No. 19993 - Desco Corporation d/b/a Colliers Industries v. Harry W. Trushel Construction Company and Fire Foe Corporation and Fire Foe Corporation v. Industrial Risk Insurers

Workman, Justice, dissenting:

I respectfully dissent from the majority's opinion. The majority correctly sets out that "[o]ur rule for damages as a result of a breach of contract is that recovery may be obtained for those damages which either arise naturally from the breach or may reasonably have been within the contemplation of the parties at the time they made the contract." Id. at 5. The trial court found that

> 'Trushel, by contracting to install a sprinkler system in the new building with the knowledge that the purpose of the system was to contain fire, had to realize that if a fire occurred before the system was operable, a significant loss could occur. And in fact, the evidence at trial was that the large and destructive fire which did occur would not have

> happened had Trushel performed its promise to have an operable sprinkler system in the new warehouse by February, 1987.'[1] (emphasis added)

Maj. op. at 13.

The trial court then concluded, however, that "'Trushel had no reason to foresee that after February, 1987 plaintiff would suffer a destructive fire as a probable result of his breach of contract.'" Id. at 14 n.7.

The trial court limited Desco's damages on its breach of contract action to the cost of completing installation of a sprinkler system and refused to award damages to Desco which occurred when its new warehouse and inventory were destroyed by a fire.

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[1]This as well as additional finding of fact of the trial court included in the majority opinion supra at footnote 6 support the conclusion of this dissent.

Although the trial court enunciated both of the standards set forth in the majority opinion in his opinion order, it seems obvious from the trial court's reasoning therein that the trial court mistakenly believed that damages for breach of contract were limited to those arising naturally from the breach. The majority does not attempt to reconcile the trial court's inconsistent findings, but upholds its conclusions on the theory that damages to the warehouse and inventory were not consequential because at the time of formation of the contract, these damages "could [not] reasonably have [been] anticipated" as being "a probable result of a breach [of the contract]." Id. at Syl. Pt. 2. Interestingly, however, the majority reaches this result by relying primarily on cases upholding Desco's position. See Lewis v. Welch Wholesale Flour & Feed Co., 96 W. Va. 694, 123 S.E. 801 (1924) (Court permitted lessee denied of occupancy of leased premises to recover special damages including rent for storage of goods and damages to stored goods due to dampness in storage area); see also Emery v.

Calendonia Sand & Gravel Co., Inc., 117 N.H. 441, 374 A.2d. 929 (1977); Olson v. Quality-Pac Co., 93 Idaho 607, 469 P.2d 45 (1970); Olson Plumbing & Heating Inc. v. Douglas Jardine, Inc., 626 P.2d 750 (Colo. App. 1981); A. Brown, Inc. v. Vermont Justice Corp., 148 Vt. 192, 531 A.2d 899 (1987).

Quite simply stated, in order to recover consequential damages, "special circumstances [must] exist to show that consequential damages were within the reasonable contemplation of the contracting parties." Maj. op. at 12; see Richmond Medical Supply Co., Inc. v. Clifton, __ Va. __, __, 369 S.E.2d 407, 409 (1988). The evidence in this case indicates that Desco contracted to have the sprinkler system installed in order to prevent fire and consequent damages. When Trushel failed in its contractual duty to install and make operational the sprinkler system, Desco even instituted a 24-hour fire watch, which required the warehouse supervisor to check the

building every few hours. Although the existence of special circumstances to show that consequential damages were within the reasonable contemplation of the contracting parties is ordinarily a question of fact for the jury, and although the trial court in this case by agreement of the parties acted as the fact-finder, still it seems clear as a matter of law that Desco and Trushel could reasonably have anticipated that damages would result from a fire. Why else would a company install a sprinkler system and hire a guard? The answer is obvious. The whole reason behind installing a fire sprinkler system is in anticipation or contemplation of a fire and in order to prevent consequent damages. It is without comprehension that the majority could conclude that such damages were not contemplated by the parties when the contract was formed.

Based upon the foregoing reasons, I dissent.