COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0154

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

SUSAN SHOEMAKER,

PLAINTIFF-APPELLANT,

V.

KRAFTMAID CABINETRY, INC., AN OHIO CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Susan Shoemaker appeals the circuit court's order granting KraftMaid Cabinetry, Inc.'s motion to dismiss and the court's judgment entered in favor of KraftMaid for costs. For the following reasons, we affirm.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Background

¶2 Shortly after purchasing her home in 1998, Shoemaker decided to renovate her kitchen utilizing KraftMaid cabinetry. Shoemaker chose KraftMaid after browsing its website and various catalogs. KraftMaid offers a five-year warranty on the cabinets and a lifetime warranty on the drawer components and hardware. Because KraftMaid sells its products only through its authorized dealers, Shoemaker contacted and purchased her cabinets through Allen Kitchen & Bath Center in Madison, Wisconsin.

¶3 Shoemaker was unsatisfied with the condition of the cabinets when they arrived. She contacted both KraftMaid and Allen Kitchen & Bath. When neither KraftMaid nor Allen Kitchen & Bath remedied her concerns, Shoemaker filed suit in small claims court, essentially alleging breach of warranty, fraudulent misrepresentation in advertising pursuant to WIS. STAT. § 100.18, and negligent misrepresentation.

¶4 At trial, Shoemaker testified that her cabinets arrived in a defective condition. One cabinet had a scratch on the top, another on the inside, and another on the back. Other areas of the cabinets had chips in the veneer, small marks, and no finish. Shoemaker also stated that her hardwood floor was scratched during installation. Additionally, Shoemaker testified that she ordered a range hood from Allen Kitchen & Bath after one of its employees assured her that she could find a compatible vent that would exit through the wall and fit the range hood. Shoemaker later testified that after much research, she discovered that the hood would not accommodate a wall vent.

¶5 After Shoemaker contacted both KraftMaid and Allen Kitchen & Bath, two representatives came to her home and attempted to remedy some of the

facial defects. The representatives assured her that they would check on her other concerns and contact her. Three months later neither had called. Shoemaker testified that she made several phone calls and wrote several letters to both companies but to no avail.

¶6 It was about this time, Shoemaker testified, that her cabinets began coming apart. In July of 1999, one of the rollout trays collapsed. Shoemaker also testified that the wood at the bottom of several rollout trays was deteriorating, lifting and separating. She testified that the drawers had been advertised as constructed with dowels, but that her drawers were constructed with staples. Shoemaker also complained that the end panels surrounding her refrigerator were supposed to be 7/8 inch thick, but her panels were 3/4 inch thick.

¶7 Shoemaker testified that she then repeatedly contacted KraftMaid and requested they perform warranty work. According to Shoemaker, KraftMaid indicated that they sent several rollout trays to Allen Kitchen & Bath. When Shoemaker contacted Allen Kitchen & Bath, they refused to give her the rollout trays. Ultimately, Shoemaker went to Home Depot to purchase replacement parts. When Shoemaker attempted to admit a damages summary encompassing an itemization of costs paid for replacement parts, the cost of the range hood, and a quote from Home Depot for repair of the floor damage, KraftMaid objected and the court excluded the exhibit.

¶8 At the close of Shoemaker's case, KraftMaid made a motion to dismiss. The court granted that motion on the basis that Shoemaker had failed to properly prove damages. Shoemaker appealed.

¶9 Additional facts will be set forth below when they become pertinent to the analysis.

Discussion

¶10 Shoemaker raises the following claims on appeal: (1) the trial court erred in granting KraftMaid's motion to dismiss because the motion lacked specificity; (2) the court erred in finding that Shoemaker failed to properly prove damages; (3) the court erred in awarding KraftMaid costs; (4) KraftMaid improperly obtained an amended order for judgment and amended judgment without notice to Shoemaker; and (5) the court erred when it failed to consider Shoemaker's motion to reset the trial date. We consider each in turn.

A. KraftMaid's Motion to Dismiss

¶11 Shoemaker first argues that the trial court should have denied KraftMaid's motion to dismiss at the close of her evidence because KraftMaid failed to state the grounds of the motion with particularity as required by WIS. STAT. § 805.14.

¶12 WISCONSIN STAT. § 805.14(3) governs motions challenging the sufficiency of the evidence at the close of a plaintiff's case.[2] Subsection (6) of § 805.14 provides that a defendant must state the grounds of a motion challenging the sufficiency of the evidence with particularity. If a motion to dismiss does not

[2] WISCONSIN STAT. § 805.14(3) provides in full:

> MOTION AT CLOSE OF PLAINTIFF'S EVIDENCE. At the close of plaintiff's evidence in trials to the jury, any defendant may move for dismissal on the ground of insufficiency of evidence. If the court determines that the defendant is entitled to dismissal, the court shall state with particularity on the record or in its order of dismissal the grounds upon which the dismissal was granted and shall render judgment against the plaintiff.

state the grounds of the motion with particularity, the motion is "deemed insufficient to entitle the movant to the order sought." WIS. STAT. § 805.14(6).

¶13 We reject Shoemaker's argument because she failed to object to the form of the motion either at the time it was made or in her post-trial motion. *See* ***State v. Edelburg***, 129 Wis. 2d 394, 400-01, 384 N.W.2d 724 (Ct. App. 1986) (failure to object to an error at trial generally precludes a defendant from raising the issue on appeal). Moreover, the fact that a motion to dismiss lacks particularity does not deprive the trial court of the authority to rule in the moving party's favor. Rather, lack of particularity deprives the moving party of the right to complain later if the trial court denies the motion.

B. Shoemaker's Failure to Properly Prove Damages

¶14 The next issue we consider is whether Shoemaker failed to properly prove damages, entitling KraftMaid to dismissal of the case at the close of Shoemaker's evidence. Our analysis encompasses Shoemaker's claims that the court erred in finding that her evidence of damages constituted inadmissible hearsay and that expert testimony was necessary to prove damages.[3]

[3] Shoemaker tersely states that the court erred in sustaining KraftMaid's objection to her damages evidence on the basis of hearsay because KraftMaid objected on the basis of foundation. This statement is misplaced. Under some circumstances, an objection to inadequate foundation and an objection to hearsay are essentially interchangeable. WISCONSIN STAT. § 907.01 provides that opinion testimony by a lay witness is limited to those opinions or inferences rationally within the witness's perception. When KraftMaid's foundational objection is read in context, it becomes clear that KraftMaid was objecting to the introduction of Shoemaker's damages evidence on the basis that Shoemaker had not sufficiently established that the repair costs and quotes were within her personal knowledge and had not been relayed to her by some outside source, such as an authorized dealer of KraftMaid products.

¶15 We examine the circuit court's decision denying the admission of evidence under the erroneous exercise of discretion standard. ***State v. Edmunds***, 229 Wis. 2d 67, 74, 598 N.W.2d 290 (Ct. App. 1999). We will uphold a circuit court's discretionary decision if it examined the relevant facts of record, applied the correct legal standard to them, and reached a conclusion that a reasonable judge could reach. ***Id.***

¶16 In her complaint and her trial brief, Shoemaker asserted claims of breach of warranty, fraudulent advertising pursuant to WIS. STAT. § 100.18, misrepresentation, and negligence. The measure of damages in a breach of warranty action is the difference between the value of the goods received and the value the goods would have had if they were as warranted. WIS. STAT. § 402.714(2). The measure of damages in cases of fraudulent or strict responsibility misrepresentation is the benefit of the bargain rule. ***Lundin v. Shimanski***, 124 Wis. 2d 175, 195, 368 N.W.2d 676 (1985); ***Vandehey v. City of Appleton***, 146 Wis. 2d 411, 414, 437 N.W.2d 550 (Ct. App. 1988). Under the benefit of the bargain rule, a purchaser's measure of damages is "typically stated as the difference between the value of the property as represented and its actual value as purchased." ***Ollerman v. O'Rourke Co.***, 94 Wis. 2d 17, 52-53, 288 N.W.2d 95 (1980).

¶17 Turning to the facts of this case, Shoemaker attempted to admit into evidence what she referred to as a "damages summary." The summary was not made a part of the record as an offer of proof, nor did Shoemaker specifically testify to its contents. Rather, she stated generally that the summary

> itemizes the amounts that we're being charged for the various components that are damaged or defective, and along with tax, and then also the original purchase price of the range hood that I can't use, and then the labor cost to

> Home Depot for installation replacement, and then also the amounts I've incurred on long distance telephone, mileage in my trips, and the amount of the proposal for the floor damage.

The trial court refused to admit the evidence on the basis that the prices on Shoemaker's list were hearsay because Shoemaker received those prices from Home Depot and Shoemaker did not call anyone from Home Depot to testify.

¶18 In later granting KraftMaid's motion to dismiss the case, the court concluded that Shoemaker had not met her burden of proof with respect to damages. The court stated that Shoemaker had not shown the difference between the value of the cabinets as represented and the value of the cabinets received, because she presented no expert testimony to that effect. Nor had she shown that the costs she incurred to repair or replace her cabinets were reasonable and customary, again because she had not presented the testimony of an expert witness.

¶19 Shoemaker's proffered evidence can be compartmentalized into three categories: (1) a quote for repair of her hardwood floor; (2) the cost she paid for the range hood; and (3) costs incurred to repair or replace damaged or defective items, along with incidental costs for long distance and mileage. We address each in turn.

1. Quote for the Floor Repair

¶20 The trial court properly excluded evidence of the quote for the floor repair on the basis of hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). How much it would cost to refinish her hardwood floor was not a matter within Shoemaker's

personal knowledge. Indeed, Shoemaker does not suggest that she has experience refinishing hardwood floors such that she inherently knew how much it would cost to refinish her own floor.

¶21 Additionally, the quote was offered to prove the amount of money it would necessarily cost to repair the floor, that is, to prove the truth of the matter asserted. The cost of the repair was an out-of-court statement made by Home Depot, but no representative from Home Depot was called to testify. Shoemaker does not suggest that the quote fell within any of the hearsay exceptions enumerated in WIS. STAT. §§ 908.03 or 908.045. Therefore, the court properly excluded evidence of the quote.

2. Cost of the Range Hood

¶22 While the cost of the hood was relevant to prove the value of the property as represented, *see* ***Anderson v. Tri-State Home Improvement Co.***, 268 Wis. 455, 464a, 67 N.W.2d 853 (1955) ("the price paid by the purchaser is relevant evidence on the issue of the value of the property if it had been as represented"), the trial court's exclusion of the evidence, even if error, was harmless. The price Shoemaker paid for the range hood was previously admitted as part of exhibit 39, encompassing an itemized price list of the total cabinetry purchased by Shoemaker.

¶23 Moreover, the court was correct in concluding that Shoemaker still needed an expert witness to testify to the value of the range hood as *received* in order to prove her measure of damages. Though Shoemaker repeatedly asserted that the hood was "useless" to her, entitling her to the full cost of the hood, her own testimony showed that it was not useless. Shoemaker essentially admitted that the hood could become fully operational by installing a vent upward through

the cabinet above the vent, though that option was less appealing to her than a vent that went through the outside wall of the home. In any event, the cost of the hood does not shed light on Shoemaker's damages; the cost of that item would not have informed the jury of the difference in value between what Shoemaker was promised and what she received with regard to the ventability of the system. Accordingly, the court's exclusion of the cost of the range hood does not warrant reversal.

3. Costs Incurred to Replace or Repair the Cabinets

¶24 Shoemaker argues that the court erred in refusing to admit evidence of the amounts she spent to repair or replace damaged or defective items. In ***Ollerman***, the supreme court recognized that an alternative measure of recovery under the benefit of the bargain rule is "the reasonable cost of placing the property received in the condition in which it was represented to be …." ***Ollerman***, 94 Wis. 2d at 53.

¶25 Nevertheless, we cannot determine whether the trial court's decision to exclude evidence of Shoemaker's alleged repair costs warrants reversal. As the court noted, Shoemaker offered no evidence that the costs she incurred in replacing or repairing damaged items were "reasonable," a necessary showing under the ***Ollerman*** decision. ***Id.*** Because Shoemaker made no offer of proof as to the contents of her damages summary, we cannot even ascertain what items Shoemaker repaired or replaced, let alone assess whether a jury might find those

costs to be reasonable. This is true of Shoemaker's alleged incidental and consequential costs as well.[4]

¶26 Moreover, the methods and costs for repairing or replacing defective cabinetry are generally not within the average layperson's intimate knowledge. Therefore, without knowing exactly what items Shoemaker repaired and how she did so, we can only assume that the court properly ruled that Shoemaker needed expert testimony to substantiate her costs as "reasonable." *See* ***Cramer v. Theda Clark Memorial Hosp.***, 45 Wis. 2d 147, 150, 172 N.W.2d 427 (1969) ("expert testimony should be adduced concerning matters involving special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind, and which require special learning, study, or experience").

¶27 For these reasons, including most significantly Shoemaker's failure to make an offer of proof, we affirm the trial court's decision denying Shoemaker's request to admit her "damages summary" into evidence.

¶28 It follows that the court properly granted KraftMaid's motion to dismiss because the only evidence admitted as to damages was the cost Shoemaker paid for her cabinets. While this evidence was relevant to show the value of the items as represented, there was no evidence tending to show the value of the items as received.

[4] We note that mileage and long-distance telephone charges do not appear to fall within WIS. STAT. § 402.715(2), defining consequential damages, and Shoemaker has failed to provide any authority for her assertion that these costs qualify as incidental damages as that term is defined in § 402.715(1).

C. KraftMaid's Recovery of Costs

¶29 Shoemaker next contends that the court erred in awarding KraftMaid its costs because the plain language of WIS. STAT. § 807.01(2) bars the recovery of such costs under circumstances present here. On appeal, Shoemaker does not assert that the amount of costs claimed by KraftMaid is unreasonable; rather, she argues only that KraftMaid is barred from recovery of any costs by § 807.01(2).

¶30 The resolution of this issue requires this court to construe WIS. STAT. § 807.01(2). We do this *de novo*. ***Barry v. Maple Bluff Country Club, Inc.***, 2001 WI App 108, ¶6, 244 Wis. 2d 86, 629 N.W.2d 24. The guiding principle in statutory construction is to discern legislative intent. ***State v. Irish***, 210 Wis. 2d 107, 110, 565 N.W.2d 161 (Ct. App. 1997). The first step in construing a statute is to look to the language of the statute itself and attempt to interpret it based on "the plain meaning of its terms." ***State v. Williquette***, 129 Wis. 2d 239, 248, 385 N.W.2d 145 (1986). If the language of the statute is clear and unambiguous, we normally apply it to the facts at hand without further analysis. *See* ***Turner v. Gene Dencker Buick-Pontiac, Inc.***, 2001 WI App 28, ¶14, 240 Wis. 2d 385, 623 N.W.2d 151.

¶31 WISCONSIN STAT. § 807.01(2) provides that at least twenty days before trial, "the defendant may serve upon the plaintiff a written offer that if the defendant fails in the defense the damages be assessed at a specified sum…. If the offer is not accepted and if damages assessed in favor of the plaintiff do not exceed the damages offered, neither party shall recover costs."

¶32 The plain language of WIS. STAT. § 807.01(2) anticipates a verdict in favor of the plaintiff, and denies costs to both parties when the assessed damages do not exceed the damages offered. Shoemaker did not obtain a verdict

in her favor and, accordingly, no damages were "assessed in [her] favor." Therefore, § 807.01(2) is inapplicable to the facts of this case and KraftMaid was entitled to recover its costs under WIS. STAT. § 814.03(1).

D. Amended Order for Judgment and Amended Judgment

¶33 Shoemaker next asserts that KraftMaid improperly obtained an amended order for judgment and amended judgment without notice to Shoemaker, denying her the right to due process. More specifically, Shoemaker argues that KraftMaid filed an itemized bill of costs on December 22, 2000, and obtained an amended order for judgment and amended judgment encompassing those costs without proper notice to Shoemaker. Without the required notice, Shoemaker argues, she failed to timely file her objections to the costs within ten days as mandated by WIS. STAT. § 814.10(4).[5] Shoemaker instead filed those objections on January 12, 2001.

¶34 The record contains a notice of entry of judgment, prepared by the circuit court clerk, showing that the notice of judgment, incorporating KraftMaid's costs, was mailed on December 22, 2000, to Shoemaker at her proper address in Edgerton, Wisconsin. Accordingly, there is no reason to think that Shoemaker

[5] WISCONSIN STAT. § 814.10(4), relating to taxation of costs, provides:

> The clerk shall note on the bill all items disallowed, and all items allowed, to which objections have been made. This action may be reviewed by the court on motion of the party aggrieved made and served within 10 days after taxation. The review shall be founded on the bill of costs and the objections and proof on file in respect to the bill of costs. No objection shall be entertained on review which was not made before the clerk, except to prevent great hardship or manifest injustice. Motions under this subsection may be heard under s. 807.13.

was not notified of the taxation of costs. We also note that if Shoemaker believed that notice was improper, she should have filed a motion to set aside the judgment pursuant to WIS. STAT. § 806.07, rather than file an untimely objection to the amount of costs taxed.

E. Motion to Reset Trial Date

¶35 Finally, Shoemaker argues that the trial court erred when it failed to consider her motion to reset the trial date.[6] We disagree.

¶36 We will not reverse a trial court's ruling on a motion for a continuance unless we conclude that the trial court erroneously exercised its discretion. ***State v. O'Connell***, 179 Wis. 2d 598, 616, 508 N.W.2d 23 (Ct. App. 1993).

¶37 On November 6, 2000, over three weeks prior to trial, Shoemaker brought a motion to compel discovery, and the court extended the discovery deadline to the day before trial to allow Shoemaker further time to prepare. There is no evidence in the record that Shoemaker asked the court to reset the trial date at that time. Rather, she waited until three days before trial to file a motion to reset, citing as a basis that because KraftMaid failed to timely comply with her discovery requests, she did not have sufficient time to depose Sean Curtin, KraftMaid's expert witness, before trial. This contention is without merit.

[6] We initially note that the court did not wholly fail to consider Shoemaker's motion to reset the trial date as she suggests. Shoemaker initially made an oral motion to reset trial, which the court denied.

¶38 KraftMaid notified Shoemaker on November 8, 2000, that Sean Curtin was an expert witness, over three weeks before trial, in response to Shoemaker's requests to produce. So far as the record discloses, Shoemaker did not attempt to depose Sean Curtin during this time period. Accordingly, the trial court did not err in failing to grant her motion to reset the trial date.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.