STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

DAVID BAKO, ET AL.,	)	
	)	
PLAINTIFFS-APPELLANTS/	)	
CROSS-APPELLEES,	)	
	)	
VS.	)	CASE NO. 00 C.A. 49
	)	
CRYSTAL CABINET WORKS, INC.,	)	O P I N I O N
ET AL.,	)	
	)	
DEFENDANTS-APPELLEES/	)	
CROSS-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court Case No. 96CV2659

JUDGMENT: Affirmed

APPEARANCES:

For Plaintiffs-Appellants/: Cross-Appellee
Atty. Richard J. Thomas
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For Defendant-Appellee: Don Walter Kitchen
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For Defendant-Appellee/: Cross-Appellant Crystal Cabinets Works, Inc.
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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: May 4, 2001

DONOFRIO, J.

Plaintiffs-appellants/cross-appellees, David and Corrine Bako (the Bakos), timely appeal a decision rendered by the Mahoning County Court of Common Pleas, whereby the trial court granted judgment in favor of the Bakos against defendant-appellee/cross-appellant Crystal Cabinet Works, Inc. (Crystal) and defendant-appellee Don Walter Kitchen Distributors, Inc. (Don Walter), jointly and severally in the amount of $24,683.02.

In 1994, the Bakos signed a contract with Don Walter for the purchase and installation of cabinets in their new home. Don Walter ordered the cabinets from Crystal, which manufactured the cabinets according to specifications. The cabinets were shipped to Don Walter who installed them in the Bakos' residence.

Shortly after installation, Mrs. Bako contacted Neil Mann (Mann), an employee of Don Walter. Mrs. Bako inquired as to whether or not Don Walter could provide a stain to match the kitchen cabinets. Mrs. Bako informed Mann that the stain would be applied and confined to the wood trim primarily on the first floor of the house. Mann ordered two one-gallon cans of stain from Crystal, which Crystal then shipped to Don Walter in unmarked-gallon cans. There were no labels, instructions, or warnings regarding improper use or application of the stain.

The cans arrived at Don Walter's store in unmarked-cardboard boxes and were delivered to the Bakos in this manner. The cans turned out to be lacquer based stains.

Shortly thereafter, Mrs. Bako again contacted Mann to purchase additional stain in a slightly different color to apply to their hardwood floor. Mann referred Mrs. Bako directly to Crystal's paint lab. Mrs. Bako spoke with Rich Hall (Hall), an employee at Crystal's paint lab. Hall shipped Mrs. Bako a series of samples from which she ordered two gallons of stain. This stain was also a lacquer based stain, and was shipped directly from Crystal to the Bakos in unmarked-gallon cans. Once again, there were no instructions for use, no warning regarding improper use or application of the product, no label indicating that it was a lacquer based stain, and no label indicating that any special topcoat was required because it was a lacquer based stain. The Bakos applied the stain to their floor.

The Bakos next obtained a polyurethane topcoat sealant that they used in conjunction with the stain that they had purchased from Don Walter and Crystal. Following the application of the sealant to the wood surfaces of their home, all of the stained and sealed wood surfaces suffered severe and permanent damage as a result of the nonadherence of the polyurethane sealant to the

lacquer based stain. The uncontroverted testimony at trial established that lacquer based stains are incompatible with the polyurethane topcoat that the Bakos applied to the wood surfaces in their home.

On October 26, 1996, the Bakos filed suit against Crystal and Don Walter for breach of express warranties, breach of the implied warranty of fitness for a particular purpose, breach of the implied warranty of merchantability, products liability, and negligence. The Bakos sought attorneys' fees and joint and several damages against appellees totaling $100,000. Crystal and Don Walter filed separate answers denying the allegations set forth in the Bakos' complaint, and Don Walter also filed a cross-claim against Crystal for indemnity.

On November 22, 1999, the parties agreed to hold a binding trial before a magistrate. A trial was held, and on February 10, 2000, the magistrate rendered a decision against appellees jointly and severally in the amount of $24,683.02. The magistrate found the parties comparatively negligent. The Bakos moved to amend the decision of the magistrate. On February 25, 2000, the magistrate issued an addendum to his decision, and denied the Bakos' motion to amend his decision. On March 3, 2000, the trial judge issued an order adopting the magistrate's decision.

The Bakos filed a timely notice of appeal on March 7, 2000, while Crystal filed a timely notice of cross appeal.

The Bakos' sole assignment of error states:

> "A TRIAL COURT COMMITS REVERSIBLE ERROR BY REDUCING A DAMAGE AWARD FOR UNIFORM COMMERCIAL CODE CLAIMS BASED ON THE DOCTRINE OF COMPARATIVE NEGLIGENCE."

Crystal's first cross-assignment of error states:

> "THE TRIAL COURT ERRED IN FINDING THAT CRYSTAL BREACHED ANY PROVISION OF THE UNIFORM COMMERCIAL CODE (UCC)."

Because the parties' assignments of error raise common issues of analysis they will be addressed together.

In the Bakos' sole assignment of error, they essentially argue that the verdict was against the manifest weight of the evidence. The Bakos argue that they presented evidence showing that appellees acted negligently, breached the implied warranty of merchantability (R.C. 1302.27), and the implied warranty of fitness for a particular purpose (R.C. 1302.28). The Bakos argue that because they established breaches of UCC warranty law, the trial court erred by ignoring the UCC breaches and reducing their award by comparative negligence principles.

In response to the Bakos' arguments, Crystal argues that the trial court erred in determining that it "technically" breached any UCC warranty. Crystal asserts that it did not breach the implied warranty of merchantability, and argues that

it is not a "merchant with respect to goods of that kind" (in the instant case, stain) as discussed in R.C. 1302.27. Crystal argues that it is not in the business of selling stain, but rather is an isolated seller. As such, Crystal argues that the Bakos are precluded from recovering against it for breach of the implied warranty of merchantability.

Crystal also argues that the Bakos are precluded from recovering against it for breach of the implied warranty of fitness for a particular purpose. Crystal argues that the Bakos failed to present evidence at trial showing that Crystal had reason to know of any particular purpose for which the stain was going to be used. Crystal further argues that the Bakos failed to present evidence showing that they relied on Crystal's skill or judgment in selecting the goods. As such, Crystal argues that the Bakos are precluded from recovering against it for breach of the implied warranty of fitness for a particular purpose.

Our standard of review has been set forth by the Ohio Supreme Court in *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77:

> "'Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.' * * * We believe that an appellate court should not

> substitute its judgment for that of the trial court when there exists * * * competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge." *Id.* at 80, quoting *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St. 2d 279.

R.C. 1302.27 governs the implied warranty of merchantability and provides in pertinent part:

> "(A) [A] warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a *merchant with respect to goods of that kind*. * * *
>
> "(B) Goods to be merchantable must be at least such as:
>
> "* * *
>
> "(3) are fit for the *ordinary purposes for which such goods are used*; and
>
> "* * *
>
> "(5) are adequately contained packaged, and labeled *as the agreement may require*[.]" (Emphasis added.)

An implied warranty of merchantability obligates a seller to provide goods that are fit for their ordinary purpose. The warranty is breached when the goods are not of comparable quality to that generally acceptable for goods of that kind. Therefore, in order to prove that appellees breached the implied warranty of merchantability, the Bakos needed to introduce evidence proving that the problems they experienced with the

stain provided by appellees were not ordinary problems experienced or associated with stain.

A thorough review of the record shows that appellees did not breach the implied warranty of merchantability. Appellees sold cans of stain to the Bakos. Mrs. Bako testified that there were no problems with the application of the stain, in and of itself, to the wood trim and wood floors. Mrs. Bako's testimony illustrates that the stain provided to the Bakos satisfied the implied warranty of merchantability. The Bakos applied the stain and had no problems with its application. It was only when the Bakos erroneously combined the lacquer based stain with the polyurethane sealant that the Bakos began to experience adhesion problems between the stain and the polyurethane sealant. The stain did just what stain was supposed to do, it colored the wood. As such, there was no breach of the implied warranty of merchantability.

In addition, appellees did not breach the implied warranty of merchantability by failing to adequately package and label the stain. R.C. 1302.27(B)(5). The Bakos failed to direct the court's attention to any agreement in the record where the stain, which appellees were to provide the Bakos, required particularized packaging or labeling instructions. Because appellees were not required to package or label the stain in any

particular manner, they did not breach this section of R.C. 1302.27.

The Bakos also claim that appellees violated the implied warranty of fitness for a particular purpose. A party must make three showings in order to show a breach of the implied warranty of fitness for a particular purpose. First, the seller must have reason to know the buyer's particular purpose. Second, the seller must have reason to know that the buyer is relying on the seller's skill or judgment to furnish appropriate goods. Finally, the buyer must in fact, rely upon the seller's skill or judgment. R.C. 1302.28; *Hollingsworth v. The Software House* (1986), 32 Ohio App.3d 61, 65.

Once a party has made a successful showing of a breach of the implied warranty of fitness for a particular purpose, R.C. 1302.65 mandates the aggrieved party notify the breaching party of its breach within a reasonable time. If the aggrieved party fails to give timely notification of breach, the party will be barred from recovering any remedy for breach. R.C 1302.65(C)(1). Whether a buyer gives a seller timely and reasonable notice of a breach of a contract for the sale of goods is ordinarily a question of fact to be determined from all the circumstances. R.C. 1301.10(B); *R.B. Sales Co. v. JHS of Tennessee, Inc.* (Aug. 9, 1996), Pike App. No. 95CA560,

unreported, 1996 WL 471232, at *3, citing *Allen Food Products, Inc. v. Block Brothers, Inc.* (S.D.Ohio 1980), 507 F.Supp. 392, 394.

Applying the law to the facts, the Bakos failed to present sufficient evidence at trial to recover for breach of the implied warranty of fitness for a particular purpose. In reference to the Bakos' claim against Don Walter, the Bakos failed to present evidence showing that they relied upon Mann's, an employee of Don Walter, skill and judgment. Mrs. Bako's testimony demonstrated that the Bakos did not rely upon Mann's skill and judgment when purchasing the stain from Don Walter. As such, they may not recover against Don Walter for breach of the implied warranty of fitness for a particular purpose.

At first glance it appears that the Bakos presented sufficient evidence showing that Crystal breached the implied warranty of fitness for a particular purpose. Crystal's catalog listed the stain in question as a lacquer based stain. The Bakos were not provided with a copy of this catalog. Mrs. Bako testified that she notified Hall, an employee of Crystal who is employed in its paint lab, that the Bakos would be using a polyurethane sealant in conjunction with the stain supplied by Crystal. Hall and Crystal failed to inform Mrs. Bako as to the incompatibility problem between the lacquer based stain and the

polyurethane sealant. The Bakos relied upon Hall's silence and expertise in mixing the stain with the polyurethane sealant. Therefore, the Bakos presented evidence showing that Crystal breached the implied warranty of fitness for a particular purpose.

Although the Bakos presented evidence showing that Crystal breached the implied warranty of fitness for a particular purpose, the Bakos failed to provide Crystal with timely notice of its breach under R.C. 1302.65, and thus the Bakos are precluded from recovering for this breach. The Bakos bore the burden of demonstrating that they provided timely and reasonable notice of the breach to Crystal. As noted by Crystal, the Bakos presented evidence that they discovered the adhesion problems between Crystal's stain and the polyurethane topcoat sealant in approximately September 1994. The only evidence which the Bakos presented evidencing that they complied with their notice burden shows that Crystal was not presented with notice of its breach until sometime around May 1995, roughly seven months after the Bakos had been alerted to the problem. While the time frame of seven months may not in and of itself be unreasonable under R.C. 1302.65, the fact that the Bakos presented evidence showing that they notified Don Walter of the adhesion problem in September or October of 1994, yet failed to notify Crystal of the breach

until roughly May of 1995, shows that the Bakos failed to give timely notice of the breach to Crystal.

Based on the foregoing reasons, the Bakos' sole assignment of error is without merit while Crystal's first cross-assignment of error is well taken.

Crystal's second and third cross-assignments of error state:

> "THE TRIAL COURT ERRED IN FINDING LIABILITY AGAINST CRYSTAL UNDER A THEORY OF PRODUCTS LIABILITY."
>
> "THE TRIAL COURT ERRED IN FINDING THAT CRYSTAL WAS NEGLIGENT[.]"

Crystal essentially argues that the trial court's decision was against the manifest weight of the evidence, and as such, the trial court erred in finding that Crystal violated R.C. 2307.76 by failing to provide an adequate warning on its stain. Crystal argues that this section is only applicable to manufacturers of a product. Crystal notes that the trial court explicitly recognized that Crystal was not a manufacturer within the meaning of the products liability statute, and therefore erred in finding Crystal in violation of this statute.

Crystal argues that at most, it may be designated as a supplier. Crystal argues that in order to be found liable as a supplier under the products liability statute, the Bakos were required to show that Crystal was negligent, and that such

negligence proximately resulted in the Bakos' injuries. Crystal argues that because it did not have knowledge of the incompatibility and adhesion problems between lacquer based stains and polyurethane sealants, the trial court committed reversible error in finding that Crystal acted negligently.

R.C. 2307.71 defines supplier and provides in pertinent part:

> "(O)(1) 'Supplier' means, * * * either of the following:
>
> "(a) A person that, in the course of a business conducted for the purpose sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce[.]"

R.C. 2307.78 of Ohio's product liability laws also provides in pertinent part:

> "(A) [A] supplier is subject to liability for compensatory damages based on a product liability claim only if the claimant establishes, by a preponderance of the evidence, that * * *:
>
> "(1) The supplier in question was negligent and that negligence was a proximate cause of harm for which the claimant seeks to recover compensatory damages[.]"

The essential elements of negligence are a duty, breach of duty, and injury resulting proximately therefrom. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282. The amount of care required of a person to establish whether he has discharged his

duty to another is referred to as the degree of care which an ordinarily careful and prudent person would exercise or observe under the same or similar circumstances. *Id.* at 285. For liability to attach, a defendant's failure to conform to this standard of care must be the actual and proximate cause of plaintiff's injuries. *Id.* at 286-87. "It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in injury to someone." *Id.* at 287, quoting *Neff Lumber Co. v. First National Bank* (1930), 122 Ohio St. 302, 309, and *Mudrich v. Standard Oil Co.* (1950), 153 Ohio St. 31, 39.

Applying the law to the facts in the present case, the trial court did not err in finding that Crystal acted negligently as there is competent and credible evidence supporting the trial court's decision. A review of the record shows that the trial court erred by stating that Crystal breached R.C. 2307.76. This section applies only to manufacturers, not suppliers. R.C. 2307.76; *Sproles v. Simpson Fence Co.* (1994), 99 Ohio App.3d 72, 77. The parties conceded that Crystal was not a manufacturer. However, the trial court's determination proved to be harmless error as a review of the record demonstrates that the trial court did not impose liability on the basis of R.C. 2307.76, but rather the trial

court imposed liability upon Crystal for its negligent conduct as a supplier in violation of R.C. 2307.78.

Crystal fell within the definition of a supplier under R.C. 2307.71. It received the stain from its manufacturer, Lilly, and then added color to, or blended the stain to customize the color. Such actions constituted "blending" within the meaning of R.C. 2307.71 and qualified Crystal as a supplier.

As a supplier, at the very least, Crystal acted negligently by delivering the stain to the Bakos without providing adequate warning, labeling, or instructions. The uncontroverted evidence shows that Crystal listed the stain in its catalog as a lacquer based stain yet failed to label or identify the cans of stain which it sold to the Bakos as a lacquer based stain. The Bakos' property damage resulted from the lacquer-based stain being combined with the polyurethane sealant. If Crystal had provided the most basic of labels and labeled the stain as a lacquer based stain, the Bakos would have at least been alerted to the fact that the stain was lacquer based and could have proceeded to inquire as to its compatibility.

For the foregoing reasons, Crystal's second and third cross-assignments of error are without merit.

Crystal's final cross-assignment of error states:

> "THE TRIAL COURT ERRED IN ITS CALCULATION OF DAMAGES[.]"

Crystal argues that the trial court committed reversible error by awarding the Bakos speculative damages[1]. Specifically, Crystal argues that the damage estimates presented by the Bakos represented repairs to the entire premises and were not confined to the damage on the first floor of their residence. Crystal therefore argues that the Bakos failed to mitigate and prove their damages by a preponderance of the evidence. As such, Crystal argues that the trial court erred in awarding any damages to the Bakos.

On review of a damages award, an appellate court must not reweigh the evidence, and may not disturb an award of damages unless it lacks support from any competent and credible evidence. *Bemmes v. Public Emp. Retirement Bd.* (1995), 102 Ohio App.3d 782, 788.

A thorough review of the record shows that the trial court's judgment was not against the manifest weight of the evidence, and that its calculation of damages was supported by some competent and credible evidence. The parties each presented conflicting evidence at trial as to whether the estimates by the contractors represented repair estimates to the

[1] Although Don Walter raises a single cross-assignment of error similar to that alleged here by Crystal, Don Walter failed to file a notice of cross appeal as required by App.R. 3(C)(1). Because Don Walter failed to file a notice of cross appeal, this court is without jurisdiction to address Don Walter's argument.

entire house or were confined primarily to the damaged woodwork on the first floor. Appellees presented testimony of three contractors who stated that their bids were to replace all wood in the house and were not confined solely to the first floor and stairway of the second floor. However, Mrs. Bako also testified that when the tradesman came to the Bakos' home, she personally directed their attention and estimates to the downstairs area.

The trial court's evaluation of damages clearly rested upon its determination of the credibility of the witnesses. The conflicting testimony created an issue of fact and credibility for the trial court to determine. The trier of fact was in the best position to judge the credibility of witnesses and the weight to be given to the evidence. *Cole v. Complete Auto Transit, Inc.* (1997), 119 Ohio App.3d 771, 777-78; *W. Coast Indus. Relations Assn., Inc. v. Superior Beverage Group, Ltd.* (1998), 127 Ohio App.3d 233, 238. Since the trial court's calculation of damages was supported by some competent and credible evidence, the trial court did not err in its award of damages.

For the foregoing reasons, Crystal's final cross-assignment of error is without merit.

Although Crystal's first cross-assignment of error is well taken, the court still affirms the judgment of the trial court.

In its decisions, the magistrate essentially stated that Crystal had committed technical UCC violations. However, the magistrate did not impose liability based upon these violations. Crystal appealed arguing that it committed no UCC violations whatsoever. As noted *supra*, contrary to the magistrate's findings, a thorough review of the record shows that Crystal committed no UCC violations.

The trial court's finding that Crystal committed technical UCC violations proved to be harmless error since the trial court imposed liability against Crystal on the basis of negligence. Therefore, despite sustaining Crystal's first cross-assignment of error, the judgment of the trial court is still affirmed.

For the aforementioned reasons, the judgment of the trial court is hereby affirmed.

Vukovich, J., concurs
Waite, J., concurs