COURT OF APPEALS
DECISION
DATED AND RELEASED

November 8, 1995

NOTICE

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

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No. 94-3137

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

MICRO COLORGRAPHICS, INC.,

Plaintiff-Respondent,

v.

ROBERT and NANCY UNGER and NORTHWOODS CRAFTSMAN, INC.,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

BROWN, J. Micro Colorgraphics, Inc. sued Northwoods Craftsman, Inc. and its owners, Robert and Nancy Unger, to collect past-due charges for printing services. Northwoods counterclaimed alleging that Micro breached the contract and made various misrepresentations during the course of the business relationship. At the close of evidence, however, the trial court

refused to instruct the jury on misrepresentation. Although the trial court reasoned incorrectly when it declined to give the instruction, we affirm because this instruction was nevertheless appropriate. In addition, affirmance is warranted because Northwoods failed to bring a postverdict motion and thus waived its right to challenge the trial court's ruling.

Northwoods is an art publisher. During the late 1980s, it began sending printing orders to Micro. Although there are many technical subtleties involved in fine art reproduction, the basic arrangement entailed Northwoods sending a piece of original art to Micro, which would then process it and ship prints back to Northwoods for approval.

The underlying dispute between the two firms focuses on orders for six different pieces of art which were processed between 1990 and 1992. During this time, Northwoods perceived an alleged decline in quality and was hearing complaints from its customers, the artists whose works were being published. Northwoods approached Micro for an explanation. Micro allegedly responded that the problems would be resolved.

Still, Northwoods continued to have quality concerns and this led to a breakdown in the relationship. Bills went unpaid, and in July 1992, Micro brought a collection action for approximately $26,000.[1]

[1] The complaint named Northwoods Craftsman, Inc. and its owners, Robert and Nancy Unger. We have referred to them collectively in the text.

In its response, Northwoods, in substance, admitted to the existence of a "business relationship" with Micro and that it placed orders. However, it asserted counterclaims. Northwoods alleged that the agreement required Micro to print "skillfully, in a true artistic and workmanlike manner" and that the delivered work did not meet this standard. Next, Northwoods alleged that it suffered consequential damages consisting of loss of good will and inability to meet orders. It claimed total losses of about $32,000.

During the course of discovery, Northwoods apparently found information which suggested that the print defects stemmed from internal operating problems at Micro. There was documentary evidence demonstrating that Micro had been having quality problems with one of its paper suppliers. Secondly, Northwoods uncovered evidence that some Micro employees had been sabotaging projects hoping to lower the company's value and acquire management control.

Thus, in March 1993, Northwoods amended its pleading to include claims that Micro had known about these labor and materials problems, but nonetheless made misrepresentations to Northwoods assuring the quality of its work.[2]

Ultimately, when the parties arrived at trial, Micro was standing on a claim that Northwoods had failed to pay its bills. On the other side,

[2] The amended pleading specifically described these claims as "negligent/strict responsibility misrepresentation" and "intentional misrepresentation/fraud."

Northwoods charged that Micro had delivered defective goods and had failed to inform Northwoods of its labor and materials problems.

After most of the evidence had been introduced, and after hearing the parties' arguments on the issue, the trial court concluded that the jury would not be instructed on the misrepresentation claims. It reasoned that the tort of misrepresentation was inconsistent with a breach of contract action. The trial court also concluded that the evidence could not support Northwoods's claim of being wrongfully induced into dealing with Micro. The jury concluded that Micro had fulfilled its obligations under the contract and awarded damages of approximately $18,000. These alleged errors in the jury instructions are the foundation of Northwoods's appeal.

We first elaborate on the legal merits of Northwoods's argument: should the jury have been instructed on both the misrepresentation and breach of contract claims? While trial courts are afforded broad discretion in formulating jury instructions, appellate review gauges whether the instructions correctly apply the law. *See* ***Young v. Professionals Ins. Co.,*** 154 Wis.2d 742, 746, 454 N.W.2d 24, 26 (Ct. App. 1990). Reversal is warranted when an erroneous instruction is prejudicial. ***Id.***

Northwoods claims that Wisconsin law permits its misrepresentation claim to be brought alongside its breach of contract claim. Its theory seems to be that Micro tried to hide the labor and materials problems (misrepresentation) to its detriment and also that it still relied on Micro to deliver quality prints (breach of contract). Thus, Northwoods appears to claim

that it is entitled to both rescind its commitment to pay for the defective prints and pursue breach of contract damages for the loss of good will among its clients. Micro contends, however, that Northwoods is trying to seek two inconsistent remedies. Northwoods cannot claim that Micro fraudulently induced it to deal and that Micro breached the resulting agreement.[3] As we will reveal below, both parties' arguments are flawed.

In ***Head & Seemann, Inc. v. Gregg***, 104 Wis.2d 156, 168, 311 N.W.2d 667, 673 (Ct. App. 1981), *aff'd*, 107 Wis.2d 126, 318 N.W.2d 381 (1982), we faced a similar question and concluded that in certain situations a defrauded party may also pursue a contract claim. *See* ***id.*** at 166, 311 N.W.2d at 672. Accordingly, the party may seek the remedies, rescission and damages, respectively associated with these claims. ***Id.*** The rule is premised on a simple principle, "[i]f complete justice requires that damages be awarded with the rescission, the court will award them." ***Id.*** at 167, 311 N.W.2d at 672.[4]

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[3] This theory is termed the election of remedies doctrine. *See* ***Bank of Commerce v. Paine, Webber, Jackson & Curtis,*** 39 Wis.2d 30, 36-39, 158 N.W.2d 350, 352-53 (1968).

[4] In ***Head & Seemann, Inc. v. Gregg***, 104 Wis.2d 156, 157, 311 N.W.2d 667, 668 (Ct. App. 1981), *aff'd*, 107 Wis.2d 126, 318 N.W.2d 381 (1982), a defrauded real estate company ejected a buyer who had failed for five months to make payments on her home. There we held that the real estate company could rescind the deal and also seek lost rents. ***Id.*** at 168, 311 N.W.2d at 673. We reasoned that these claims were not inconsistent because they worked together to restore the real estate company to its precontract position. ***Id.*** Although the Wisconsin cases applying ***Head & Seemann*** have coincidentally arisen in the context of other real estate transactions, the doctrine is applicable in any contractual context. *See, e.g.,* ***Jersild v. Aker***, 775 F. Supp. 1198 (E.D. Wis. 1991) (sale of securities).

However, as this passage suggests, whether both claims may go to the jury depends on the circumstances. In some situations, allowing a party to prosecute both would enable it to obtain a double recovery for the same wrong. *See* ***id.*** at 159, 311 N.W.2d at 669. Thus, as Judge Gordon explained in ***Jersild v. Aker***, 775 F. Supp. 1198 (E.D. Wis. 1991), defrauded parties may bring a breach of contract action (i.e., and a claim for consequential damages) when the additional award will not be "duplicative of direct damages." *See* ***id.*** at 1206. Therefore, Micro's assertion that both causes of action may never be pursued simultaneously is simply incorrect.

Similarly, Northwoods is incorrect as well. It was not entitled to both instructions because it did not allege any separate, direct damages as a result of Micro's alleged misrepresentations. We observe that this was originally a collection action. Northwoods's counterclaim shows that it was using the misrepresentation claim as a defense to Micro's allegation that it was owed $26,000 for the delivered prints. In its amended pleading, Northwoods sought compensatory damages for lost profits and good will and dismissal of Micro's collection action. Both classes of damages were sought under the misrepresentation and breach of contract theories. The posture of this case is unlike ***Jersild***, for example, where the defrauded investor was entitled to return of $100,000 paid for shares in a bankrupt company and the interest the investor

had paid to get the funds he used to buy the stock. *See* ***Jersild***, 775 F. Supp. at 1206. Here, Northwoods never paid a cent. Thus, voiding and rescinding the contract via its misrepresentation would not have garnered Northwoods any different damages than those asserted in its breach of contract claim.[5]

Since it was advancing different theories to prove the same damages, Northwoods was required to elect its chosen remedy at the instructions conference. *See* ***Wills v. Regan***, 58 Wis.2d 328, 345, 206 N.W.2d 398, 407 (1973). Instead, Northwoods erroneously claimed before the trial court that it was entitled to both the breach of contract and misrepresentation instructions. The trial court, just as erroneously, made the election for Northwoods by submitting only the breach of contract claim to the jury. We are satisfied, however, that the trial court's mistake stems from Northwoods's failure to understand or appreciate that *it* was required to make the election.

Thus, while the trial court misinterpreted the applicable law, it nonetheless reached a correct result. One of these theories could have gone to the jury, but not both. That the trial court chose which theory should go to the jury cannot now be laid at its feet. The error arising out of the instructions conference is a direct consequence of Northwoods's misunderstanding of the law. We will not find error in what the trial court did in response.

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[5] Our review of the record indicates that Northwoods also sought punitive damages when it added the misrepresentation claim. However, it has not addressed this issue in its briefs, nor does the record contain evidence which would support a finding of "outrageous conduct" by Micro. *See* ***Brown v. Maxey***, 124 Wis.2d 426, 431, 369 N.W.2d 677, 680 (1985). We deem the issue waived.

Even if we were to say that the trial court's error should be attributed to the court, the error was not prejudicial. This is because the jury was still allowed to decide whether Micro was less than candid with Northwoods and whether Micro's behavior was responsible for Northwoods's losses. We consider that the jury was told:

> If one person enters into a contract with another, there is an implied promise by each that he will do nothing to hinder or obstruct performance by the other.

WIS J I—CIVIL 3046 (Implied promise of no hindrance). Further, the jury was informed, as part of the instruction on substantial performance:

> A failure to complete performance under a contract, or a defective performance, does not prevent recovery if you find that there was substantial performance of the contract. You must first find that there was a good-faith effort to perform; if you find that a good-faith effort was made, you will then proceed to determine whether the performance was … substantial.

WIS J I—CIVIL 3052. Finally, in regard to damages, the jury was instructed:

> The law provides that a person who has been damaged by a breach of contract shall be fairly and reasonably compensated for his loss. In determining the damages, if any, you will allow an amount that will reasonably compensate the injured person for all losses that are the natural and probable results of the breach.

WIS J I—CIVIL 3710 (Consequential damages). Based on these instructions, together with the evidence presented at trial, we conclude that the jury could have found that Micro's withholding of information "obstructed performance" or that Micro had not made a "good faith" effort to perform the contract. If the

jury had concluded that Micro thus breached the contract, the jury could have reasoned that Northwoods was entitled to consequential damages for its lost business and customer good will. In sum, we have confidence in this jury's finding because the jury was allowed to consider Northwoods's allegations of misrepresentation in the guise of "obstructed performance" and lack of good faith.

In addition, there is an alternative ground for affirming the trial court. We agree with Micro's charge that Northwoods waived its right to challenge the jury instructions due to a failure to file a postverdict motion with the trial court. *See* ***Ford Motor Co. v. Lyons,*** 137 Wis.2d 397, 417, 405 N.W.2d 354, 362 (Ct. App. 1987); *see generally* Michael S. Heffernan, APPELLATE PRACTICE AND PROCEDURE IN WISCONSIN § 3.3 (2d ed. 1995). This rule applies even when, as Northwoods did here, the party raised the exact issue before the trial court during the instructions conference. *See* ***Ford Motor***, 137 Wis.2d at 417, 405 N.W.2d at 362.

Northwoods, apparently recognizing that this waiver rule is aimed at improving judicial efficiency, argues that filing of postverdict motions would have only "tied up the resources of the court and of counsel" because its theory had already been argued before the trial judge. *See* ***Douglas v. Dewey***,

154 Wis.2d 451, 468, 453 N.W.2d 500, 507 (Ct. App. 1990) (cautioning against "overzealous advocacy" before the trial court).[6]

We do not see how resources would have been wasted, or the patience of the trial court taxed, by Northwoods's postverdict motion. As revealed above, its argument is based on established law. We are confident that the trial court would have been better advised if the specific cases had been brought to its attention in a postverdict motion.[7] The postverdict hearing would have provided the trial court with an opportunity to reexamine its rationale after review of the applicable case law. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 11, 456 N.W.2d 797, 802 (1990). Moreover, a decision involving jury instructions requires an understanding of the facts presented at trial. Thus, the trial court arguably has a better understanding of the factual issues since it does not have to draw its conclusions from a cold, black-and-white record, as we must. Finally, we add that the resources used by counsel when preparing for postverdict motions may be readily incorporated into the development of their

[6] Northwoods specifically cites ***Douglas v. Dewey***, 154 Wis.2d 451, 453 N.W.2d 500 (Ct. App. 1990), as support for its argument. We note, however, that ***Douglas*** concerns the need to raise a specific objection at the jury instructions conference when a general objection has already been made. *See* ***id.*** at 464-68, 453 N.W.2d at 506-07. It did not approach the issue of postverdict motions. In fact, the parties and the trial court in ***Douglas*** used the postverdict hearing to clarify the record as to what had occurred during trial. *See* ***id.***

[7] Most of the jury instructions conference, including Northwoods's formal objection and argument, was preserved on the record. Although some portions of the discussions were not recorded, the only authority Northwoods cited which would have informed the trial judge that these two types of claims may be brought concurrently was WIS J I—CIVIL 3068 ("Voidable Contracts") which states that instruction on misrepresentation should follow. Other than this implicit reference, there is no suggestion that Northwoods's attorney presented cases, such as ***Head & Seemann***, 104 Wis.2d at 168, 311 N.W.2d at 673, which would have explicitly informed the judge that such an instruction could be given.

appellate briefs. We thus conclude that the postverdict waiver rule should be applied given the facts underlying this appeal.[8]

Northwoods mounts one final challenge. Even if Northwoods was wrong regarding its understanding of election of remedies and even if it waived its challenge to the instructions by failure to submit timely postverdict motions, it correctly notes that we may still exercise our discretion and order a new trial in the interests of justice. This power is voiced through a two-part standard: whether the alleged error results in the real controversy not being fully tried or for any other reason justice is miscarried. *See* ***id.*** at 16-17, 456 N.W.2d at 804. The trial court's technical error regarding the jury instructions falls into the first category. *See* ***id.*** at 22, 456 N.W.2d at 807. Our analysis thus entails reviewing the record to determine if there are facts supporting a conclusion that the real controversy has not been addressed.

However, as we have already explained, the real issue was tried, albeit in the guise of a breach of contract theory rather than a misrepresentation theory. The jury was permitted to hear and decide whether Micro's actions and nonactions harmed Northwoods and resulted in a breached contract. We decline to order a new trial in the interests of justice.

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[8] Although it was not specifically outlined in its pleading or amended pleading, Northwoods also urged the trial court to give a breach of implied warranty instruction. Its theory seems to be that Micro's alleged promise to do the printing in an "artistic and workmanlike manner" constitutes evidence of its implied warranty. We deem this issue waived because of Northwoods's failure to file postverdict motions. Moreover, we have substantive doubts about this claim because there is no evidence that Micro selected the prints in accordance with terms set by Northwoods. *See* ***Ewers v. Eisenzopf***, 88 Wis.2d 482, 491, 276 N.W.2d 802, 806 (1979). Besides, Northwoods appears to have had the ultimate right of refusal on any work produced by Micro.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.