

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 31, 2012

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2256

Cir. Ct. No. 2006CV88

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

THOMAS DIERL AND ELIZABETH DIERL,

PLAINTIFFS-RESPONDENTS,

V.

LINDAL CEDAR HOMES, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sawyer County:
FREDERICK A. HENDERSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Lindal Cedar Homes, Inc., a manufacturer of custom home kits, appeals a judgment finding it liable for roof repairs under a ten-year limited warranty certificate. It asserts that no “major structural defect” existed to trigger warranty coverage, insufficient evidence supports an award for

future repairs to a lower section of the roof, and the circuit court erroneously failed to find liable the construction contractor, Carson Builders, Inc. We reject Lindal's arguments and affirm.

BACKGROUND

¶2 Thomas and Lisa Dierl purchased lakefront property in Sawyer County, Wisconsin, in 1991. Some time later, the Dierls discussed constructing a home on the property. Thomas saw a model of a Lindal Cedar Home and contacted a dealer to discuss his desired home design, the quality of Lindal's materials, and Lindal's engineering expertise. The Dierls and Lindal executed a purchase and sale agreement in October 1994. The home was completed in 1997 by Carson Builders, Inc., an authorized Lindal dealer. Lindal issued a ten-year limited warranty certificate that provided coverage for "major structural defects."

¶3 Almost immediately, the Dierls experienced problems with the home. In 1997, Thomas discovered significant ice damming on the roof. In 1998 and 1999, ice dams again formed, this time accompanied by water leakage into the Dierls' living space. The Dierls observed water spotting on major structural components of the home.

¶4 The Dierls contacted Lindal repeatedly for a solution, and in 2001 Thomas traveled to Lindal's headquarters to resolve the matter in person. Lindal proposed two methods of improving ventilation in the roof, both of which Thomas

rejected to preserve the home's aesthetic appeal and out of his belief that the proposed ventilation would only partially solve the damming and leakage issues.¹

¶5 In 2005, the Dierls resorted to self-help. They hired contractors to replace the fiberglass insulation in the upper roof with closed-cell spray insulation. The Dierls have not experienced further damming or leakage issues in the upper roof.

¶6 The Dierls filed suit against Lindal on June 5, 2006, seeking damages under Lindal's ten-year limited warranty. Following a three-day trial, the court determined that water spotting on major load-bearing beams indicated damage that, if left unchecked, would cause the untreated wood to rot and decay. The court concluded that the water damage was caused by inadequate ventilation that allowed warm air to accumulate in the roof cavity. It found that replacing the fiberglass insulation with a closed-cell spray insulation eliminated the need for ventilation, and that, without such a fix, the damage "will continue to a point where the structural members would decay and fail and make the house unfit for human habitation." The Dierls were awarded \$47,921.17 for their upper roof repairs and \$91,000 for future repairs to the lower roof.

DISCUSSION

¶7 Lindal first contends that the circuit court misinterpreted the ten-year warranty and that, when properly construed, the evidence was insufficient to support the circuit court's findings. The construction of a written contract is a

¹ Thomas Dierl is an aerospace engineer whose education and experience include airflow and heat transfer principles.

question of law. *McNamee v. APS Ins. Agency, Inc.*, 112 Wis. 2d 329, 333, 332 N.W.2d 828 (Ct. App. 1983). With respect to the sufficiency of the evidence, we will affirm if there is any credible evidence to support the court's decision. *Graham v. Zellers*, 205 Wis. 542, 544, 238 N.W. 385 (1931).

¶8 Lindal's ten-year limited warranty covers "major structural defects occurring within the next ten years" The warranty certificate includes the following definition of "major structural defect:"

Definition of a Major Structural Defect. Damage to the actual load bearing posts, beams, timbers and framing that vitally affects the use of the home for habitation. Non load bearing parts of the home are not covered. These include roof shingles and sheeting, dry wall, exterior siding, subfloor and flooring materials, wall coverings, porches, decks, paint, doors, windows, trim, cabinets, hardware, insulation, plumbing, electrical and heating systems.

¶9 Lindal argues that no structural components were damaged by the inadequate ventilation. The warranty certificate does not define "damage." Generally, we give contract terms their plain and ordinary meaning, which we may discern from a recognized dictionary. *McNamee*, 112 Wis. 2d at 333. The plain meaning of "damage" is "loss due to injury" or "injury or harm to ... property." *See* WEBSTER'S THIRD NEW INT'L DICTIONARY 571 (unabr. 1993). Thus, we construe the term "damage" broadly, to encompass any harm to the load-bearing components of the Dierls' home.

¶10 Under this definition, the evidence was sufficient to support the circuit court's determination that load-bearing components of the Dierls' home had been damaged. Thomas Dierl and Lonnie Kennell, a contractor who helped repair the upper roof in 2005, both testified that wooden, load-bearing beams known as "TGIs" exhibited water spotting. Though the stains constitute "damage"

under the limited warranty, both Thomas and Kennell testified that the spotting was not their main concern. Rather, the spotting was merely a visible symptom of the more subtle rot and deterioration likely occurring in the wood.²

¶11 Lindal next asserts that even if there was damage, it did not vitally affect the use of the Dierls' home for habitation. Lindal notes that the certificate warrants against major structural defects "occurring" within ten years. Lindal interprets the warranty to cover damage that *presently* renders the home unsuitable to live in, not damage that might affect the future habitability of the home.

¶12 The circuit court acknowledged Lindal's position that the warranty required the home's structural integrity to be compromised within the warranty period. However, it found Lindal's position untenable because "if left unchecked, [the water damage] will become a situation where the structural members may fail with a catastrophic result. In other words, if you see a spot of cancer on your skin, you don't leave it there. You take care of it before it gets worse." The court deemed Lindal's interpretation unreasonable, stating the warranty language should not require a homeowner "to wait until [there are] these TGI[s] collapsing or something like that before you can bring an action under that warranty."

¶13 We first look to the warranty language to determine whether damage impairing the future habitability of the Dierls' home is covered. The warranty provides coverage for any "major structural defect" occurring within the next ten

² The Dierls did not present evidence that the load-bearing structures had begun to deteriorate, though the circuit court took judicial notice that repeated exposure to moisture would eventually cause such a condition. However, the testimony relating personal observations of water spotting was sufficient evidence of damage; it was not also necessary for the Dierls to introduce expert testimony regarding the wood's present integrity.

years. Lindal stresses that the term “occurring” suggests that damage must presently affect the home’s habitability. Under Lindal’s interpretation, the ten-year warranty period applies to both “damage” and “habitability.” However, there is an equally reasonable alternative construction of the warranty. The “habitation” clause may be read not as a separate element that must be fulfilled within the ten-year period, but as describing the severity of the damage triggering warranty coverage. Under this construction, only the “damage” must occur within the ten-year warranty period, without regard to when the home becomes uninhabitable. Thus, the warranty does not clearly state whether damage must render the home uninhabitable within the ten-year warranty period, or whether it is sufficient that damage occurring within the ten-year period will impair the home’s future habitability.

¶14 Given this ambiguity in the warranty language, we resort to a well-established set of standards governing contract interpretation. Courts cannot redraft agreements, but “must adopt that construction which will result in a reasonable, fair and just contract as opposed to one that is unusual or extraordinary.” *Jones v. Jenkins*, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979). “Ambiguous wording will be construed against the drafter provided the contract is also construed as a whole.” *Id.* We will avoid constructions that lead to absurd or unreasonable results. See *Town Bank v. City Real Estate Dev., LLC*, 2010 WI 134, ¶49, 330 Wis. 2d 340, 793 N.W.2d 476; *Capital Invs., Inc. v. Whitehall Packing Co.*, 91 Wis. 2d 178, 192-93, 280 N.W.2d 254 (1979).

¶15 Here, we agree with the circuit court’s reasoning and construe the warranty to require only that “damage” occur within ten years. We conclude the “habitation” clause describes the type of damage necessary to trigger the warranty; it is not a separate condition that must be fulfilled within the warranty period. It

would be absurd to require that a home's structural integrity be impaired, or that the home actually collapse, before an owner may seek a remedy under the warranty. The circuit court's cancer analogy was spot on. The Dierls correctly argue that Lindal's interpretation "is neither safe for those living in the home, cost efficient for repairing the 'damaged' home, practical, nor in accord with [canons] of contract construction"

¶16 Under our interpretation, there was sufficient evidence that, if left unremedied, continual exposure of the TGIs to moisture would vitally affect the use of the home for habitation. Thomas testified that the Lindal design did not provide adequate ventilation in the roof cavity, causing heat accumulation and water infiltration. He further testified that the TGIs were not intended to be exposed to moisture and that wood, a natural composite, will break down under such conditions. Kennell agreed that continual exposure to moisture "can cause major damage in the roof and in the structure of the house." Indeed, the court took judicial notice of the fact that moisture will eventually rot wood, a ruling Lindal does not challenge on appeal.

¶17 Next, Lindal asserts that the circuit court's award of \$91,000 for repairs to the lower roof is "unjustified and based on pure speculation" because one of the Dierls' experts, Lucas Thorne, conducted an inadequate investigation of the property.³ However, Thorne was not the only person to express concerns regarding moisture in the lower roof. Kenneth LaCoy testified that he observed water spotting on beams in the lower roof. Based on these observations and his

³ Lindal notes that Thorne's investigation in 2009 consisted of the following: a tour of the home's interior, a review of the building design, and his observations of the roof cavity and insulation through a small hole drilled in the upper roof.

review of the home plans, LaCoy concluded that the lower roof was inadequately ventilated. Both he and Kennell testified that the lower roof should be sprayed with closed-cell insulation to prevent moisture accumulation and deterioration of the TGIs. Thorne concurred with these opinions and stated that he had agreed to make the necessary repairs for approximately \$91,000.⁴

¶18 The adequacy of an expert's investigation goes to the weight, not the admissibility, of the evidence. See *City of Stoughton v. Thomasson Lumber Co.*, 2004 WI App 6, ¶18, 269 Wis. 2d 339, 675 N.W.2d 487. It is the fact finder's responsibility to make a judgment about whether an expert's investigation was adequate to support his or her opinion. *Id.*, ¶¶18-19; see also *Weeden v. City of Beloit*, 29 Wis. 2d 662, 668-69, 139 N.W.2d 616 (1966).

¶19 Lastly, Lindal asserts that the circuit court erred in failing to hold Carson Builders liable for the repairs to the Dierls' home. Lindal asserts that Carson Builders failed to install numerous vents depicted in Lindal's design plans.⁵ However, there was ample evidence at trial that Lindal was responsible for the moisture problems in the Dierls' home. LaCoy testified that Lindal's design did not provide adequate ventilation in the roof. A visit to the house confirmed his opinion of the design. Thomas Dierl, Lonnie Kennell, and Michael Carson all testified that the Dierls' home was built to Lindal's specifications. The circuit court's allocation of liability is not clearly erroneous.

⁴ Thorne stated this price included removing everything from the home; floor and sidewall preparation; removal of existing roof boards, wood, and insulation; spraying closed-cell foam; replacing the wood; and backtracking out of the project. According to Thorne, these were essentially the same repairs that were done to the upper roof.

⁵ The purchase and sale agreement excluded from all warranties "the quality of the construction of the structure by any contractor"

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5.

