

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 29, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-2357

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

THEBCO, INC.,

PLAINTIFF-APPELLANT,

v.

LOU ANN COLLINS AND MATT COLLINS,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed.*

¶1 DEININGER, J.¹ Thebco, Inc., appeals an order dismissing its small claims action against Lou Ann and Matt Collins. Thebco claims the trial

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.

court erred in dismissing the action because the court's factual findings are clearly erroneous. We disagree and affirm.

BACKGROUND

¶2 Thebco sued the Collins for the amount of an unpaid invoice for purchase and installation of a patio door in their home. The Collins contested the claim, alleging in part that the “patio door that Thebco installed is not satisfactory” and the “installation is unacceptable.” The matter was tried to the court.²

¶3 In 1994, the Collins went to Thebco for replacement windows and doors for their home. The Collins could not afford to replace all of the doors and windows at once, so they did some in 1994, 1995, 1997, and 1999. According to the Collins, Thebco assured them that they would not have drafts or frost with their new doors and windows, and prior to the patio door at issue, they had not.

¶4 The Collins asked Thebco in 1999 to install a new patio door in a bedroom. Thebco's president informed them that the brand of patio door that Thebco had previously installed in their family room was no longer available. He recommended that the Collins purchase a particular door by a different manufacturer. Matt Collins testified that Thebco's president assured the Collins that this door would be “comparable” to the door it previously installed; the only difference pointed out to the Collins was that the new door was not available in wood grain. According to Matt, when asked whether the new door would allow drafts, Thebco's president said Thebco would fix any problems with the door. The

² The case was first heard by a court commissioner, and then tried de novo to the court. *See* WIS. STAT. § 799.207.

Collins then contracted with Thebco to provide and install the patio door which Thebco had recommended.

¶5 The Collins had numerous problems with the bedroom patio door, including cold drafts, moisture and frost, and the entry of bugs. They refused to pay the invoice for the door and installation until the problems were fixed. A representative from Thebco and one from the door manufacturer examined the patio door at issue. They concluded that there was no defect in the door or its installation. The Collins, however, continued to experience problems with the door.

¶6 At the conclusion of the hearing, the court requested that Thebco return to the Collins's home to see if anything could be done to resolve the situation. The parties agreed to the suggestion, and there was an exchange of correspondence following the hearing, but no resolution. Accordingly, the court issued a written decision dismissing Thebco's claim because there had been "no substantial performance of the contract." Thebco appeals the court's order.

ANALYSIS

¶7 Thebco claims that the trial court erred in its factual findings. We will uphold a trial court's factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). Whether the facts concerning a contracting party's performance satisfy the test for substantial performance has been consistently identified as a question of fact to be reviewed accordingly. See *Wm. G. Tannhaeuser Co. v. Holiday House, Inc.*, 1 Wis. 2d 370, 373-74, 83 N.W.2d 880 (1957); *Stevens Constr. Corp. v. Carolina Corp.*, 63 Wis. 2d 342, 359, 217 N.W.2d 291 (1974). Moreover, both parties agree that the clearly erroneous

standard of review governs this appeal. Accordingly, we will examine the trial court's factual findings for clear error.

¶8 The court made several key findings at the hearing which indicate its conclusions regarding credibility and the functioning of the patio door:

THE COURT: ...[H]ere you have people that were satisfied customers for years, and they have got a problem with the door in that it is leaking and drafts are coming in and it is cold and there [is] a gap in the screen for insects
....

Of course ... they have a door that is apparently not satisfactory, because it is causing moisture and causing drafts to come in and it keeps them cold

....

...[I]t looks like there (Indicating) is a gap there, and can't we have someone go out and take a look at this and see if it can be corrected? I'm sure they would be happy to pay.

On the other hand, if it can be corrected, aren't they entitled to at least some substantial performance of the contract they had?...

[THEBCO'S COUNSEL]: Judge, I take it from your comments, that you have taken – my inclination is that you have determined that my client's testimony is less credible than their's

....

THE COURT: ...[W]hat you are forgetting about is the fact that you did business with them in '94 and '95 and '97, and you were paid and they were satisfied with your work.

And all I'm saying is that today, we have undisputed testimony that there are drafts coming into the house and that there is water leaking and there is condensation and there is a gap in the screen

In addition, the record reflects that Thebco's president assessed the Collins's needs, and selected the door at issue from Thebco's product lines. He testified that a more expensive option was available, but he did not present it to the Collins for consideration. According to the Collins, he told them that the selected door would be "comparable" to the door previously installed.

¶9 A trial court's factual findings will not be disturbed on appeal unless they are "clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See* WIS. STAT. § 805.17(2). When a trial court sits as a trier of fact, it determines issues of credibility. *See Fidelity & Deposit Co. v. First Nat'l Bank*, 98 Wis. 2d 474, 485, 297 N.W.2d 46 (Ct. App. 1980). It is for the trier of fact, and not this court to assess witness credibility. *Rohl v. State*, 65 Wis. 2d 683, 695, 223 N.W.2d 567 (1974).

¶10 We are satisfied that the trial court did not clearly err in finding that Thebco did not substantially perform the contract. The test for "substantial performance" is whether the performance met the essential purpose of the contract. *Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 516, 434 N.W.2d 97 (Ct. App. 1988) (citing *Plante v. Jacobs*, 10 Wis. 2d 567, 570, 103 N.W.2d 296 (1960)). The record establishes that the trial court reasonably concluded that the essential purpose of the contract was the installation of a patio door that would keep outside elements outside, as had the windows and door Thebco previously installed. And, as we have noted, there was ample support in the record for the trial court's finding that Thebco had not met this essential purpose of the contract.

¶11 Thebco points to evidence in the record tending to show that it installed the specific door called for in its contract with the Collins, and that neither the door nor its installation was defective. But, under the clearly erroneous

standard of review, we are to search the record for evidence to support findings reached by the trial court, not for evidence to support findings the trial court did not but could have reached. *See Johnson v. Merta*, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). “In addition, when the trial judge acts as the finder of fact, and ... there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.” *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979) (citation omitted).

¶12 Thebco also argues that there is no support in the record for the court finding “a defect in the installation of the patio door.” We disagree. Lou Ann Collins testified to the following:

THE COURT: Let’s find out what is wrong. What is it that you claim, that wind comes in through the door?

MRS. COLLINS: Yes. There are drafts.

THE COURT: What else?

MRS. COLLINS: Gaps underneath the screen, and that allows bugs to come in, and we have had bugs in there, and there is frost, and then it puddles up, and it smells, and the puddles, it leaks onto the carpet and drapes, and then it dries up and then it does that all over again, and there is – also, they hacksawed this aluminum off, so that it could drain, and in the process, they chipped the door, and there is drafts coming in there also, some.

The court could readily infer from this testimony that the door was improperly installed.

¶13 In its reply brief, Thebco contends that the door's performance was not at issue at trial, and that either (1) the Collins have waived this issue, or (2) we should remand this case to allow the trial court to address this issue. We do not agree that the Collins failed to raise this issue at the trial court. To the contrary, the Collins based their entire defense for nonpayment on the door's unsatisfactory performance, beginning with their answer to Thebco's complaint and continuing through their testimony at trial.

CONCLUSION

¶14 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

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

