

CASE NO. A09-879

State of Minnesota
In Court of Appeals

CHAD DeROSIER,

Respondent,

vs.

UTILITY SYSTEMS OF AMERICA, INC.,

Appellant.

RESPONDENT'S BRIEF

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Table of Contents

Table of Authorities ii

Statement of the Legal Issues 1

Statement of the Case 2

Statement of Facts 3

Argument. 14

 I. Standard of Review 14

 II. Discussion 15

 A. Substantial evidence in the record supports the Trial Court’s
 award of damages for removal of excess fill 15

 B. The Trial Court did not err in awarding consequential
 damages 21

Conclusion. 23

Table of Authorities

Cardinal Consulting Co. v. Circo Resorts, Inc.,
297 N.W.2d 260 (Minn. 1980). 21

Northern Petro Chemical Company v. Thorsen & Thorshov, Inc.
297 Minn. 118, 211 N.W.2d 159 (1973)..... 21

Bryngelson v. Minnesota Valley Breeders Association,
262 Minn. 275, 114 N.W.2d 148 (1962)..... 21

Statement of the Legal Issues

1. **Was there substantial evidence to support the Trial Court's award of actual damages of \$22,829 for removal of excess fill?**

The testimony from the witnesses and trial exhibits support the Trial Court's award of the actual damages.

2. **Did the Trial Court err in awarding consequential damages?**

The Trial Court found that an Award was justified by the evidence.

Statement of the Case

This case results from the construction of the home of Respondent Chad DeRosier. This was a new construction project. As part of the construction, Mr. DeRosier needed to have fill brought into the property before the construction process could begin.

Mr. DeRosier and Appellant Utility Systems of America, Inc. entered into a verbal contract whereby Appellant would provide fill to Mr. DeRosier at no cost (but substantial savings to the Appellant). Mr. DeRosier obtained a permit for 1,500 cubic yards of fill from the City of Duluth. Appellant provided approximately 6,500 cubic yards of fill (and ongoing) until Mr. DeRosier instructed Appellant to stop providing fill.

Mr. DeRosier alleges that he provided a copy of the permit to Appellant; and Appellant, in order to not take the fill to a further locale (at greater expense), kept providing fill despite what the permit allowed. Further, Mr. DeRosier asserted that because so much excess fill was provided (approximately 5,000 cubic yards too much) that it cost in excess of \$20,000 to remove the fill and led to other expenses and delay.

This matter came on before the Honorable Sally L. Tarnowski for a bench trial on September 11, 2008. Prior to the trial date, the testimony of Karl

Tarnowski¹ and Danny Johnson was taken by deposition.² On January 9, 2009, Judge Tarnowski issued Findings of Fact and an Order in favor of Mr. DeRosier awarding him \$22,829 in actual damages (removal of the fill) and an additional \$8,000 in consequential damages. Following post-trial motions, a Judgment in that amount, with costs and interest, were awarded to Mr. DeRosier by the Court.

Statement of Facts

The Respondent, Chad DeRosier, resides at 1512 Minneapolis Avenue in the City of Duluth. (Transcript of proceedings, page 30 [T. 30]). This home, on Minneapolis Avenue, is the subject of the lawsuit. (T. 32).

Mr. DeRosier and his wife purchased the property in approximately 2004. (T. 32). When the property was purchased by Mr. DeRosier, the lot was completely undeveloped (although some neighboring properties had already been developed, with homes built upon them). (T. 33; Karl Tarnowski Deposition Exhibit 2 (Tarnowski Exhibit 2)).

Mr. DeRosier had a plan of having the lot cleared (to the extent required) and to have a home built upon it by Tarnowski Brothers Construction owned by Karl Tarnowski. (T. 33; Karl Tarnowski Deposition, pages 5-7 (Tarnowski 5-7)).

¹ The last name of the trial judge is also Tarnowski. The Court notified the parties of the likelihood of some distant relationship. The parties waived any issue of a conflict.

² The trial judge read the sworn trial testimony but did not observe either deponent personally. Their testimony is referenced by their deposition pages and deposition exhibits.

Plans for the home were drawn up by Tarnowski Brothers Construction by September 2004. (T. 34). The plans included a walkout basement which was considered to be perfect for the site given that there was a substantial drop-off from the front of the property (street side of the property) to the very back of the property (T. 35; Tarnowski 12; Tarnowski Exhibit 2).

Because of the topography of the lot, as it existed originally, particularly the substantial drop-off from the front of the lot to the rear of the lot, Mr. DeRosier was told by Mr. Tarnowski that some fill would be needed to be brought into the front of the site so that the drop-off would be more gradual for a proper front yard and also to provide some support for a driveway on the left-hand side of the home. (T. 37; Tarnowski 26).

At the time that these plans were being finalized, Utility Systems of America was involved in a road reconstruction project less than a mile from the DeRosier property. (T. 38). Mr. Tarnowski suggested to Mr. DeRosier that he approach the street reconstruction project (Utility Systems of America) and ask if they would be willing to provide the necessary fill. (T. 38). The practice of companies that reconstruct roadways, giving away fill for free is common. (Tarnowski 34-35).

Mr. DeRosier went to the street project and spoke to the supervisor of the project, Tony Norman. (T. 39). Mr Norman agreed that his company could provide the fill as long as Mr. DeRosier obtained the proper permits. (T. 39-40).

So Mr. DeRosier went and obtained the permit from the City of Duluth seeking 1,500 cubic yards of fill. (T. 40; Trial Exhibit 4). Mr. DeRosier was also informed that in addition to a fill permit, a "Haul Route" had to be completed and so a Haul Route Application was done. Mr. DeRosier gave that to Mr. Norman to complete. (T. 42).

At about the same time, the trees on the DeRosier property are beginning to be removed by a different provider. (T. 43). The person removing the trees was having difficulty moving his equipment about the lot and so he apparently only removed trees near the front of the lot and left some significant trees in the back of the lot that were not cleared. Nevertheless the majority of the lot was cleared. (T. 43-44; 53-54).

Now that the trees have been removed, Mr. Tarnowski returned and marked the soil with some spray paint and some stakes to designate the area where the fill was to be (and not to be)³. (T. 54).

Then Mr. DeRosier received a letter from the City indicating that a special inspection was required before the fill project could proceed. (T. 56; Trial Exhibit 11). Mr. DeRosier then arranged for GME, another contractor, to provide the special inspection. (T. 56-57; Trial Exhibit 12). The work to be done by GME specifically indicated that the fill was for the driveway and yard and that the home would be built on the natural soil. (T. 61; Trial Exhibit 13).

³ Mr. Tarnowski could not recall if he did mark the DeRosier property, but said he normally would have done it. (Tarnowski 25).

When GME first visited the DeRosier property on August 17, 2004, the land had been cleared of trees but no fill had been provided. (T. 62; Tarnowski Exhibit 4).

When GME visited the property again on August 27, the filling of the lot had already begun. (T. 62-63; Tarnowski Exhibit 4).

Importantly, up until August 27, 2004, although Mr. DeRosier had begun the process of obtaining the permit, the Haul Route Application, the pre-inspection by GME and so forth, the actual permit had not yet been issued. In fact it was not issued until August 27, 2004. (T. 65-66; Trial Exhibit 14). August 27, 2004 was a Friday and Mr. DeRosier obtained the permit at the very end of the work day shortly before the City offices closed. (T. 65-66). Mr. DeRosier found Mr. Norman at the road construction site, presented him with a copy of the permit, and then immediately left for a vacation. (T. 67-68). Mr. DeRosier is a school teacher and he and his family, including his school age stepson went on a vacation at the end of August and through Labor Day weekend immediately before school started. He returned the Tuesday or Wednesday after Labor Day. (T. 67-68).

Mr. Tarnowski testified that the pictures taken by GME on August 27 (pictures taken prior to the permit actually being issued) show fill throughout the front of the yard and along the side (where the planned driveway would be). (Tarnowski 18-19; Tarnowski Exhibit 4: page 5). Had the fill project stopped right there, it would have been perfect, according to Mr. Tarnowski. (Tarnowski 18-19; Tarnowski Exhibit 4: page 5).

During the time that he was gone, approximately 10 days, Mr. DeRosier received no contact at all from anyone involved in his home project including Tony Norman. (T. 68). When Mr. DeRosier returned, he found his lot completely covered with fill, top to bottom, front to back, side to side. (T. 68-69).

Upon seeing the site, the builder, Karl Tarnowski, estimated that the cost of removal of the fill would be around \$20,000. (T 71; Tarnowski 23-25).

Mr. Tarnowski testified that upon seeing the site in early September the lot was completely full. (Tarnowski, 22; Johnson Exhibit 1: last picture). This last photograph of Johnson Exhibit 1 is a panoramic photograph that shows the entire lot completely full, front to back, top to bottom, side to side showing approximately 5,000 cubic yards too much according to Mr. Tarnowski (Tarnowski 22). The lot was full 150-200 feet back from street level and was brought completely up to street level. (Tarnowski 23-24).

In summary, Mr. Tarnowski pointed out the photographs (Tarnowski Exhibit 2) that showed the land being a vacant lot, with no trees cut, very wooded and deeply sloped, front (street level) to back. (Tarnowski 12). Then Mr. Tarnowski pointed out photographs showing the trees cut but no fill. (Tarnowski 13; Tarnowski Exhibit 3: pages 1 and 2). Then Mr. Tarnowski pointed out pictures showing the lot being cleared but without fill except in the very front (Tarnowski 14-16; Tarnowski Exhibit 4: page 2). Mr. Tarnowski also pointed out pictures that showed how deep the lot falls down from front to back. (Tarnowski 16; Tarnowski Exhibit 4: page 3). Then of course the photographs as already

discussed in this Brief showing the lot completely full, including Tarnowski Exhibit 3, pages 3 & 4. (Tarnowski 13). The photographs show the sequence of events. (Wooded deeply sloped lot, trees removed, fill being brought into the front, fill being brought into the very front and side, and then the lot completely full.) The last pictures taken by GME, showing the lot full only in the front and on the one side (Tarnowski Exhibit 4) were taken on August 27, 2004, the very day the permit was issued. The pictures were taken earlier in the day before the permit was issued.

The pictures that were taken later on, those which showed the lot completely full, were taken some time after August 27 and in fact after September 6 or 7 by the time Mr. DeRosier had returned from his vacation. No photographs were taken after August 27 but before Mr. DeRosier's return from vacation.

Upon his return, Mr. DeRosier confronted Mr. Norman and Mr. Norman told Mr. DeRosier that he was not going to remove any of the extra dirt. (T. 70). Mr. Tarnowski told Mr. DeRosier that the home could not be built as planned, unless and until the extra dirt was removed⁴. (Tarnowski 29). Mr. DeRosier then made complaints to the owner of Utility Systems of American, Dan Lamppa. No response was received from Mr. Lamppa. (T. 75). Then efforts were made through the Better Business Bureau and the Attorney General's office to see if

⁴ In fact, Mr. Tarnowski stated that not only could the fill not be built on, but that even if that much fill was going to be used to be built upon, it would still have to be redone because the fill would have had to have been put down at 6 inch intervals, compacted, and then refilled. Here, the fill was just dumped without proper compaction being done every 6 inches. (Tarnowski 30).

help could be obtained. (T. 75). These services did not help Mr. DeRosier resolve his problem. In the meantime he lost Karl Tarnowski as his builder as Mr. Tarnowski could not wait for the fill to be removed. (T 76).

Eventually, Mr. DeRosier had some communications with Utility Systems of America (with the help of counsel) where Appellant indicated that it would remove the fill but charge Mr. DeRosier \$9,500. Mr. DeRosier declined this option by Appellant because he did not trust Appellant (they had already violated the verbal contract and failed to respond to his past requests to remove the fill) and instead decided to trust his new builder, Zierden Builders to remove the extra fill. (T. 92).

Importantly, at no point in time did Utility Systems of America have any knowledge of the specifics of the DeRosier house project. The only thing Utility Systems of America was told was that they were going to provide fill up to the limit of the permit (T. 84-85).⁵

The evidence clearly demonstrated that approximately 6,500 cubic yards of fill rather than 1,500 cubic yards of fill was provided. Again the Appellant does

⁵ One of the “defenses” made by Appellant at trial (not made in this appeal) is that Mr. DeRosier wanted to build on fill. Like many of the defenses asserted at trial, and on appeal, this was a red herring. Whether Mr. DeRosier wanted to build on fill or not, this had nothing to do with the contract between Mr. DeRosier and Appellant. The contract between those two was simple; the Appellant was to provide 1,500 cubic yards of fill. They violated the contract by providing too much. It appears, from it Brief, that Appellant no longer disputes the existence of a contract (they did dispute that at trial) or that they breached the contract (again they disputed that at trial). Appellant also appears to have given up on other “red herring” defenses on issues of compaction.

not seem to dispute this any longer. The dispute on appeal simply goes to damages, not to the breach or the scope of the breach.

Mr. DeRosier hired Zierden Builders in the spring to complete the house building project. The planned home was going to be basically the same although with a slightly different design, but still with a walk-out basement. (T. 76-77). This new design was very similar to the old design of Tarnowski Brothers. The amount of fill needed remained the same, in other words, all of the excess fill had to be removed.

Zierden then arranged for the removal of the fill primarily with G & T Excavating to haul away the extra fill. (T. 77). There were other trucks involved including Zierden itself, some neighbors, Grubb Trucking and a few others to take away the fill - but it was mostly done by G & T. (T. 77-78).

Dan Johnson, the owner of G & T Construction, also testified. Mr. Johnson testified that he was hired by Zierden Builders to remove the fill from the DeRosier property. (Johnson 7-8). Mr. Johnson testified that he made 3 pages of handwritten invoices of the work that he did on the DeRosier property. (Johnson 18-20; Johnson Exhibit 2: pages 1-3). Those three pages of exhibits have various notations including "X Loads," "Hoe," "Dozer," "Truck 3," "Truck 4," "Truck 2," and "End Dump." (Johnson Exhibit 2). The notations also refer to "Material Out," "LaFrance," and "Grubb." Mr. Johnson described in his testimony the meanings of each of these terms. For example, "X Loads" means the number of

loads of fill that were removed from the property on a given trip. That notation is then followed by a price. (Johnson 20).

“Hoe” and “Dozer” means equipment that was used, and the number of hours it was used on a given day, to move fill and to load it into trucks for hauling away. (Johnson 18; 21).

“Truck 3” and “Truck 4” represent the number of hours those particular trucks, each hauling 10-12 cubic yards of fill at a time, were used to haul away fill. Each hour would represent 1-2 loads removed. (Johnson 18; 24).

“Truck 2” and “End Dump” are two different terms for the same type of truck. Like “Truck 3” or “Truck 4” this truck was used to haul away fill. This truck would haul away up to 16 cubic yards at a time. Again each hour represented 1 or 2 loads hauled away. (Johnson 18; 24).

“Material Out” also referred to the hauling away of extra fill. “LaFrance” and “Grubb” represented trucks rented from other companies by G & T, to haul away extra fill. (Johnson 27-30).

Again each of those notations was followed by a price.

When reviewing all of G & T notations by Mr. Johnson for those items, the charges add up to \$21,599.⁶

⁶ Actually the amount adds up to \$21,629, \$30 more. Plaintiff’s counsel erred in his addition. The Court made the same error. Mr. DeRosier does not seek the extra \$30. From this point forward, the Brief will just reference \$21,599 even though that number is \$30 too small.

There are additional notations written by Mr. Johnson on those 3 pages of invoices for other items, such as seed, hay, fuel, labor and other services. These items were not added up to come up with the \$21,599 in charges by G & T. These are extra charges that have nothing to do with the hauling away of fill. These were not charges that Mr. DeRosier sought compensation for. (Johnson 26-31).

In addition to the G & T invoices, there were Zierden invoices that showed \$7,560 of excavation done by Zierden and \$1,230 of excavation paid for Zierden but done by Grubb.⁷ (Johnson Exhibit 2).

The Court did not award the \$7,560 of excavation done by Zierden. Instead, the Court awarded \$22,829, the cost of the G & T excavation and hauling away of fill and Grubb excavation and hauling away of fill.

Certainly, Mr. Johnson testified that there was other work done by G & T Construction at the DeRosier property. Again this other work was not part of the claim and Mr. DeRosier did not seek compensation for this other work. Importantly, Mr. Johnson also testified that there were other people removing fill at no cost to Mr. DeRosier. (Johnson 38-39).

Using just the bare minimum of one load per hour and the size of each truck, Mr. Johnson was able to estimate that a minimum of 2,000 yards was hauled away by his company from the DeRosier property. (Johnson 63-65).

⁷ This was in addition to the Grubb work that Mr. Johnson paid for under the G & T invoices.

Similarly as already noted, Karl Tarnowski testified that by his estimate an extra 5,000 cubic yards of fill were at the property above and beyond what was needed or allowed by the permit. He further testified that any “excavation” that would have been done on the property anyway (removal of the very top of the original soil) would have remained on the property and would have been used as backfill. (Tarnowski 40-41). In other words, there would have been some excavation done on the property regardless of there being no fill, too much fill or not enough fill. That is because a building cannot be built on virgin soil. But that excavation would have been done and would have dug up dirt that would have remained on the property.

The G & T invoices represented trucks that were used to haul fill away, not for the general excavation that would have been done anyway. In fact, the total cost of the G & T services was nearly \$30,000. (Johnson Exhibit 2). It’s just that about \$22,000 of that service was to remove fill that had been placed there by Appellant.⁸

Mr. Johnson further testified to some additional pictures that showed what the property looked like after it was completely filled and once the digging by G & T had commenced. (Johnson 12, Johnson Exhibit 1). Mr. Johnson discussed the photograph showing 9-10 feet deep of fill being dug out. (Johnson 12-13). The

⁸ To put it another way, there would have been no need for “Truck 2,” “Truck 3,” and “Truck 4” from G & T to be at the property simply to dig off the virgin topsoil and to place it elsewhere on the property. A backhoe could have done that. Trucks 2, 3 and 4 were used to fill up and haul fill off the property.

lot was not desirable to build on “because all of the fill. You know there was a ton of fill material...We had to remove it.” (Johnson 8).

Mr. DeRosier also sought compensation for having to build taller and/or thicker basement walls because of the reconfiguration of the house and the extra fill. He also sought compensation for the additional excavation done by Zierden. As noted above, the Court did not award the compensation for the extra excavation done by Zierden. Likewise the Court did not award compensation for the extra concrete.

Mr. DeRosier testified quite clearly that his home construction project was started in 2005 rather than 2004 and this was because of the extra fill causing delay in the project and having to get a new builder and so forth. The Court award \$8,000 for these consequential damages suffered by Mr. DeRosier.

Argument

I. Standard of Review

The Appellant correctly states the standard of review in its Brief. The Trial Court’s factual findings are given great deference and should not be set aside unless they are clear erroneous. Likewise the Court’s application of the law to the fact is reviewed under an abuse of discretion standard. Pure questions of law are reviewed de novo.

II. Discussion

A. The Trial Court's award of \$22,829 in actual damages is well supported by the evidence.

As noted above, Dan Johnson was the excavator on the home project here. Mr. Johnson testified that he and his company, G & T Contracting, basically provided two services: 1) excavating and hauling away excess fill and 2) general excavation work that is done on almost all new home construction projects.

Mr. DeRosier did not seek damages for any of the expenses incurred from G & T Contracting for the second of the two excavation duties that G & T Contracting performed. That is, Mr. DeRosier did not seek compensation for the general excavation and landscaping that G & T Contracting had to do (that any excavation company would have done) on his new home construction project. Instead, Mr. DeRosier sought damages for the first part of the project done by G & T, that is the digging up and hauling away of the excess fill.

Mr. Johnson testified that he and his company removed in excess of 2,000 cubic yards of fill. (Other testimony from Carl Tarnowski and even Tony Norman support the fact that approximately 5,000 extra cubic yards of fill were added to the project. Mr. DeRosier and Mr. Johnson also testified that others, other than G & T Contracting removed some of the fill from the DeRosier project at no cost to Mr. DeRosier.)

Mr. Johnson kept invoices of his work. His invoices for all of the fill removal portion of the project were labeled with the piece of equipment (the hoe

or dozer) used to move and excavate the excess fill and with the truck (Truck 2 [also known as a End Dump], Truck 3 and Truck 4) that was used to haul away the fill.

When Mr. Johnson's invoices were added up for just the equipment used to dig up or haul away the excess fill, we come to \$21,599.⁹

Mr. DeRosier also incurred additional expenses for hauling away fill with Mike Grubb trucking in the amount of \$1,230. When the total digging up and hauling away of the excavation is added up, we come to a grand total of \$22,829.

Contrary to Appellant's argument, there was nothing speculative at all in these calculations or in how they were come about.

Moreover, even before the fill was removed, the original builder, Carl Tarnowski, estimated that the cost of the removal would be about \$20,000.

The Appellant, as it did throughout much of the trial, attempts to obfuscate and mislead and avoid the underlying issue. The underlying issue, of course, is that Appellant knew the amount of fill that it was allowed to bring. It brought 4 times as much as was requested or allowed. It wants to seek avoidance of responsibility to remove all of the excess fill.

Appellant's attempts to avoid the issue include pointing out that there is no exact figure of how many cubic yards of fill were actually removed, how many truck loads were required to remove the fill and so forth. While this is all true, we

⁹ Again, as noted in the fact section, Mr. DeRosier's counsel miscalculated, and the Court did the same miscalculation, coming up with \$21,599, \$30 less than the actual damages suffered by Mr. DeRosier.

do know, from Mr. Johnson's testimony, the days that he worked on the project (it's on the invoices), the equipment he used to dig up the fill (again on the invoices), the trucks he used to haul away the fill (again on the invoices) and the cost of the use of those pieces of equipment (again on the invoices). Mr. Johnson's company was paid nearly \$30,000. The extra approximately \$8,000 it was paid were for other items such as general excavation, seeding, rock, sand, etc. Mr. DeRosier did not seek compensation for those things and the Court did not award compensation for those things. Those services would have been provided under any circumstances.

What is clear is that Mr. Johnson testified that the invoices where he mentioned the excavation machine or where he mentioned the trucks, all involved digging up of and removal of excess fill. And as noted in the fact section, the soil that would have been excavated under normal circumstances never would have been hauled away but rather would have been used as backfill along the rear and sides of the home or property. The hauling away was entirely of excess fill.

Not content with limiting its obfuscation to the "speculation" argument, Appellant goes on to make a "failure to mitigate" argument. The argument goes like this – Mr. DeRosier complained of the excess fill. The Appellant agreed to remove the excess fill only if Mr. DeRosier would pay Appellant \$9,500. Mr. DeRosier did not take Appellant up on this contractual offer, but instead sought someone else to remove the fill and this cost over \$20,000. It should have only cost \$9,500.

This argument fails at many levels.

First, the duty to mitigate is not solely a pure “lowest cost” exercise. Rather, the entire scenario must be looked at to look at the decision making process of Mr. DeRosier in this case. Did Mr. DeRosier have an obligation to have the very company that committed the breach of contract repair that breach? And at a cost to himself, the very person who was harmed by the initial breach? Doesn’t Mr. DeRosier have the right to consider the veracity of the outfit, Appellant, making the low ball offer?¹⁰

Second, the “offer” of a new \$9,500 contract (one that would allow Appellant to further profit from its breach of the initial contract) was made only after Mr. DeRosier asked Appellant to remove the excess fill and received a “no” reply, then asked for help thru the Better Business Bureau, still received no help or offer, then asked for assistance from the Minnesota Attorney General’s office, still no help, and finally sought legal help. If it takes that much effort to get any kind of “offer” from the contract breaching Appellant, does the consumer, Mr. DeRosier, have to accept the offer and continue to deal with the company, Appellant, that had made life so difficult in the first place. Or rather, shouldn’t

¹⁰ If this was a personal injury claim, does the injured party have to go with the cheapest doctor? Or the best doctor? Or perhaps should a plaintiff look at the best doctor for the price? Likewise, if this was an attorney malpractice claim, should a plaintiff have the very attorney who committed the malpractice fix the malpractice or should that client consider the quality of the underlying legal work before making that decision? These are all legitimate concerns and they all ought to be considered. Here, the Appellant asserts that the only issue was the lowest price regardless of the quality of the work. That is not the law.

someone in Mr. DeRosier's shoes have the right (without being accused of failure to mitigate) to wash his hands of such an untrustworthy company?

Third, Appellant's argument basically sets out an entirely new proposition of law, that is that a defendant in a breach of contract case can set the ceiling of damages by offering to repair the breach at a cost. But there is more to the proposition of law than just that. Had Mr DeRosier agreed to Appellant's proposition, he would have entered into a new contractual obligation with Appellant. He would have been contractually obligated to pay Appellant \$9,500; and Appellant would have been contractually obligated to remove all of the fill.

Then, does Mr. DeRosier have a legal right to sue Appellant for the \$9,500 that he already paid them for breach of first contract? Or does the second contract render the first breach repaired? Under Appellant's new theory of law, Mr. DeRosier should have taken them up on their offer of \$9,500. They would have removed the fill. He would have paid them \$9,500. He would have then sued them for bringing too much fill in the first place for that cost of \$9,500.

Of course then the Appellant would argue in that new breach of contract claim that there was "accord and satisfaction" by the new contract, an argument that probably would succeed.

Fourth, there is no evidence that the offer by Appellant, to remove the excess fill for \$9,500, was in anyway legitimate. The offer was made by the owner of Appellant. The owner never visited the property. He never saw how

much excess fill was brought in. He never explained how he came about the figure

The two professionals who actually looked at the site (Mr. Tarnowski and Mr. Johnson) both came up with substantially higher figures. One, Mr. Tarnowski, came up with a figure of about \$20,000 based upon his eyeballing the situation. The other, Mr. Johnson, came up with the exact figure based upon having actually done the work.

Should Mr. DeRosier have accepted a low ball, blind offer that likely would have precluded him from being able to seek any recovery at all for the damages already done? And from the very company that committed the damages in the first place?¹¹

Without question substantial evidence supports the Trial Court's award of actual damages and it should be affirmed in all respects.

¹¹ Interestingly, the Appellant also fails to note the original offer made by Mr. DeRosier. Defendant made its offer to remove the fill for \$9,500, a cost to be footed by Mr. DeRosier in response to Mr. DeRosier's initial offer that they simply come and remove the fill and everyone walks away. Appellant complains that Mr. DeRosier failed to mitigate his damages by not accepting their lowball, blind uneducated offer. Instead Appellant ought to look to itself and wonder why it simply did not fix the mistake it made in the first place by removing the fill, an offer that they had an opportunity to take, and yet refused to do so. Even more, one could argue that Appellant's pre-lawsuit "settlement offer" cannot be used as evidence of the value of the claim. After all, offers of settlement are not relevant evidence. Minnesota Rules of Evidence 408.

B. The Court's Award of \$8,000 in consequential damages is supportable by substantial evidence and the law.

There is no doubt that initial Complaint in this matter did not seek damages in the form of consequential damages. It is also undisputed that speculative damages are not recoverable as set out by Appellant in its Brief.

On the other hand, damages for contractual breach, when they exist, but which are difficult to calculate, still should be awarded. The difficulty in the mathematical calculation does not justify a denial of damages. Certainly, when there is uncertainty to whether damages exist, damages should be denied. But where damages exist but are difficult to calculate, they should still be awarded. Cardinal Consulting Co. v. Circo Resorts, Inc., 297 N.W.2d 260 (Minn. 1980); Northern Petro Chemical Company v. Thorsen & Thorshov, Inc. 297 Minn. 118, 211 N.W.2d 159 (1973); Bryngelson v. Minnesota Valley Breeders Association, 262 Minn. 275, 114 N.W.2d 148 (1962).

Here, Mr. DeRosier's sought to build his home in the late summer, early fall 2004. Once all the excess fill was brought in and it was determined that it would all have to be removed before his home could be built, Mr. DeRosier had to delay the building of his home until the following year. He had to obtain a new builder. He and his family had to go through all of the hassle and headache that is associated with such a delay. There is no specific event or item or thing that one could put a finger on. But we do know that there was delay.

In fact, in the very letter sent to Appellant offering to have it remove all the excess fill at no cost, the delay was mentioned. Appellant knew about the delay before the litigation commenced. In fact Appellant knew about the delay before the actual construction of the home even commenced.

Even more, Appellant cannot point out, in any way shape or form, how it was surprised or harmed or otherwise put at a disadvantage because of the failure of Mr. DeRosier to specifically plead this consequential damage. Appellant knew about the delay. Obviously there would be a delay if there was excess fill that all had to be removed. Again there is no specific way to calculate the damage here, just as there is no way to calculate pain and suffering in a personal injury claim. It is based upon judgment and reason and experience of the finder of fact, the Trial Court in this case. The award of \$8,000 to Mr. DeRosier for having the ultimate construction project delayed due to the Appellant's negligence is well supported by the evidence. And of course there is nothing that the Appellant could have or would have offered in the form of testimony, argument or otherwise, that could negate these undisputed facts. The undisputed facts are that the construction project was going to take place in the fall and it did not take place until the next summer. The undisputed fact is that the reason for that delay was the excess fill. What else could the Appellant have offered by way of testimony or other evidence or argument that could negate against this? Nothing.

Thus, while consequential damages were not specifically pled by Mr. DeRosier, the existence of such damages was known by Appellant even before the

lawsuit was commenced, and were proven by substantial evidence. The Trial Court's award of such damages should be affirmed.

Conclusion

For these reasons, the Respondent Chad DeRosier respectfully requests this Court affirm, in its entirety, the judgment of the Trial Court.

FALSANI, BALMER, PETERSON,
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DATE: 8.12.09

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