if he wanted a bigger one. Before selling, Hoffman told the Red Owl representatives that he had $18,000 for "getting set up in business" and they assured him that there would be no problems in establishing him in a bigger operation. The makeup of the $18,000 was not discussed; it was understood plaintiff's father-in-law would furnish part of it. By June, 1961, the towns for the new grocery store had been narrowed down to two, Kewaunee and Chilton. In Kewaunee, Red Owl had an option on a building site. In Chilton, Red Owl had nothing under option, but it did select a site to which plaintiff obtained an option at Red Owl's suggestion. The

(1) Parties initial talks —
(2) P wants to expand his business
(3) P told his capital D said its enough to set P for a franchise
(4) P buys a store & does some grocery work for experience
(5) D insists P tells P to sell the store for that D would get P a bigger store elsewhere

option stipulated a purchase price of $6,000 with $1,000 to be paid on election to purchase and the balance to be paid within 30 days. On Lukowitz's assurance that everything was all set plaintiff paid $1,000 down on the lot on September 15th.

On September 27, 1961, plaintiff met at Chilton with Lukowitz and Mr. Reymund and Mr. Carlson from the home office who prepared a projected financial statement. Part of the funds plaintiffs were to supply as their investment in the venture were to be obtained by sale of their Wautoma bakery building.

On the basis of this meeting Lukowitz assured Hoffman: ". . . [E]verything is ready to go. Get your money together and we are set." Shortly after this meeting Lukowitz told plaintiffs that they would have to sell their bakery business and bakery building, and that their retaining this property was the only "hitch" in the entire plan. On November 6, 1961, plaintiffs sold their bakery building for $10,000. Hoffman was to retain the bakery equipment as he contemplated using it to operate a bakery in connection with his Red Owl store. After sale of the bakery Hoffman obtained employment on the night shift at an Appleton bakery.

The record contains different exhibits which were prepared in September and October, some of which were projections of the fiscal operation of the business and others were proposed building and floor plans. Red Owl was to procure some third party to buy the Chilton lot from Hoffman, construct the building, and then lease it to Hoffman. No final plans were ever made, nor were bids let or a construction contract entered. Some time prior to November 20, 1961, certain of the terms of the lease under which the building was to be rented by Hoffman were understood between him and Lukowitz. The lease was to be for 10 years with a rental approximating $550 a month calculated on the basis of 1 percent per month on the building cost, plus 6 percent of the land cost divided on a monthly basis. At the end of the 10-year term he was to have an option to renew the lease for an additional 10-year period or to buy the property at cost on an installment basis. There was no discussion as to what the installments would be or with respect to repairs and maintenance.

On November 22nd or 23rd, Lukowitz and plaintiffs met in Minneapolis with Red Owl's credit manager to confer on Hoffman's financial standing and on financing the agency. Another projected financial statement was there drawn up entitled, "Proposed Financing For An Agency Store." This showed Hoffman contributing $24,100 of cash capital of which only $4,600 was to be cash possessed by plaintiffs. Eight thousand was to be procured as a loan from a Chilton bank secured by a mortgage on the bakery fixtures, $7,500 was to be obtained on a 5 percent loan from the father-in-law, and $4,000 was to be obtained by sale of the lot to the lessor at a profit.

A week or two after the Minneapolis meeting Lukowitz showed Hoffman a telegram from the home office to the effect that if plaintiff could get another $2,000 for promotional purposes the deal could go through for $26,000. Hoffman stated he would have to find out if he could get another $2,000. He met with his father-in-law, who agreed to put $13,000 into the business provided he could come into the business as a partner. Lukowitz told Hoffman the partnership arrangement "sounds fine" and

that Hoffman should not go into the partnership arrangement with the "front office." On January 16, 1962, the Red Owl credit manager teletyped Lukowitz that the father-in-law would have to sign an agreement that the $13,000 was either a gift or a loan subordinate to all general creditors and that he would prepare the agreement. On January 31, 1962, Lukowitz teletyped the home office that the father-in-law would sign one or other of the agreements. However, Hoffman testified that it was not until the final meeting some time between January 26th and February 2nd, 1962, that he was told that his father-in-law expected to sign an agreement that the $13,000 he was advancing was to be an outright gift. No mention was then made by the Red Owl representatives of the alternative of the father-in-law signing a subordination agreement. At this meeting the Red Owl agents presented Hoffman with the following projected financial statement:

Capital required in operation:		
Cash	$ 5,000.00	
Merchandise	20,000.00	
Bakery	18,000.00	
Fixtures	17,500.00	
Promotional Funds	1,500.00	
TOTAL:	$62,000.00	
Source of funds:		
Red Owl 7-day terms	$ 5,000.00	
Red Owl Fixture contract (Term 5 years)	14,000.00	
Bank loans (Term 9 years Union State Bank of Chilton) (Secured by Bakery Equipment)	8,000.00	
Other loans (Term No-pay) No interest Father-in-law (Secured by None)	13,000.00	
(Secured by Mortgage on Wautoma Bakery Bldg.)	2,000.00	
Resale of land	6,000.00	
Equity Capital:	$ 5,000.00	Cash
Amount owner has to invest:	17,500.00	Bakery Equip.
	22,500.00	
TOTAL:	$70,500.00	

Hoffman interpreted the above statement to require of plaintiffs a total of $34,000 cash made up of $13,000 gift from his father-in-law, $2,000 on mortgage, $8,000 on Chilton bank loan, $5,000 in cash from plaintiff, and $6,000 on the resale of the Chilton lot. Red Owl claims $18,000 is the total of the unborrowed or unencumbered cash, that is, $13,000 from the father-in-law and $5,000 cash from Hoffman himself. Hoffman informed Red Owl he could not go along with this proposal, and particularly objected to the requirement that his father-in-law sign an agreement that his $13,000 advancement was an absolute gift. This terminated the negotiations between the parties.

The case was submitted to the jury on a special verdict with the first two questions answered by the court.

This verdict, as returned by the jury, was as follows:

Question No. 1: Did the Red Owl Stores, Inc. and Joseph Hoffman on or about mid-May of 1961 initiate negotiations looking to the establishment of Joseph Hoffman as a franchise operator of a Red Owl Store in Chilton?

Answer: Yes. (Answered by the Court.)

Question No. 2: Did the parties mutually agree on all of the details of the proposal so as to reach a final agreement thereon?

Answer: No. (Answered by the Court.)

Question No. 3: Did the Red Owl Stores, Inc., in the course of said negotiations, make representations to Joseph Hoffman that if he fulfilled certain conditions that they would establish him as a franchise operator of a Red Owl Store in Chilton?

Answer: Yes.

Question No. 4: If you have answered Question No. 3 "Yes," then answer this question: Did Joseph Hoffman rely on said representations and was he induced to act thereon?

Answer: Yes.

Question No. 5: If you have answered Question No. 4 "Yes," then answer this question: Ought Joseph Hoffman, in the exercise of ordinary care, to have relied on said representations?

Answer: Yes.

Question No. 6: If you have answered Question No. 3 "Yes," then answer this question: Did Joseph Hoffman fulfill all the conditions he was required to fulfill by the terms of the negotiations between the parties up to January 26, 1962?

Answer: Yes.

Question No. 7: What sum of money will reasonably compensate the plaintiffs for such damages as they sustained by reason of:

(a) The sale of the Wautoma store fixtures and inventory?

Answer: $16,735.00.

(b) The sale of the bakery building?

Answer: $2,000.00.

(c) Taking up the option on the Chilton lot?

Answer: $1,000.00.

(d) Expenses of moving his family to Neenah?

Answer: $140.00.

(e) House rental in Chilton?

Answer: $125.00.

Plaintiffs moved for judgment on the verdict while defendants moved to change the answers to Questions 3, 4, 5, and 6 from "Yes" to "No," and in the alternative for relief from the answers to the subdivisions of Question 7 or a new trial. On March 31, 1964, the circuit court entered the following order:

> IT IS ORDERED in accordance with said decision on motions after verdict hereby incorporated herein by reference:
>
> 1. That the answer of the jury to Question No. 7(a) be and the same is hereby vacated and set aside and that a new trial be had on the sole issue

of the damages for loss, if any, on the sale of the Wautoma store, fixtures and inventory.

2. That all other portions of the verdict of the jury be and hereby are approved and confirmed and all after-verdict motions of the parties inconsistent with this order are hereby denied.

Defendants have appealed from this order and plaintiffs have cross-appealed from paragraph 1. thereof.

CURRIE, C.J. The instant appeal and cross-appeal present these questions:

(1) Whether this court should recognize causes of action grounded on promissory estoppel as exemplified by sec. 90 of Restatement, 1 Contracts?
(2) Do the facts in this case make out a cause of action for promissory estoppel?
(3) Are the jury's findings with respect to damages sustained by the evidence?

RECOGNITION OF A CAUSE OF ACTION GROUNDED ON PROMISSORY ESTOPPEL

Sec. 90 of Restatement, 1 Contracts, provides (at p.110):

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

The Wisconsin Annotations to Restatement, Contracts, prepared under the direction of the late professor William H. Page and issued in 1933, stated (at p.53, sec. 90):

> The Wisconsin cases do not seem to be in accord with this section of the Restatement. It is certain that no such proposition has ever been announced by the Wisconsin court and it is at least doubtful if it would be approved by the court.

Since 1933, the closest approach this court has made to adopting the rule of the Restatement occurred in the recent case of Lazarus v. American Motors Corp. (1963), 21 Wis. 2d 76, 85, 123 N.W.2d 548, 553, wherein the court stated:

> We recognize that upon different facts it would be possible for a seller of steel to have altered his position so as to effectuate the equitable considerations inherent in sec. 90 of the Restatement.

While it is not necessary to the disposition of the *Lazarus* Case to adopt the promissory estoppel rule of the Restatement, we are squarely faced in the instant case with that issue. Not only did the trial court frame the special verdict on the theory of sec. 90 of Restatement, 1 Contracts, but no other possible theory has been presented to or discovered by this

court which would permit plaintiffs to recover. Of other remedies considered that of an action for fraud and deceit seemed to be the most comparable. An action at law for fraud, however, cannot be predicated on unfulfilled promises unless the promisor possessed the present intent not to perform. Suskey v. Davidoff (1958), 2 Wis. 2d 503, 507, 87 N.W.2d 306, and cases cited. Here, there is no evidence that would support a finding that Lukowitz made any of the promises, upon which plaintiffs' complaint is predicated, in bad faith with any present intent that they would not be fulfilled by Red Owl.

Many courts of other jurisdictions have seen fit over the years to adopt the principle of promissory estoppel, and the tendency in that direction continues. As Mr. Justice McFaddin, speaking in behalf of the Arkansas court, well stated, that the development of the law of promissory estoppel "is an attempt by the courts to keep remedies abreast of increased moral consciousness of honesty and fair representations in all business dealings." . . .

The Restatement avoids use of the term "promissory estoppel," and there has been criticism of it as an inaccurate term. See 1A Corbin, Contracts, p.232, et seq., sec. 204. On the other hand, Williston advocated the use of this term or something equivalent. 1 Williston, Contracts (1st ed.), p.308, sec. 139. Use of the word "estoppel" to describe a doctrine upon which a party to a lawsuit may obtain affirmative relief offends the traditional concept that estoppel merely serves as a shield and cannot serve as a sword to create a cause of action. See Utschig v. McClone (1962), 16 Wis. 2d 506, 509, 114 N.W.2d 854. "Attractive nuisance" is also a much criticized term. See concurring opinion, Flamingo v. City of Waukesha (1952), 262 Wis. 219, 227, 55 N.W.2d 24. However, the latter term is still in almost universal use by the courts because of the lack of a better substitute. The same is also true of the wide use of the term "promissory estoppel." We have employed its use in this opinion not only because of its extensive use by other courts but also since a more accurate equivalent has not been devised.

Because we deem the doctrine of promissory estoppel, as stated in sec. 90 of Restatement, 1 Contracts, is one which supplies a needed tool which courts may employ in a proper case to prevent injustice, we endorse and adopt it.

Applicability of Doctrine to Facts of This Case

The record here discloses a number of promises and assurances given to Hoffman by Lukowitz in behalf of Red Owl upon which plaintiffs relied and acted upon to their detriment.

Foremost were the promises that for the sum of $18,000 Red Owl would establish Hoffman in a store. After Hoffman had sold his grocery store and paid the $1,000 on the Chilton lot, the $18,000 figure was changed to $24,100. Then in November, 1961, Hoffman was assured that if the $24,100 figure were increased by $2,000 the deal would go through. Hoffman was induced to sell his grocery store fixtures and inventory in

June, 1961, on the promise that he would be in his new store by fall. In November, plaintiffs sold their bakery building on the urging of defendants and on the assurance that this was the last step necessary to have the deal with Red Owl go through.

We determine that there was ample evidence to sustain the answers of the jury to the questions of the verdict with respect to the promissory representations made by Red Owl, Hoffman's reliance thereon in the exercise of ordinary care, and his fulfillment of the conditions required of him by the terms of the negotiations had with Red Owl.

There remains for consideration the question of law raised by defendants that agreement was never reached on essential factors necessary to establish a contract between Hoffman and Red Owl. Among these were the size, cost, design, and layout of the store building; and the terms of the lease with respect to rent, maintenance, renewal, and purchase options. This poses the question of whether the promise necessary to sustain a cause of action for promissory estoppel must embrace all essential details of a proposed transaction between promisor and promisee so as to be equivalent of an offer that would result in a binding contract between the parties if the promisee were to accept the same.

Originally the doctrine of promissory estoppel was invoked as a substitute for consideration rendering a gratuitous promise enforceable as a contract. See Williston, Contracts (1st ed.), p.307, sec. 139. In other words, the acts of reliance by the promisee to his detriment provided a substitute for consideration. If promissory estoppel were to be limited to only those situations where the promise giving rise to the cause of action must be so definite with respect to all details that a contract would result were the promise supported by consideration, then the defendants' instant promises to Hoffman would not meet this test. However, sec. 90 of Restatement, 1 Contracts, does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee. Rather the conditions imposed are:

(1) Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?
(2) Did the promise induce such action or forbearance?
(3) Can injustice be avoided only by enforcement of the promise?

We deem it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach of contract action. As Dean Boyer points out, it is desirable that fluidity in the application of the concept be maintained. 98 U. of Pa. L. Rev. (1950), 459, at page 497. While the first two of the above listed three requirements of promissory estoppel present issues of fact which ordinarily will be resolved by a jury, the third requirement, that the remedy can only be invoked where necessary to avoid injustice, is one that involves a policy decision by the court. Such a policy decision necessarily embraces an element of discretion.

We conclude that injustice would result here if plaintiffs were not granted some relief because of the failure of defendants to keep their promises which induced plaintiffs to act to their detriment.

DAMAGES

Defendants attack all the items of damages awarded by the jury.

The bakery building at Wautoma was sold at defendants' instigation in order that Hoffman might have the net proceeds available as part of the cash capital he was to invest in the Chilton store venture. The evidence clearly establishes that it was sold at a loss of $2,000. Defendants contend that half of this loss was sustained by Mrs. Hoffman because title stood in joint tenancy. They point out that no dealings took place between her and defendants as all negotiations were had with her husband. Ordinarily only the promisee and not third persons are entitled to enforce the remedy of promissory estoppel against the promisor. However, if the promisor actually foresees, or has reason to foresee, action by a third person in reliance on the promise, it may be quite unjust to refuse to perform the promise. 1A Corbin, Contracts, p.220, sec. 200. Here not only did defendants foresee that it would be necessary for Mrs. Hoffman to sell her joint interest in the bakery building, but defendants actually requested that this be done. We approve the jury's award of $2,000 damages for the loss incurred by both plaintiffs in this sale.

Defendants attack on two grounds the $1,000 award because of Hoffman's payment of that amount on the purchase price of the Chilton lot. The first is that this $1,000 had already been lost at the time the final negotiations with Red Owl fell through in January, 1962, because the remaining $5,000 of purchase price had been due on October 15, 1961. The record does not disclose that the lot owner had foreclosed Hoffman's interest in the lot for failure to pay this $5,000. The $1,000 was not paid for the option, but had been paid as part of the purchase price at the time Hoffman elected to exercise the option. This gave him an equity in the lot which could not be legally foreclosed without affording Hoffman an opportunity to pay the balance. The second ground of attack is that the lot may have had a fair market value of $6,000, and Hoffman should have paid the remaining $5,000 of purchase price. We determine that it would be unreasonable to require Hoffman to have invested an additional $5,000 in order to protect the $1,000 he had paid. Therefore, we find no merit to defendants' attack upon this item of damages.

We also determine it was reasonable for Hoffman to have paid $125 for one month's rent of a home in Chilton after defendants assured him everything would be set when plaintiff sold the bakery building. This was a proper item of damage.

Plaintiffs never moved to Chilton because defendants suggested that Hoffman get some experience by working in a Red Owl store in the Fox River Valley. Plaintiffs, therefore, moved to Neenah instead of Chilton. After moving, Hoffman worked at night in an Appleton bakery but held himself available for work in a Red Owl store. The $140 moving expense would

not have been incurred if plaintiffs had not sold their bakery building in Wautoma in reliance upon defendants' promises. We consider the $140 moving expense to be a proper item of damage.

We turn now to the damage item with respect to which the trial court granted a new trial, i.e., that arising from the sale of the Wautoma grocery store fixtures and inventory for which the jury awarded $16,735. The trial court ruled that Hoffman could not recover for any loss of future profits for the summer months following the sale on June 6, 1961, but that damages would be limited to the difference between the sales price received and the fair market value of the assets sold, giving consideration to any goodwill attaching thereto by reason of the transfer of a going business. There was no direct evidence presented as to what this fair market value was on June 6, 1961. The evidence did disclose that Hoffman paid $9,000 for the inventory, added $1,500 to it and sold it for $10,000 or a loss of $500. His 1961 federal income tax return showed that the grocery equipment had been purchased for $7,000 and sold for $7,955.96. Plaintiffs introduced evidence of the buyer that during the first eleven weeks of operation of the grocery store his gross sales were $44,000 and his profit was $6,000 or roughly 15 percent. On cross-examination he admitted that this was gross and not net profit. Plaintiffs contend that in a breach of contract action damages may include loss of profits. However, this is not a breach of contract action.

The only relevancy of evidence relating to profits would be with respect to proving the element of goodwill in establishing the fair market value of the grocery inventory and fixtures sold. Therefore, evidence of profits would be admissible to afford a foundation for expert opinion as to fair market value.

Where damages are awarded in promissory estoppel instead of specifically enforcing the promisor's promise, they should be only such as in the opinion of the court are necessary to prevent injustice. Mechanical or rule of thumb approaches to the damage problem should be avoided. In discussing remedies to be applied by courts in promissory estoppel we quote the following views of writers on the subject:

> Enforcement of a promise does not necessarily mean Specific Performance. It does not necessarily mean Damages for breach. Moreover the amount allowed as Damages may be determined by the plaintiff's expenditures or change of position in reliance as well as by the value to him of the promised performance.[5] Restitution is also an "enforcing" remedy, although it is often said to be based upon some kind of a rescission. In determining what justice requires, the court must remember all of its powers, derived from equity, law merchant, and other sources, as well as the common law. Its decree should be molded accordingly. 1A Corbin, Contracts, p.221, sec. 200.
>
> The wrong is not primarily in depriving the plaintiff of the promised reward but in causing the plaintiff to change position to his detriment. It would follow that the damages should not exceed the loss caused by the change of position, which would never be more in amount, but might be less, than the promised reward. Seavey, Reliance on Gratuitous Promises or Other Conduct, 64 Harv. L. Rev. (1951), 913, 926.

> There likewise seems to be no positive legal requirement, and certainly no legal policy, which dictates the allowance of contract damages in every case where the defendant's duty is consensual. Shattuck, Gratuitous Promises—A New Writ?, 35 Mich. L. Rev. (1936), 908, 912.[3]

At the time Hoffman bought the equipment and inventory of the small grocery store at Wautoma he did so in order to gain experience in the grocery store business. At that time discussion had already been had with Red Owl representatives that Wautoma might be too small for a Red Owl operation and that a larger city might be more desirable. Thus Hoffman made this purchase more or less as a temporary experiment. Justice does not require that the damages awarded him, because of selling these assets at the behest of defendants, should exceed any actual loss sustained measured by the difference between the sales price and the fair market value.

Since the evidence does not sustain the large award of damages arising from the sale of the Wautoma grocery business, the trial court properly ordered a new trial on this issue.

Order affirmed. Because of the cross-appeal, plaintiffs shall be limited to taxing but two-thirds of their costs.

QUESTIONS

1. This case caused a stir when it was first handed down. Can you see why? How does the use of promissory estoppel here differ from its use in prior cases?

2. One sentence in particular struck the commentators as extraordinary. Can you identify it?

3. Promissory estoppel, as applied here, puts severe limitations on the bargaining process. Is this a good idea?

4. Would the reasoning of this case reverse the result in Petterson v. Pattberg (see Chapter 1)?

Protecting as it does the reliance interest, which is at the very heart of contract law, promissory estoppel appears to be a theory that an attorney would want to use as often as possible. As the cases suggest, this assumption is wrong. There are significant reasons for avoiding pressing a promissory estoppel claim if it is possible to make a case for a traditional contracts action. First, promissory estoppel theory is not available if an enforceable contract in fact exists. Second, the use of promissory estoppel may indicate to the judge that the very attorney who may have failed to help create an enforceable contract is now trying to use promissory estoppel to pervert the usual rules so as to snatch chestnuts from a fire of the attorney's own making.

3. For expression of the opposite view, that courts in promissory estoppel cases should treat them as ordinary breach of contract cases and allow the full amount of damages recoverable in the later, see Note, 13 Vand. L. Rev. (1960), 705.

Problem 64

You represent the Molé Chicken Company, which wants to sell franchises to existing B&Z Drive-In franchises. The sale of Molé Chicken will necessarily require the B&Z franchisees to terminate their relationship with B&Z and to engage in significant remodeling. What suggestions do you have for the Molé sales force that will help Molé avoid the problem Red Owl faced in *Hoffman*?

NOTES

1. The Colorado Supreme Court in Vigoda v. Denver Urban Renewal Auth., 646 P.2d 900 (Colo. 1982), cited *Hoffman* with approval. The plaintiff's complaint alleged that the defendant had promised to negotiate with her in good faith for the purchase of her property; that the defendant knew that the plaintiff would devote time and make expenditures in reliance on that promise; and that the promise of the defendant was relied on by the plaintiff, inducing her to expend time and money in furtherance of the anticipated negotiations. The court felt that these allegations were sufficient to support a claim based on the doctrine of promissory estoppel. The court stated:

> We believe that the doctrine as set forth in the Restatement should be applied to prevent injustice where there has not been mutual agreement by the parties on all essential terms of a contract, but a promise was made which the promisor should reasonably have expected would induce action or forbearance, and the promise in fact induced such action or forbearance.

The case was remanded in part for a determination of whether there was sufficient proof to support the allegations by the plaintiff.

On the issue of the parties' duties to negotiate in good faith, see generally Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195 (1968), and Farnsworth at 203-206.

2. Compare with *Hoffman,* the lead case, and *Vigoda,* cited in the last note, the case of Wheeler v. White, 398 S.W.2d 93 (Tex. 1965). Wheeler was to build a shopping center on White's land. White agreed to furnish Wheeler with construction financing. Because of White's assurances that the financing would be provided, Wheeler demolished existing buildings and generally prepared the site. The loan was not made, and Wheeler sued White for breach of contract. The court held the contract was too indefinite to enforce because the terms of repayment of the loan were not specified. However, the court held that the complaint stated a cause of action for promissory estoppel and reversed and remanded for a finding pursuant to that ruling. The court, like many courts (including the Wisconsin Supreme Court in *Hoffman*) would not award lost profits in a promissory estoppel action. The Texas Supreme Court justified this result

by saying that the promisee is partially at fault in not getting a traditional contract, so traditional damages are not recoverable, and the promisee is restricted to out-of-pocket losses only. To the same effect is First Natl. Bank v. Logan Mfg. Co., 577 N.E.2d 949 (Ind. 1991). Because several courts have held that oral commitments to loan money are actionable, many states have enacted statutes that provide that any oral loan commitment will not give rise to any action for damages.

3. In Keil v. Glacier Park, Inc., 188 Mont. 455, 614 P.2d 502 (1980), Glacier Park brought suit for alleged breach of a contract for the rental of an emergency water pump. There was no agreement as to what pump accessories would be provided by plaintiffs or as to who was to provide fuel or maintain the pump. The lease price was left open, but it was agreed that the defendant would pay a reasonable price. In refusing to enforce the alleged contract on the basis of promissory estoppel, the court stated: "The parties here had nothing more than an agreement to agree that was in the initial stages of the negotiation process. This does not constitute the clear and unambiguous promise necessary to satisfy the first element of a promissory estoppel claim." See also Garrett v. Bankwest, Inc., 459 N.W.2d 833 (S.D. 1990), where the court held that a rancher was not entitled to relief under promissory estoppel theory where an alleged promise by a bank to redeem a ranch subject to foreclosure and lease it back to the rancher was "vague, uncertain, and unsettled." According to *Hoffman* a promise too indefinite to be an offer may be a promise enforceable under promissory estoppel. Of course, it is difficult to distinguish a promise that although too indefinite to be an offer is definite enough to be the grounds for promissory estoppel. Nevertheless, several courts have explicitly stated that they do not agree with *Hoffman* on the point of whether a promise too indefinite to meet the test of formation for a contract can meet the first test of estoppel. See, e.g., Prenger v. Baumhoer, 939 S.W.2d 23 (Mo. App. 1997). Other courts are explicit in stating that they do not feel promissory estoppel can be used in a situation in which the parties' agreement is too indefinite or where continuing negotiations indicate the parties have not agreed on all terms and negotiations are still ongoing. Oswasso Development Co. v. Associated Wholesale Grocers, 19 Kan. App.2d 549, 873 P.2d 212 (1994).

4. A number of cases have involved the issue of the rights of a franchisee in a franchise that is terminable at will by the party providing the franchise. Under traditional theory such agreements are illusory and therefore void for lack of mutuality of obligation. See cases collected in 19 A.L.R.3d 196 (1968). However, in a number of recent cases courts have protected reliance losses in such contracts by allowing the dealer to enjoy the franchise at least for a period of time to allow the dealer to recoup his or her investment. It has been said that this concept is based primarily on tort notions but that §90 has significantly reinforced the reasons for reimbursement of a dealer's reliance losses. See Henderson, Promissory Estoppel and Traditional Contract Doctrine, 78 Yale L.J. 343, 363 (1969).

5. There were a number of predictions in the last thirty years that the doctrine of promissory estoppel would prove so appealing to the courts that it would come to dominate contracts cases, but time has proven otherwise. Employment cases have proven to be the least futile for the doctrine.

Most states are "at will" jurisdictions—an employee may be fired at any time with no reason as long as it is not on a prohibited basis such as race. When employers make what appears to be a promise of employment with limits on the employer's right to fire at will, employees have often argued that promissory estoppel can be used to prevent a firing not in accord with employer's promise, an argument that rarely succeeds. See, e.g., Mackenzie v. Miller Brewing Co., 241 Wis.2d 700, 623 N.W.2d 739 (2001); Leicht v. Hawaiian Airlines, Inc., 77 F. Supp. 2d 1134 (D. Hawaii 1999). See also Robert Conner, A Study of the Interplay Between Promissory Estoppel and At-Will Employment in Texas, 53 SMU L. Rev. 579 (2000).

Studies show that promissory estoppel is successfully invoked in less than 10 percent of the cases in which it is urged, see Robert A. Hillman, Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study, 98 Colum. L. Rev. 580 (1998), and that the courts typically tame it by stating that reliance on a promise containing some obvious legal defect (such as being oral when the law requires a writing) is unreasonable, particularly in a business setting; see Sidney W. DeLong, The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch 22, 1997 Wis. L. Rev. 943. But a more recent article challenges these authors' dire assessments as to the health of promissory estoppel. See Juliet P. Kostritsky, The Rise and Fall of Promissory Estoppel Or Is Promissory Estoppel Really As Unsuccessful As Scholars Say It Is: A New Look at the Data, 37 Wake Forest L. Rev. 531 (2002) (arguing if qualitative factors relating to the strength of a claim are accounted for in the data, the win rates are significant, and that if qualitative factors are recognized promissory estoppel results can be rationalized in efficiency terms).

VII. THE NEED FOR CONSIDERATION

What function does the doctrine of consideration serve? If a bill were introduced in the state legislature that stated: "Promises, seriously meant, shall be enforceable even if no consideration is given for them," would you, as a legislator, vote in favor?

In a series of cases decided in England around the time of the American Revolution, Lord Mansfield, often called the "father of commercial law," tried to eliminate the requirement of consideration. In Pillans v. Van Mierop, 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765), Lord Mansfield declared, "In commercial cases amongst merchants, the want of consideration is not an objection." This iconoclastic idea, however, did not prevail. In the next decade, the case of Rann v. Hughes, 7 T.R. 350n, 101 Eng. Rep. 1014n (1778), reinstated consideration as a viable issue in contract disputes.

In the 1930s, the Commissioners of Uniform State Laws proposed the following simple statute, which only Pennsylvania adopted. What is its effect?

Uniform Written Obligations Act

Section 1. A written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.

Two final things: The United Nations Convention on Contracts for the International Sale of Goods says not a word about the need for consideration, and the Uniform Commercial Code does not make much of the doctrine. You should review the inroads that the UCC has made on the necessity for consideration. Read UCC §§1-107, 2-205, and 2-209(1).

CHAPTER

3

REMEDIES

I. DAMAGES

A. *Introduction*

At the end of the complaint filed in a lawsuit, the plaintiff must specify the relief requested. This part of the complaint is called, fittingly enough, the "prayer." In an action founded upon a contract, the prayer may request extraordinary relief, such as an injunction (a court order forbidding certain conduct) or specific performance (a court decree commanding the other party to perform the contract as agreed), or simply a declaratory judgment (a ruling interpreting the contract or resolving some other dispute between the parties without stating any specific relief). Typically, however, the complaint will ask for money damages because such extraordinary relief is generally not available. In this portion of Chapter 3, we consider how those damages are to be measured.

In a tort suit, the injured party usually asks for enough damages to return to the pre-injury position, the status quo prior to the commission of the tort. In contracts cases the goal is different. Section 1-106(1) of the Uniform Commercial Code puts it this way:

> (1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed.

Thus contract law gives the injured person the benefit of the broken bargain. A famous law review article, Fuller and Perdue, The Reliance Interest in Contract Damages, 46 Yale L. Rev. 52, 53-54 (1936-1937), elaborates:

> It is convenient to distinguish three principal purposes which may be pursued in awarding contract damages. These purposes, and the situations in which they become appropriate, may be stated briefly as follows:
>
> *First,* the plaintiff has in reliance on the promise of the defendant conferred some value on the defendant. The defendant fails to perform his

promise. The court may force the defendant to disgorge the value he received from the plaintiff. The object here may be termed the prevention of gain by the defaulting promisor at the expense of the promisee; more briefly, the prevention of unjust enrichment. The interest protected may be called the *restitution interest.* For our present purposes it is quite immaterial how the suit in such a case be classified, whether as contractual or quasi-contractual, whether as a suit to enforce the contract or as a suit based upon a rescission of the contract. These questions relate to the superstructure of the law, not to the basic policies with which we are concerned.

Secondly, the plaintiff has in reliance on the promise of the defendant changed his position. For example, the buyer under a contract for the sale of land has incurred expense in the investigation of the seller's title, or has neglected the opportunity to enter other contracts. We may award damages to the plaintiff for the purpose of undoing the harm which his reliance of the defendant's promise has caused him. Our object is to put him in as good a position as he was in before the promise was made. The interest protected in this case may be called the *reliance interest.*

Thirdly, without insisting on reliance by the promisee or enrichment of the promisor, we may seek to give the promisee the value of the expectancy which the promise created. We may in suit for specific performance actually compel the defendant to render the promised performance to the plaintiff, or, in suit for damages, we may make the defendant pay the money value of this performance. Here our object is to put the plaintiff in as good a position as he would have occupied had the defendant performed his promise. The interest protected in this case we may call the *expectation interest.*

It is the last interest discussed above — the expectation interest — that is the general goal of an award of damages in a contracts case. The Restatement (Second) of Contracts provides:

§347. Measure of Damages in General

Subject to the limitations stated in §§350-353, the injured party has a right to damages based on his expectation interest as measured by

(a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
(b) any other loss, including incidental or consequential loss, caused by the breach, less
(c) any cost or other loss that he has avoided by not having to perform.

Section 344 is better than this

Even with the expectancy goal in mind, courts often struggle in arriving at a dollar figure that meets the typical expectations of the plaintiff and does not go beyond or below that figure. The next subsection considers the issues involved in calculating an expectation measure of money damages.

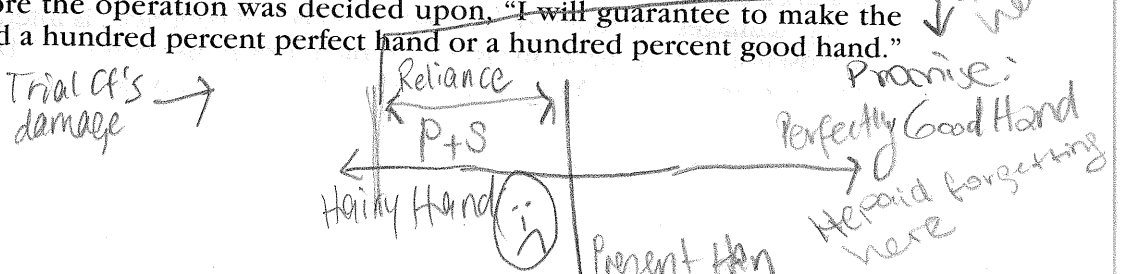
B. *Measuring Expectation Damages*

HAWKINS v. McGEE
Supreme Court of New Hampshire, 1929
84 N.H. 114, 146 A. 641

Assumpsit against a surgeon for breach of an alleged warranty of the success of an operation. Trial by jury. Verdict for the plaintiff. The writ also contained a count in negligence upon which a nonsuit was ordered, without exception.

Defendant's motions for a nonsuit and for a directed verdict on the count in assumpsit were denied, and the defendant excepted. During the argument of plaintiff's counsel to the jury, the defendant claimed certain exceptions, and also excepted to the denial of his requests for instructions and to the charge of the court upon the question of damages, as more fully appears in the opinion. The defendant seasonably moved to set aside the verdict upon the grounds that it was (1) contrary to the evidence; (2) against the weight of the evidence; (3) against the weight of the law and evidence; and (4) because the damages awarded by the jury were excessive. The court denied the motion upon the first three grounds, but found that the damages were excessive, and made an order that the verdict be set aside, unless the plaintiff elected to remit all in excess of $500. The plaintiff having refused to remit, the verdict was set aside "as excessive and against the weight of the evidence," and the plaintiff excepted. . . .

BRANCH, J. 1. The operation in question consisted in the removal of a considerable quantity of scar tissue from the palm of the plaintiff's right hand and the grafting of skin taken from the plaintiff's chest in place thereof. The scar tissue was the result of a severe burn caused by contact with an electric wire, which the plaintiff received about nine years before the time of the transactions here involved. There was evidence to the effect that before the operation was performed the plaintiff and his father went to the defendant's office, and that the defendant, in answer to the question, "How long will the boy be in the hospital?" replied, "Three or four days, not over four; then the boy can go home and it will be just a few days when he will go back to work with a good hand." Clearly this and other testimony to the same effect would not justify a finding that the doctor contracted to complete the hospital treatment in three or four days or that the plaintiff would be able to go back to work within a few days thereafter. The above statements could only be construed as expressions of opinion or predictions as to the probable duration of the treatment and plaintiff's resulting disability, and the fact that these estimates were exceeded would impose no contractual liability upon the defendant. The only substantial basis for the plaintiff's claim is the testimony that the defendant also said before the operation was decided upon, "I will guarantee to make the hand a hundred percent perfect hand or a hundred percent good hand."



The plaintiff was present when these words were alleged to have been spoken, and, if they are to be taken at their face value, it seems obvious that proof of their utterance would establish the giving of a warranty in accordance with his contention.

The defendant argues, however, that, even if these words were uttered by him, no reasonable man would understand that they were used with the intention of entering "into any contractual relation whatever," and that they could reasonably be understood only "as his expression in strong language that he believed and expected that as a result of the operation he would give the plaintiff a very good hand." It may be conceded, as the defendant contends, that, before the question of the making of a contract should be submitted to a jury, there is a preliminary question of law for the trial court to pass upon, i.e. "whether the words could possibly have the meaning imputed to them by the party who founds his case upon a certain interpretation," but it cannot be held that the trial court decided this question erroneously in the present case. It is unnecessary to determine at this time whether the argument of the defendant, based upon "common knowledge of the uncertainty which attends all surgical operations," and the improbability that a surgeon would ever contract to make a damaged part of the human body "one hundred percent perfect," would, in the absence of countervailing considerations, be regarded as conclusive, for there were other factors in the present case which tended to support the contention of the plaintiff. There was evidence that the defendant repeatedly solicited from the plaintiff's father the opportunity to perform this operation, and the theory was advanced by plaintiff's counsel in cross-examination of defendant that he sought an opportunity to "experiment on skin grafting," in which he had had little previous experience. If the jury accepted this part of plaintiff's contention, there would be a reasonable basis for the further conclusion that if defendant spoke the words attributed to him, he did so with the intention that they should be accepted at their face value, as an inducement for the granting of consent to the operation by the plaintiff and his father, and there was ample evidence that they were so accepted by them. The question of the making of the alleged contract was properly submitted to the jury.

2. The substance of the charge to the jury on the question of damages appears in the following quotation: "If you find the plaintiff entitled to anything, he is entitled to recover for what pain and suffering he has been made to endure and for what injury he has sustained over and above what injury he had before." To this instruction the defendant seasonably excepted. By it, the jury was permitted to consider two elements of damage: (1) Pain and suffering due to the operation; and (2) positive ill effects of the operation upon the plaintiff's hand. Authority for any specific rule of damages in cases of this kind seems to be lacking, but, when tested by general principle and by analogy, it appears that the foregoing instruction was erroneous.

"By 'damages,' as that term is used in the law of contracts, is intended compensation for a breach, measured in the terms of the contract." Davis v. New England Cotton Yarn Co., 77 N.H. 403, 404, 92 A. 732, 733. The

purpose of the law is "to put the plaintiff in as good a position as he would have been in had the defendant kept his contract." 3 Williston Cont. §1338; Hardie-Tynes Mfg. Co. v. Easton Cotton Oil Co., 150 N.C. 150, 63 S.E. 676, 134 Am. St. Rep. 899. The measure of recovery "is based upon what the defendant should have given the plaintiff, not what the plaintiff has given the defendant or otherwise expended." 3 Williston Cont. §1341. "The only losses that can be said fairly to come within the terms of a contract are such as the parties must have had in mind when the contract was made, or such as they either knew or ought to have known would probably result from a failure to comply with its terms." Davis v. New England Cotton Yarn Co., 77 N.H. 403, 404, 92 A. 732, 733, Hurd v. Dunsmore, 63 N.H. 171.

The present case is closely analogous to one in which a machine is built for a certain purpose and warranted to do certain work. In such cases, the usual rule of damages for breach of warranty in the sale of chattels is applied, and it is held that the measure of damages is the difference between the value of the machine, if it had corresponded with the warranty and its actual value, together with such incidental losses as the parties knew, or ought to have known, would probably result from a failure to comply with its terms. . . .

The rule thus applied is well settled in this state. "As a general rule, the measure of the vendee's damages is the difference between the value of the goods as they would have been if the warranty as to quality had been true, and the actual value at the time of the sale, including gains prevented and losses sustained, and such other damages as could be reasonably anticipated by the parties as likely to be caused by the vendor's failure to keep his agreement, and could not by reasonable care on the part of the vendee have been avoided." Union Bank v. Blanchard, 65 N.H. 21, 23, 18 A. 90, 91; Hurd v. Dunsmore, supra; Noyes v. Blodgett, 58 N.H. 502; P.L. ch. 166, §69, subd. 7. We therefore conclude that the true measure of the plaintiff's damage in the present case is the difference between the value to him of a perfect hand or a good hand, such as the jury found the defendant promised him, and the value of his hand in its present condition, including any incidental consequences fairly within the contemplation of the parties when they made their contract. 1 Sutherland, Damages (4th ed.) §92. Damages not thus limited, although naturally resulting, are not to be given.

The extent of the plaintiff's suffering does not measure this difference in value. The pain necessarily incident to a serious surgical operation was a part of the contribution which the plaintiff was willing to make to his joint undertaking with the defendant to produce a good hand. It was a legal detriment suffered by him which constituted a part of the consideration given by him for the contract. It represented a part of the price which he was willing to pay for a good hand, but it furnished no test of the value of a good hand or the difference between the value of the hand which the defendant promised and the one which resulted from the operation.

It was also erroneous and misleading to submit to the jury as a separate element of damage any change for the worse in the condition of the plaintiff's hand resulting from the operation, although this error was

probably more prejudicial to the plaintiff than to the defendant. Any such ill effect of the operation would be included under the true rule of damages set forth above, but damages might properly be assessed for the defendant's failure to improve the condition of the hand, even if there were no evidence that its condition was made worse as a result of the operation. . . .

New trial.

QUESTIONS AND NOTES

1. What exactly did the trial court judge do wrong here? How should plaintiff's damages have been measured?

2. If the goal of contract law is to put the injured person in the same position that performance would have done (thus giving the "expectancy"), consider which of the following items should be relevant on retrial:

(a) The cost of the operation
(b) The pain plaintiff suffered in the original operation
(c) The pain plaintiff suffered that would not have been suffered if the hand had been as promised
(d) The embarrassment plaintiff suffered as a result of the operation
(e) The difference between a hand with hair and scars and a hand without these defects
(f) The difference between plaintiff's hand before and after the operation

What would be Hawkin's restitution element in this fact pattern? Which of all these possible recoveries would be most important to the plaintiff in the actual case?

3. This famous decision is often referred to as the "hairy hand" case because Dr. McGee grafted skin from Hawkin's chest onto his hand, and, since it came from the chest, it grew hair, causing him extreme embarrassment. For an account of what actually happened after the decision in this case, see the investigative follow-up done by students at Harvard in the Harvard Law Record, Vol. 66, March 17, 1978. It reveals that the original jury verdict was for $3,000 and that the case was finally settled for $1,400 and attorney's fees.

Problem 65

Roderick Murgatroyd had always thought his family house was worth little because it was so old, and therefore he was surprised when Rose Maybud offered to buy it from him for $280,000. He signed the contract with her immediately. As he finished signing, he asked her why she was

560
- 280

willing to pay so much for the property, and she replied, "Because it's worth twice the amount you have just sold it for, and I plan to enjoy the profit I'll make when I resell." Astounded, Roderick tore up the contract and told her that he was not going to sell her the property. When she sues, what damages should she ask for, considering that she never paid him a cent (though the property is worth $560,000)? Does the fact that she has paid nothing and has in no way made any expenditures in reliance on this contract furnish him with a defense? No

PEEVYHOUSE v. GARLAND COAL & MINING CO.
Supreme Court of Oklahoma, 1962
382 P.2d 109

JACKSON, J. In the trial court, plaintiffs Willie and Lucille Peevyhouse sued the defendant, Garland Coal and Mining Company, for damages for breach of contract. Judgment was for plaintiffs in an amount considerably less than was sued for. Plaintiffs appeal and defendant cross-appeals.

In the briefs on appeal, the parties present their argument and contentions under several propositions; however, they all stem from the basic question of whether the trial court properly instructed the jury on the measure of damages.

Briefly stated, the facts are as follows: plaintiffs owned a farm containing coal deposits, and in November, 1954, leased the premises to defendant for a period of five years for coal mining purposes. A "strip-mining" operation was contemplated in which the coal would be taken from pits on the surface of the ground, instead of from underground mine shafts. In addition to the usual covenants found in a coal mining lease, defendant specifically agreed to perform certain restorative and remedial work at the end of the lease period. It is unnecessary to set out the details of the work to be done, other than to say that it would involve the moving of many thousands of cubic yards of dirt, at a cost estimated by expert witnesses at about $29,000.00. However, plaintiffs sued for only $25,000.00.

During the trial, it was stipulated that all covenants and agreements in the lease contract had been fully carried out by both parties, except the remedial work mentioned above; defendant conceded that this work had not been done.

Plaintiffs introduced expert testimony as to the amount and nature of the work to be done, and its estimated cost. Over plaintiffs' objections, defendant thereafter introduced expert testimony as to the "diminution in value" of plaintiffs' farm resulting from the failure of defendant to render performance as agreed in the contract — that is, the difference between the present value of the farm, and what its value would have been if defendant had done what it agreed to do.

At the conclusion of the trial, the court instructed the jury that it must return a verdict for plaintiffs, and left the amount of damages for jury determination. On the measure of damages, the court instructed the jury that it

might consider the cost of performance of the work defendant agreed to do, "together with all of the evidence offered on behalf of either party."

It thus appears that the jury was at liberty to consider the "diminution in value" of plaintiffs' farm as well as the cost of "repair work" in determining the amount of damages.

It returned a verdict for plaintiffs for $5000.00 — only a fraction of the "cost of performance," *but more than the total value of the farm even after the remedial work is done.*

On appeal, the issue is sharply drawn. Plaintiffs contend that the true measure of damages in this case is what it will cost plaintiffs to obtain performance of the work that was not done because of defendant's default. Defendant argues that the measure of damages is the cost of performance "limited, however, to the total difference in the market value before and after the work was performed."

It appears that this precise question has not heretofore been presented to this court. In Ardizonne v. Archer, 72 Okl. 70, 178 P. 263, this court held that the measure of damages for breach of a contract to drill an oil well was the reasonable cost of drilling the well, but here a slightly different factual situation exists. The drilling of an oil well will yield valuable geological information, even if no oil or gas is found, and of course if the well is a producer, the value of the premises increases. In the case before us, it is argued by defendant with some force that the performance of the remedial work defendant agreed to do will add at the most only a few hundred dollars to the value of plaintiffs' farm, and that the damages should be limited to that amount because that is all plaintiffs have lost.

Plaintiffs rely on Groves v. John Wunder Co., 205 Minn. 163, 286 N.W. 235, 123 A.L.R. 502. In that case, the Minnesota court, in a substantially similar situation, adopted the "cost of performance" rule as opposed to the "value" rule. The result was to authorize a jury to give plaintiff damages in the amount of $60,000, where the real estate concerned would have been worth only $12,160, even if the work contracted for had been done.

It may be observed that Groves v. John Wunder Co., supra, is the only case which has come to our attention in which the cost of performance rule has been followed under circumstances where the cost of performance greatly exceeded the diminution in value resulting from the breach of contract. . . .

The explanation may be found in the fact that the situations presented are artificial ones. It is highly unlikely that the ordinary property owner would agree to pay $29,000 (or its equivalent) for the construction of "improvements" upon his property that would increase its value only about ($300) three hundred dollars. The result is that we are called upon to apply principles of law theoretically based upon reason and reality to a situation which is basically unreasonable and unrealistic.

In Groves v. John Wunder Co., supra, in arriving at its conclusions, the Minnesota court apparently considered the contract involved to be analogous to a building and construction contract, and cited authority for the proposition that the cost of performance or completion of the building as contracted is ordinarily the measure of damages in actions for damages for the breach of such a contract.

In an annotation following the Minnesota case beginning at 123 A.L.R. 515, the annotator places the three cases relied on by defendant (*Sandy Valley, Bigham* and *Sweeney*) under the classification of cases involving "grading and excavation contracts."

We do not think either analogy is strictly applicable to the case now before us. The primary purpose of the lease contract between plaintiffs and defendant was neither "building and construction" nor "grading and excavation." It was merely to accomplish the economical recovery and marketing of coal from the premises, to the profit of all parties. The special provisions of the lease contract pertaining to remedial work were incidental to the main object involved.

Even in the case of contracts that are unquestionably building and construction contracts, the authorities are not in agreement as to the factors to be considered in determining whether the cost of performance rule or the value rule should be applied. The American Law Institute's Restatement of the Law, Contracts, Volume 1, Sections 346(1)(a)(i) and (ii) submits the proposition that the cost of performance is the proper measure of damages "if this is possible and does not involve *unreasonable economic waste*"; and that the diminution in value caused by the breach is the proper measure "if construction and completion in accordance with the contract would involve *unreasonable economic waste.*" (Emphasis supplied.) In an explanatory comment immediately following the text, the Restatement makes it clear that the "economic waste" referred to consists of the destruction of a substantially completed building or other structure. Of course no such destruction is involved in the case now before us.

On the other hand, in McCormick, Damages, Section 168, it is said with regard to building and construction contracts that ". . . in cases where the defect is one that can be repaired or cured without *undue expense*" the cost of performance is the proper measure of damages, but where ". . . the defect in material or construction is one that cannot be remedied without *an expenditure for reconstruction disproportionate to the end to be attained*" (emphasis supplied) the value rule should be followed. The same idea was expressed in Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 129 N.E. 889, 23 A.L.R. 1429, as follows:

> The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value.

It thus appears that the prime consideration in the Restatement was "economic waste"; and that the prime consideration in McCormick, Damages, and in Jacob & Youngs, Inc. v. Kent, supra, was the relationship between the expense involved and the "end to be attained" — in other words, the "relative economic benefit."

In view of the unrealistic fact situation in the instant case, and certain Oklahoma statutes to be hereinafter noted, we are of the opinion that the "relative economic benefit" is a proper consideration here. This is in accord with the recent case of Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78, where, in applying the cost rule, the Virginia court specifically noted that

". . . the defects are remediable from a practical standpoint and the costs *are not grossly disproportionate to the results to be obtained*" (emphasis supplied).

23 O.S. 1961 §§96 and 97 provide as follows:

> §96. . . . Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation, than he would have gained by the full performance thereof on both sides. . . .
>
> §97. . . . Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice no more than reasonable damages can be recovered.

Although it is true that the above sections of the statute are applied most often in tort cases, they are by their own terms, and the decisions of this court, also applicable in actions for damages for breach of contract. It would seem that they are peculiarly applicable here where, under the "cost of performance" rule, plaintiffs might recover an amount about nine times the total value of their farm. Such would seem to be "unconscionable and grossly oppressive damages, contrary to substantial justice" within the meaning of the statute. Also, it can hardly be denied that if plaintiffs here are permitted to recover under the "cost of performance" rule, they will receive a greater benefit from the breach than could be gained from full performance, contrary to the provisions of Sec. 96. . . .

We therefore hold that where, in a coal mining lease, lessee agrees to perform certain remedial work on the premises concerned at the end of the lease period, and thereafter the contract is fully performed by both parties except that the remedial work is not done, the measure of damages in an action by lessor against lessee for damages for breach of contract is ordinarily the reasonable cost of performance of the work; however, where the contract provision breached was merely incidental to the main purpose in view, and where the economic benefit which would result to lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the nonperformance.

. . . It should be noted that the rule as stated does not interfere with the property owner's right to "do what he will with his own" (Chamberlain v. Parker, 45 N.Y. 569), or his right, if he chooses, to contract for "improvements" which will actually have the effect of reducing his property's value. Where such result is in fact contemplated by the parties, and is a main or principal purpose of those contracting, it would seem that the measure of damages for breach would ordinarily be the cost of performance. . . .

Under the most liberal view of the evidence herein, the diminution in value resulting to the premises because of nonperformance of the remedial work was $300.00. After a careful search of the record, we have found no evidence of a higher figure, and plaintiffs do not argue in their briefs

valuation (\$0, not 29,000, but 300).

that a greater diminution in value was sustained. It thus appears that the judgment was clearly excessive, and that the amount for which judgment should have been rendered is definitely and satisfactorily shown by the record. . . .

We are of the opinion that the judgment of the trial court for plaintiffs should be, and it is hereby, modified and reduced to the sum of \$300.00, and as so modified it is affirmed.

WELCH, DAVISON, HALLEY, and JOHNSON, JJ., concur.

WILLIAMS, C.J., BLACKBIRD, V.C.J., and IRWIN and BERRY, JJ., dissent.

IRWIN, J. (dissenting). By the specific provisions in the coal mining lease under consideration, the defendant agreed as follows:

> 7b. Lessee agrees to make fills in the pits dug on said premises on the property line in such manner that fences can be placed thereon and access had to opposite sides of the pits.
>
> 7c. Lessee agrees to smooth off the top of the soil banks on the above premises.
>
> 7d. Lessee agrees to leave the creek crossing the above premises in such a condition that it will not interfere with the crossings to be made in pits as set out in 7b. . . .
>
> 7f. Lessee further agrees to leave no shale or dirt on the high wall of said pits.

Following the expiration of the lease, plaintiffs made demand upon defendant that it carry out the provisions of the contract and to perform those covenants contained therein.

Defendant admits that it failed to perform its obligations that it agreed and contracted to perform under the lease contract and there is nothing in the record which indicates that defendant could not perform its obligations. Therefore, in my opinion defendant's breach of the contract was wilful and not in good faith.

Dissent says D's breach not in good faith

Although the contract speaks for itself, there were several negotiations between the plaintiffs and defendant before the contract was executed. Defendant admitted in the trial of the action, that plaintiffs insisted that the above provisions be included in the contract and that they would not agree to the coal mining lease unless the above provisions were included.

In consideration for the lease contract, plaintiffs were to receive a certain amount as royalty for the coal produced and marketed and in addition thereto their land was to be restored as provided in the contract.

Defendant received as consideration for the contract, its proportionate share of the coal produced and marketed and in addition thereto, the *right to use* plaintiffs' land in the furtherance of its mining operations.

The cost for performing the contract in question could have been reasonably approximated when the contract was negotiated and executed and there are no conditions now existing which could not have been reasonably anticipated by the parties. Therefore, defendant had knowledge, when it prevailed upon the plaintiffs to execute the lease, that the cost of performance might be disproportionate to the value or benefits received by plaintiff for the performance.

D knew the cost of performance would be disproportionate when made the K.

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Defendant has received its benefits under the contract and now urges, in substance, that plaintiffs' measure of damages for its failure to perform should be the economic value of performance to the plaintiffs and not the cost of performance.

If a peculiar set of facts should exist where the above rule should be applied as the proper measure of damages, (and in my judgment those facts do not exist in the instant case) before such rule should be applied, consideration should be given to the benefits received or contracted for by the party who asserts the application of the rule.

Defendant did not have the right to mine plaintiffs' coal or to use plaintiffs' property for its mining operations without the consent of plaintiffs. Defendant had knowledge of the benefits that it would receive under the contract and the approximate cost of performing the contract. With this knowledge, it must be presumed that defendant thought that it would be to its economic advantage to enter into the contract with plaintiffs and that it would reap benefits from the contract, or it would have not entered into the contract.

Therefore, if the value of the performance of a contract should be considered in determining the measure of damages for breach of a contract, the value of the benefits received under the contract by a party who breaches a contract should also be considered. However, in my judgment, to give consideration to either in the instant action, completely rescinds and holds for naught the solemnity of the contract before us and makes an entirely new contract for the parties. . . .

In Great Western Oil & Gas Company v. Mitchell, Okl., 326 P.2d 794, we held:

> The law will not make a better contract for parties than they themselves have seen fit to enter into, or alter it for the benefit of one party and to the detriment of the others; the judicial function of a court of law is to enforce a contract as it is written.

I am mindful of Title 23 O.S. 1961 §96, which provides that no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in cases not applicable herein. However, in my judgment, the above statutory provision is not applicable here.

In my judgment, we should follow the case of Groves v. John Wunder Company, 205 Minn. 163, 286 N.W. 235, 123 A.L.R. 502, which defendant agrees "that the fact situation is apparently similar to the one in the case at bar," and where the Supreme Court of Minnesota held:

> The owner's or employer's damages for such a breach (i.e. breach hypothesized in 2d syllabus) are to be measured, not in respect to the value of the land to be improved, but by the reasonable cost of doing that which the contractor promised to do and which he left undone.

The hypothesized breach referred to states that where the contractor's breach of a contract is wilful, that is, in bad faith, he is not entitled to any benefit of the equitable doctrine of substantial performance.

In the instant action defendant has made no attempt to even substantially perform. The contract in question is not immoral, is not tainted with fraud, and was not entered into through mistake or accident and is not contrary to public policy. It is clear and unambiguous and the parties understood the terms thereof, and the approximate cost of fulfilling the obligations could have been approximately ascertained. There are no conditions existing now which could not have been reasonably anticipated when the contract was negotiated and executed. The defendant could have performed the contract if it desired. It has accepted and reaped the benefits of its contract and now urges that plaintiffs' benefits under the contract be denied. If plaintiffs' benefits are denied, such benefits would inure to the direct benefit of the defendant. . . .

I therefore respectfully dissent to the opinion promulgated by a majority of my associates.

QUESTIONS

1. How do we measure the value of land? Is market value all that land is worth to a farmer? To you?

2. Is the decision wise as a matter of policy? If *Peevyhouse* were decided today, is it likely the increased public awareness in environmental concerns would affect the court's decision? See Rock Island Improvement Co. v. Helmerick & Payne, 698 F.2d 1075 (10th Cir. 1983) (prediction that Oklahoma would no longer follow *Peevyhouse*). Where the defendant is guilty of a willful breach, some courts opt for the cost of repair even where this arguably results in economic waste, in effect imposing a form of punitive damages on the bad faith party; see American Standard, Inc. v. Schectman , 439 N.Y.S.2d 529 (N.Y. App. Div. 1981).

3. Should a court attempt to determine whether the plaintiff in a case like *Peevyhouse* has particular environmental or aesthetic values before determining whether to award damages under the cost of performance rule or the diminution in value rule? What other factors should control the court's adoption of either rule?

4. The burden is on the breaching party to show that the cost of repairs is unreasonable when compared to the diminution of value due to the breach. See Andrulis v. Levin Construction Corp., 331 Md. 354, 628 A.2d 197 (Md. App. 1993); Greene v. Bearden Enterprises, 598 S.W.2d 649 (Tex. Civ. App. 1980).

5. Suppose that after this case was decided you are the attorney for the Smiths who have the farm next door to the Peevyhouses. Garland is proposing to strip mine on their land. What do you advise be put into the contract to make sure the land will be returned to its original condition when the mining is done? I'd say if in breach of reclamation, cost of performance required.

6. For a study of this case which includes pictures of the farm and the strip mine and an investigation as to whether members of the court were bribed, see Judith L. Maute, Peevyhouse v. Garland Coal Co. Revisited: The Ballad of Willie and Lucille, 89 Northwestern U. L. Rev. 501 (1995).

COUNCIL OF UNIT OWNERS OF SEA COLONY EAST v. CARL M. FREEMAN ASSOCIATES

Superior Court of Delaware, 1989
564 A.2d 357

MARTIN Judge. Plaintiff, Council of Unit Owners of Sea Colony East, Phase III Condominium has moved this Court for a motion in limine or, in the alternative, for judgment as a matter of law, to preclude the Freeman Defendants and any other party from introducing evidence at trial of any diminution of value and/or useful life theories as a means of reducing Plaintiff's damage award. The Freeman Defendants have filed a corresponding motion to establish the measure of damages in this tort and contract action. Third-party defendant Enamel Products & Plating Co. has filed a response to both Plaintiff's and Freeman Defendants' motions. Third-party defendant Peninsula Roofing has filed a response to Plaintiff's motion in limine. Defendant Alcan Aluminum has also filed an answering memorandum in response to the cross-motions. Third-party defendant Salisbury Steel Products Corporation adopts the arguments of the Freeman Defendants as well as Alcan Aluminum Corporation and Enamel Products and Plating Company. This is the Court's decision on said motions, said decision incorporating the responses filed by the aforementioned parties.

The "Freeman Defendants" include Carl M. Freeman Associates, Inc., Sea Colony Development Corporation, Inc., Sea Colony, Inc., and Sea Colony Management, Inc.

DIMINUTION IN VALUE OR COST OF REPAIR

The Plaintiff has taken the position that the proper measure of damages under Delaware law is the full cost of repairs needed for Sea Colony East, Phase III Condominium, without any reduction or offset on either a diminution of value theory or useful life theory. Plaintiff argues that any measure of damages other than the full cost of repair will provide no true relief to Plaintiff and will in turn provide a substantial windfall to Freeman Defendants. The Freeman Defendants have argued that diminution or loss in value of the Phase III Condominiums is the appropriate measure of damages or in the alternative an adjusted cost of repair or replacement could be utilized, taking into account already expired useful lives of the Condominium and any increase in condominium value created by such repairs or replacements. Third-party defendant Enamel Product agrees with the Freeman Defendants that the proper measure of damages is the diminution in value theory and not cost of repair but argues in the alternative that if the cost of repair theory is adopted then as to Plaintiff's claims concerning roof panels, that theory should be appropriately supplemented by application of the useful life doctrine.

Peninsula Roofing takes the position that if damages are based on the replacement cost of the built up roofing system then such damages should be reduced on account of the useful life that Plaintiff has actually received or would have received if it had not replaced the roof. Alcan Aluminum adopts the Freeman Defendants' position that diminution of value is the appropriate measure, but if the Court adopts cost of repair theory, then the repair cost of the roof panels should be prorated by the expired useful life of the panels.

Sea Colony Phase III, also known as the Edgewater House, is a Fourteen (14) Story High-rise Building consisting of one hundred and seventy-seven (177) condominium units located immediately adjacent to the Atlantic Ocean in Bethany Beach, Delaware. The lobby and lower level of Edgewater House consists of offices, retail space, meeting rooms and recreational facilities. The remainder of the building consists of privately owned condominium units, many of which are rented during the peak summer season.

Edgewater House was constructed by defendant Sea Colony Development Corporation during 1974 and 1975. Sea Colony Development Corporation served as the general contractor and both it and Carl M. Freeman Associates, were involved in the design and construction of the building. Construction was substantially completed by May 21, 1975.

Defendant Sea Colony Management is the managing agent for Edgewater House and has managed the Council's financial affairs.

On February 17, 1989, Plaintiff filed its first amended complaint alleging defects in the roof, walls, concrete balconies and walkways, and sliding glass door interfacing of the Edgewater House, alleging the said defects are the result of the defendants' acts of omissions, said complaint raising a number of claims sounding in both contract and tort. The allegations relate to defective design, engineering, construction, materials, workmanship, operation, maintenance and repair involving the following common elements: flat roofing, metal roofing components, exterior wall panel system, the interface between the sliding doors and windows and the curtain wall, drainage concrete floor slabs, deteriorating concrete, re-bars in the concrete walkway and balconies, and ventilation shafts.

Plaintiff has estimated that the cost of completely repairing or replacing all of the allegedly defective building components at the Condominium is between $13 million and $15 million dollars. Through discovery, the Freeman Defendants' experts on damages have opined that there is no discernable difference or decrease in the properties' appreciation attributable to the defects alleged by Plaintiff. In fact Defendants suggested that since 1975 the market value of units in the Condominium has appreciated at a rate equal to or better than comparable units in the market.

As indicated, both Plaintiff and Freeman Defendants have filed motions, in effect, requesting that the Court resolve these "measure of damages" questions prior to trial as matters of law. Furthermore, it appears that the "useful life" theory presents a question of first impression in Delaware. In addition, review of applicable precedents suggest that the

application of the diminution in value theory may have some novelty as applied to this particular type of litigation.

For the purpose of establishing a damage theory for this litigation only, this Court accepts as true that Edgewater House is in need of between $13 million to $15 million dollars worth of repairs as outlined by Plaintiff's experts.

The Plaintiff has argued that the proper measure of damages is the "full cost of repairs" without any reduction or offset based on either diminution in value theory or useful life theory. Plaintiff asserts that cost of repair is the most widely accepted and generally applied measure of expectancy damages. See Hyatt and Downer: Condominium and Homeowner Association Litigation: Community Association Law, §5.54, §8.54 (1987). Under established principals [sic] of contract law, the "purpose of money damages is to put the injured party in as good a position as that in which full performance would have put him in," Restatement (1st) of Contracts §346B (1932), or to "give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed," Restatement (2nd) of Contracts §347, a (1979). In establishing a damage theory, "regardless of whether the cause of action sounds in contract or tort, the focus is to identify the [injured parties'] interests and to compensate for the damage done to them." D. Dobbs, Handbook on the Law of Remedies §5.1, at 311 (1973).

The cost of repair rule and value rule are part of the alternative formula presented in the Restatement (1st) of Contracts, §346 for damages for breach of a construction contract.[1]

A number of other Courts have addressed this question with differing results.[2]

1. Section 346 provides that compensatory damages for defective construction may be either:

> (i) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste (repair rule); or
>
> (ii) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste [value rule].

Id. at (1)(a)(i)-(ii).

2. The actual measure of damages varies among the states. *In a majority of states, damages are measured by the cost to complete the residence according to the contract and plans. This formula is used when completion is possible and the cost would not be so excessive as to constitute economic waste.* In cases in which completion according to the plans or correction of defects would be excessively costly, the court may award damages based on the difference between the residence as intended and as actually constructed. The same rule may apply if injury to real property is of a permanent nature. *Some courts may impose damages equal to the cost of repair even if economic waste results and damages measured by the difference in value would be less.* Special damages may also be recoverable for unusual circumstances.

Some states follow a combination of the cost of repair and diminution of value rules or apply another measure, *whichever best compensates the plaintiff for the injuries or losses sustained.* For example, in Wyoming no specific rule for calculating damages is

The repair rule is "generally preferred" over the value rule. Remedies §12.21, at 897. The cost of repairs normally will be awarded unless the repairs results in "undue loss or expense . . . an expenditure for reconstruction disproportionate to the end to be attained, or . . . endangering unduly other parts of the building. . . ." C. McCormick Handbook on the Law of Damages §168, at 647-48 (1935).

As stated in the Restatement (2nd) of Contracts §348(2)(b), the reasonable cost of remedying the construction defects will be awarded unless that cost is "clearly disproportionate to the probable loss in value. . . ." Therefore Plaintiff asserts that it is entirely possible to make repairs that will correct problems or eliminate alleged design and construction defects to the Condominium for substantially less than the combined value of all of the individual condominium units. The Defendants accept the Restatement formulation of what the appropriate measure of damages in cases involving construction contracts should be, i.e. "diminution in the market price of the property . . ." or "the reasonable cost of . . . remedying the defects if that cost is not clearly disproportionate to the probable loss in value. . . ." The difference in approach is that the Defendants suggest that any diminution in market price that may result from alleged defects is a fraction of the estimated repair cost and therefore this disproportion requires application of the diminution in market price or loss of value approach. The Freeman Defendants suggest that Plaintiff's proposed repairs are replacement claims that constitute a virtual demolition and reconstruction of the entire exterior of the Condominium. It follows, according to these defendants, that the cost of repair or replacement is unreasonable and excessive in relation to any diminution in market price and therefore the diminution approach would be the appropriate measure of damages.

In recent construction defect cases, Delaware Courts have formulated the following rule, awarding damages: "if a party to a construction contract fails to perform its obligations under the contract, the aggrieved party is entitled to damages measured by the amount required to remedy the defective performance unless it is not reasonable or practical to do so." Farny v. Bestfield Builders, Inc., Del. Super., 391 A.2d 212, at 214 (1978); Carey v. McGinty, Del. Super., C.A. No. 86C-JL-17, Chandler, Judge slip op. at 5, 1988 WL55336 (May 18, 1988). These cases adopt Restatement §346 and state, in effect, "if the defect is remediable from the practical standpoint, recovery generally will be based on the market price completing or

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preferred over another, *because the primary objective is to determine the amount of loss, applying whatever rule is best suited for that purpose.* Michigan follows no fixed rule but recognizes that damages for injury to real property are generally measured by one of the two standards, diminution in value or reasonable cost of restoration or repair. Michigan employs a combination of the two standards depending on the extent of damage. If the damage cannot be repaired, the measure of damages is the difference between the market value of the property before and after the injury. *When the damage is repairable and the cost is less than the value of the property prior to the injury, the cost of repair is the proper measure.* Hyatt and Downer, Condominium and Homeowner Association Litigation, at §5.54 (emphasis added).

correcting the performance. . . ." See S. Williston, Treatise on the Law of Contract §1363 at 344-345 (3rd Ed. 1961). Furthermore, see Tydings v. Loewenstein, Del. Supr., 505 A.2d 443, at 447 (Del. Supr., 1986) wherein the Court extended the cost of repair theory to negligence claims. In Young v. Joyce, Del. Super., 351 A.2d 857 (1975), the Court held that the full cost of repairs was the appropriate measure of damages for a house purchaser whose action alleged fraud. These cases establish that under Delaware law the cost of repairs is the appropriate measure not only in tort cases but also in contract cases. . . .

Where there is a tremendous disparity between restoration cost and the diminished value of the property, diminution in value may be an appropriate measure of damages. See Brandywine 100 Corp. v. New Castle County, Del. Supr., 527 A.2d 1241 (1987). In *Brandywine One Hundred* the evidence which the Supreme Court considered relevant in its affirmance of a trial court decision based on diminution in value was that the cost to restore buildings wrongfully demolished by the defendant was $287,719 and the diminished value of said property was only $30,600. The Supreme Court cited Restatement (2nd) Torts §929(1)(a) which provided two alternative methods of determining damages similar to those stated in Restatement (2nd) of Contracts. Section 929(1)(a), which provides:

> The difference in value between the land before the harm and the value after the harm or at plaintiff's election in an appropriate case, cost of restoration that has been or may be reasonably incurred. . . .

Brandywine 100 supra, dealt with abandoned, heavily damaged structures having no intrinsic value other than aesthetics. Under the facts of this case, as developed in discovery, any appreciation in value of units at Edgewater House is due to substantial market forces in the relevant area and any comparison between such appraised value and any reduction due to alleged defects will be misleading at best.

Furthermore, the Freeman Defendants' expert, Gary Parker, in deposition testimony suggests that there will be no diminution in value until the cost of repair actually reflects itself in the market place. In fact, the evidence may show that there has been equal or greater appreciation of units at Edgewater House, as compared to comparables in the area, suggesting no diminution in value at all, notwithstanding what is assumed for this analysis, i.e., there is up to $13 million to $15 million in needed repairs.

For purposes of determining the measure of damages, tracking of sale prices paid by individual unit owners cannot be directly related to the need for correction of alleged defects and deficiencies. Moreover, there is evidence to suggest that, in the aggregate, the cost of repairs, on a per unit basis, are substantially less than the value of the units themselves. This factual context is also complicated by the fact that Plaintiff herein is the Council, which functions on behalf of all of the unit owners. The individual owners may realize a financial gain upon a sale of their investment in a condominium, while the Condominium Council itself will have to address any defects that are found to exist in the aggregate building, thereby charg-

ing the unit owners for repair. Therefore, for the purpose of establishing a measure of damages, it's plausible that the property value of the Condominium has diminished at least by the amount of repairs needed.

Finally, if repair cost is the appropriate measure, the Freeman Defendants suggest that it will have to be shown that the application of such will not result in economic waste. Economic waste exists when the repairs will result in "undue loss or expenses . . . an expenditure for reconstruction disproportionate to the end to be obtained or endangering unduly other parts of the building. . . ." See McCormick, supra, 648. Even if consideration of "economic waste" was mandated in Delaware, on the current record — and in arguments in support thereof — economic waste has not been shown and therefore the value rule does not have to be applied.

Therefore it appears that the appropriate measure of damages will be the reasonable cost of remedying the defects, appropriately applied.

Application of Useful Life Theory

The Freeman Defendants have argued that repair or replacement of allegedly defective building components at Edgewater House would give Plaintiff a windfall by extending the useful lives of those components beyond what was reasonably expectable at the time of construction. In effect then, as construed by Plaintiff, the Freeman Defendants are suggesting that some minimum cost to repair the building should be the appropriate measure and this concept is related to the building's "useful life reasonably contemplated by the parties at the time of the purchase." Further it is suggested that any award of costs that would "extend" the life of the components of the building beyond their useful life would result in unjust enrichment to Plaintiff. . . .

The argument then is that repair or replacement cost, if used, should be pro-rated for the already-expired useful lives of the allegedly defective building components. For example, assume an element of construction had a useful life of 20 years and after 15 years it was found to have been defective and a defendant was required to restore it to its original value. Since 75% of the useful life would have expired, the replacement, assumed to have a 20 year useful life, would then provide that owner-plaintiff with a clear windfall, since the repair would entitle plaintiff to an additional 15 years of utility. The Defendants argue that fairness and equity dictate that if repair of this element is required, then that cost has to be pro-rated to reflect that a plaintiff would have gotten the benefit of three quarters of the useful life of that particular component. Arguably, the "useful life" approach, is to put plaintiff in the position it would have been in without the breach and in turn to avoid giving plaintiff a windfall. . . .

Authority in this jurisdiction suggest that a Delaware Court has discretion to employ a flexible approach to damages in order to achieve a just and reasonable result. *Farny,* supra, at 213-14. Accord, *Tydings,* supra. Some courts have expressly approved and applied the useful life concept to prorate plaintiffs' damages for building defects and construction

contract cases where plaintiffs have enjoyed substantial periods of use of the defective components prior to replacing them. Defendants suggest that application of the useful life doctrine may be particularly appropriate here where the plaintiff is a condominium association.[5]

This Court has decided that the case, *sub judice,* is not appropriate for implementation of the "useful life" theory as a measure of damages. Although its initial appeal is in preventing a windfall for Plaintiff, a result the Court is sensitive to, its utilization here, as an adjunct to the measure of damages, has the potential of giving the Defendants too much of a benefit. This is especially true when applied to tort claims, where damages, if awarded, should be to make a plaintiff whole. Furthermore, utilization of this theory, in this matter, involving claims to exterior walls, concrete, roof and interfacing, has the potential to create significant proof problems and substantial jury confusion. . . .

In developing a measure of damages for the tort and contract claims included in this case, it is assumed that a claimant will have to show the reasonableness of any repair or replacement estimates or requests for reimbursement for funds spent.

Also for purposes of determining a measure of damages, this Court accepts that there are significant allegations that Plaintiff did not have full use and enjoyment of the referenced components even for what is alleged to be their useful life. Conceptually there would be some attraction in giving a defendant the benefit of having provided a component that performed properly until it had to be replaced. Of course, if this were the case there would be no need for repair or replacement of the component. Assuming then that a plaintiff did not get the benefit of his bargain, and there is a need for replacement or repair of a component and a defendant is entitled to some "mitigation" for "useful life," then the plaintiff should also receive an "offset" for the diminished use of the defective component during its "not-so-useful life." Although qualitatively attractive as an approach, the quantification of such diminished use, along with assessment of useful lives of components such as those pertinent to this case, as

5. Defendants argue that proration of damages based on expired useful life may be appropriate in the present case where Plaintiff is a condominium association. A condominium normally maintains reserve funds which are gradually built up based on a replacement schedule so that when building components can be expected to need replacing, the necessary funds for replacement are available. In the present case, Plaintiff's Code of Regulations requires Plaintiff to "build up and maintain reasonable reserves for working capital, operations, contingencies and replacements." Code of Regulations of Sea Colony Phase III Condominium, Article V, Section 1(d). Reserve funding schedules are based on expected useful lives of the building's components. Thus, for example, three-quarters of the cost of replacing the roof should be in the reserve fund when a roof with a twenty-year useful life is fifteen years old. If, at that time, the roof is found to be defective and is replaced with a new roof whose useful life is twenty years, the condominium will receive fifteen years of roof life unless it contributes its reserves to the replacement of the roof. It is suggested that the appropriateness of applying useful life to a condominium is clearer than it might be for a different type of plaintiff, because the condominium's financial management of its physical plant is or should be founded essentially on useful life principles.

a proof problem, is simply overwhelming. A telephone pole hit by a car has a specific, identifiable period of useful service which is readily determined by looking at the number of years it performed prior to being damaged. Building components, alleged to have been defective early in their respective lives are not amenable to such easy and straightforward characterization.

For all of the foregoing reasons, this Court denies the Freeman Defendant's Motion to Establish the Measure of Damages and grants Plaintiff's Motion in Limine, which establishes as a measure of damages, the "cost of repair."

It is so ordered.

QUESTIONS

1. How would this court have come out in the *Peevyhouse* case?

2. Assume that shortly after the plaintiffs in the principal case discovered the defective roof they hired a roofer to replace it for $50,000, $10,000 more than the defendants say should have been spent. Assume further that the plaintiffs hired the roofer after calling two other roofers and getting higher bids. How much should the plaintiffs recover? Would it affect your answer if you knew that the roofing material used in the replacement was of a higher quality than that promised by the original contractor?

Problem 66

Helen's Contracting agreed to build a huge horse for the town of Troy's annual pioneer parade. Helen agreed to build the horse for $24,000. It was going to cost Helen $20,000 to build the horse. After three months' work and the expenditure of $15,000, the horse was three-fourths completed. On that date, the town of Troy told Helen to stop construction on the horse. Troy had already paid Helen $5,000 but refused to pay any more. Helen can sell the horse for $2,000 salvage value. What is the loss in expectation value to Helen?

C. The Reliance Interest

SULLIVAN v. O'CONNOR
Supreme Judicial Court of Massachusetts, 1973
363 Mass. 579, 296 N.E.2d 183

KAPLAN, J. The plaintiff patient secured a jury verdict of $13,500 against the defendant surgeon for breach of contract in respect to an operation upon the plaintiff's nose. The substituted consolidated bill of exceptions

presents questions about the correctness of the judge's instructions on the issue of damages.

The declaration was in two counts. In the first count, the plaintiff alleged that she, as patient, entered into a contract with the defendant, a surgeon, wherein the defendant promised to perform plastic surgery on her nose and thereby to enhance her beauty and improve her appearance; that he performed the surgery but failed to achieve the promised result; rather the result of the surgery was to disfigure and deform her nose, to cause her pain in body and mind, and to subject her to other damage and expense. The second count, based on the same transaction, was in the conventional form for malpractice, charging that the defendant had been guilty of negligence in performing the surgery. Answering, the defendant entered a general denial.

On the plaintiff's demand, the case was tried by jury. At the close of the evidence, the judge put to the jury, as special questions, the issues of liability under the two counts, and instructed them accordingly. The jury returned a verdict for the plaintiff on the contract count, and for the defendant on the negligence count. The judge then instructed the jury on the issue of damages.

As background to the instructions and the parties' exceptions, we mention certain facts as the jury could find them. The plaintiff was a professional entertainer, and this was known to the defendant. The agreement was as alleged in the declaration. More particularly, judging from exhibits, the plaintiff's nose had been straight, but long and prominent; the defendant undertook by two operations to reduce its prominence and somewhat to shorten it, thus making it more pleasing in relation to the plaintiff's other features. Actually the plaintiff was obliged to undergo three operations, and her appearance was worsened. Her nose now had a concave line to about the midpoint, at which it became bulbous; viewed frontally, the nose from bridge to midpoint was flattened and broadened, and the two sides of the tip had lost symmetry. This configuration evidently could not be improved by further surgery. The plaintiff did not demonstrate, however, that her change of appearance had resulted in loss of employment. Payments by the plaintiff covering the defendant's fee and hospital expenses were stipulated at $622.65.

The judge instructed the jury, first, that the plaintiff was entitled to recover her out-of-pocket expenses incident to the operations. Second, she could recover the damages flowing directly, naturally, proximately, and foreseeably from the defendant's breach of promise. These would comprehend damages for any disfigurement of the plaintiff's nose — that is, any change of appearance for the worse — including the effects of the consciousness of such disfigurement on the plaintiff's mind, and in this connection the jury should consider the nature of the plaintiff's profession. Also consequent upon the defendant's breach, and compensable, were the pain and suffering involved in the third operation, but not in the first two. As there was no proof that any loss of earnings by the plaintiff resulted from the breach, that element should not enter into the calculation of damages.

By his exceptions the defendant contends that the judge erred in allowing the jury to take into account anything but the plaintiff's out-of-pocket expenses (presumably at the stipulated amount). The defendant excepted to the judge's refusal of his request for a general charge to that effect, and, more specifically, to the judge's refusal of a charge that the plaintiff could not recover for pain and suffering connected with the third operation or for impairment of the plaintiff's appearance and associated mental distress.

The plaintiff on her part excepted to the judge's refusal of a request to charge that the plaintiff could recover the difference in value between the nose as promised and the nose as it appeared after the operations. However, the plaintiff in her brief expressly waives this exception and others made by her in case this court overrules the defendant's exceptions; thus she would be content to hold the jury's verdict in her favor.

We conclude that the defendant's exceptions should be overruled.

It has been suggested on occasion that agreements between patients and physicians by which the physician undertakes to effect a cure or to bring about a given result should be declared unenforceable on grounds of public policy. See Guilmet v. Campbell, 385 Mich. 57, 76, 188 N.W.2d 601 (dissenting opinion). But there are many decisions recognizing and enforcing such contracts, see annotation, 43 A.L.R.3d 1221, 1225, 1229-1233, and the law of Massachusetts has treated them as valid, although we have had no decision meeting head on the contention that they should be denied legal sanction. Small v. Howard, 128 Mass. 131; Gabrunas v. Miniter, 289 Mass. 20, 193 N.E. 551; Forman v. Wolfson, 327 Mass. 341, 98 N.E.2d 615. These causes of action are, however, considered a little suspect, and thus we find courts straining sometimes to read the pleadings as sounding only in tort for negligence, and not in contract for breach of promise, despite sedulous efforts by the pleaders to pursue the latter theory. See Gault v. Sideman, 42 Ill. App. 2d 96, 191 N.E.2d 436; annotation, supra, at 1225, 1238-1244.

It is not hard to see why the courts should be unenthusiastic or skeptical about the contract theory. Considering the uncertainties of medical science and the variations in the physical and psychological conditions of individual patients, doctors can seldom in good faith promise specific results. Therefore it is unlikely that physicians of even average integrity will in fact make such promises. Statements of opinion by the physician with some optimistic coloring are a different thing, and may indeed have therapeutic value. But patients may transform such statements into firm promises in their own minds, especially when they have been disappointed in the event, and testify in that sense to sympathetic juries.[2] If actions for breach of promise can be readily maintained, doctors, so it is said, will be frightened into practising "defensive medicine." On the other

2. Judicial skepticism about whether a promise was in fact made derives also from the possibility that the truth has been tortured to give the plaintiff the advantage of the longer period of limitations sometimes available for actions on contract as distinguished from those in tort or for malpractice. See Lillich, The Malpractice Statute of Limitations in New York and Other Jurisdictions, 47 Cornell L.Q. 339; annotation, 80 A.L.R.2d 368.

hand, if these actions were outlawed, leaving only the possibility of suits for malpractice, there is fear that the public might be exposed to the enticements of charlatans, and confidence in the profession might ultimately be shaken. See Miller, The Contractual Liability of Physicians and Surgeons, 1953 Wash. L.Q. 413, 416-423. The law has taken the middle of the road position of allowing actions based on alleged contract, but insisting on clear proof. Instructions to the jury may well stress this requirement and point to tests of truth, such as the complexity or difficulty of an operation as bearing on the probability that a given result was promised. See annotation, 43 A.L.R.3d 1225, 1225-1227.

If an action on the basis of contract is allowed, we have next the question of the measure of damages to be applied where liability is found. Some cases have taken the simple view that the promise by the physician is to be treated like an ordinary commercial promise, and accordingly that the successful plaintiff is entitled to a standard measure of recovery for breach of contract — "compensatory" ("expectancy") damages, an amount intended to put the plaintiff in the position he would be in if the contract had been performed, or, presumably, at the plaintiff's election, "restitution" damages, an amount corresponding to any benefit conferred by the plaintiff upon the defendant in the performance of the contract disrupted by the defendant's breach. See Restatement: Contracts §329 and comment a, §§347, 384(1). Thus in Hawkins v. McGee, 84 N.H. 114, 146 A. 641, the defendant doctor was taken to have promised the plaintiff to convert his damaged hand by means of an operation into a good or perfect hand, but the doctor so operated as to damage the hand still further. The court, following the usual expectancy formula, would have asked the jury to estimate and award to the plaintiff the difference between the value of a good or perfect hand, as promised, and the value of the hand after the operation. (The same formula would apply, although the dollar result would be less, if the operation had neither worsened nor improved the condition of the hand.) If the plaintiff had not yet paid the doctor his fee, that amount would be deducted from the recovery. There could be no recovery for the pain and suffering of the operation, since that detriment would have been incurred even if the operation had been successful; one can say that this detriment was not "caused" by the breach. But where the plaintiff by reason of the operation was put to more pain than he would have had to endure, had the doctor performed as promised, he should be compensated for that difference as a proper part of his expectancy recovery. It may be noted that on an alternative count for malpractice the plaintiff in the *Hawkins* case had been nonsuited; but on ordinary principles this could not affect the contract claim, for it is hardly a defense to a breach of contract that the promisor acted innocently and without negligence. The New Hampshire court further refined the *Hawkins* analysis in McQuaid v. Michou, 85 N.H. 299, 157 A. 881, all in the direction of treating the patient-physician cases on the ordinary footing of expectancy. See McGee v. United States Fid. & Guar. Co., 53 F.2d 953 (1st Cir.) (later development in the *Hawkins* case); Cloutier v. Kasheta, 105 N.H. 262, 197 A.2d 627; Lakeman v. LaFrance, 102 N.H. 300, 305, 156 A.2d 123.

Other cases, including a number in New York, without distinctly repudiating the *Hawkins* type of analysis, have indicated that a different and