

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 18, 2002

Cornelia G. Clark
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. 01-3394-FT
STATE OF WISCONSIN**

Cir. Ct. No. 01-SC-586

**IN COURT OF APPEALS
DISTRICT IV**

RICHARD BOUCHETTE,

PLAINTIFF-RESPONDENT,

V.

CATHERINE SPATOLA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Juneau County:
VIRGINIA WOLFE, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Catherine Spatola appeals a judgment of the circuit court awarding Richard Bouchette the sum of \$2,330.67 for unpaid renovations to Spatola's home. For the following reasons, we affirm.

Background

¶2 In October of 2000, Bouchette, a general contractor doing business as Hometown Builders, bid on and was awarded a contract to repair hail damage to Spatola's roof and to replace the siding on her home. The roof repair was to be paid by Spatola's insurance company and the siding replacement was to be paid by a block grant from the Juneau County Housing Authority. The contract from the Housing Authority, attached to which was a copy of Hometown Builders' proposal and quote, provided that "[a]ll materials are guaranteed to be as specified in the bid specifications. Any alteration or deviation from the attached specifications will be executed only upon written consent of the property owner, contractor and the [Community Development Block Grant] Office."

¶3 Bouchette replaced the roof on Spatola's home at a cost of \$3,365, which cost was paid by Spatola's insurance company. Bouchette also replaced the siding at a cost of \$8,690, which cost was paid for by the Housing Authority block grant. Subsequently, Bouchette filed a small claims complaint against Spatola, seeking \$4,107.36, for "add ons" not covered by the insurance company or the Housing Authority. Those items included: (1) \$225 to remove and replace rotted boards; (2) \$280 to remove caulk from the storm windows; (3) \$1,965 to close in

¹ This is an expedited appeal under WIS. STAT. Rule 809.17 (1999-2000), decided by one judge pursuant to WIS. STAT. § 752.31(2)(a). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the front porch to create a three-season room; and (4) \$1,637.36 to replace storm windows with vinyl windows.

¶4 At trial, Bouchette testified that in the process of replacing the siding on Spatola's home, he encountered several problems. The first was rotted boards under the siding that needed to be replaced at a cost of \$225. Bouchette testified that when he bid on the project, the wood rot was not evident because it was under the siding, and thus, replacement of the boards was not part of his original estimate. Bouchette also testified that when he informed Spatola of the wood rot, Spatola told Bouchette to replace the boards and that, rather than wait to file a change order with the Housing Authority, she would pay for the cost of the new boards.

¶5 Bouchette then testified that when he attempted to remove the storm windows to replace the aluminum siding underneath, he found that the windows were not screwed into place, but were caulked. Bouchette stated that removing the windows required additional time and labor, at a cost of \$280, because of the caulking. Bouchette testified that he spoke with Spatola about the windows and she agreed to pay for the additional labor required to remove them.

¶6 Bouchette also testified that Spatola asked him to "close in her front porch" by removing eight screens and installing storm windows. Initially, Spatola asked for aluminum storm windows, which Bouchette installed along with a door, at a cost of \$1,965. Bouchette stated that the original contract did not call for installation of the windows and door. After the installation, Spatola complained that the windows were crooked. Bouchette agreed and said he would reset the windows at no cost to Spatola. Bouchette testified that during this conversation, Spatola stated that she did not like the aluminum storm windows and wanted vinyl

replacements. Bouchette told Spatola that she could purchase the vinyl windows and other materials required to install the windows and he would install them at no charge. Bouchette charged Spatola \$1,637.36 for the cost of the windows and the materials to install them.

¶7 Bouchette testified that he was never paid for the additional work, amounting to \$4,107.36; however, he was informed by the window supplier that Spatola had paid the supplier \$1,432.69 for the cost of the vinyl windows. Bouchette then testified that the difference of \$204.67 between the cost of the vinyl windows and the amount he charged Spatola for the windows encompassed the cost of aluminum wrap, stops, insulation and caulk required to install the windows.

¶8 On cross-examination, Bouchette testified that he never submitted a change order to the Housing Authority to obtain additional funds to cover the cost of the windows. Instead, Bouchette stated, Spatola told him to request more money when he sought payment for the siding. That request was denied by the Housing Authority because no change order was submitted prior to completing the additional work as required by the contract.

¶9 Spatola then testified that she believed she did not owe Bouchette any money because she was not satisfied with the completed work. Spatola also testified that the aluminum windows installed on the porch were not the proper size and that it was Bouchette who ordered incorrect windows. Spatola acknowledged that the cost of the aluminum windows would be encompassed within the \$1,965 charge, but she did not know what portion of that charge was for the windows and what was for labor or other materials.

¶10 Spatola also acknowledged that the eight porch windows were not part of the initial bid, but said that because of the way the trim was installed, when the old windows were removed she had to replace them with new windows. Spatola also testified that she had Bouchette return three times to make repairs to the windows because of gaps between the window frame and the wall. Spatola agreed that Bouchette corrected the problems by caulking around the windows, but she stated that she was not happy with the repairs because she believed the windows should not have needed that amount of caulking.

¶11 Spatola also testified that the wood rot under the siding on her home was apparent at the time Bouchette made his bid and, therefore, she did not believe that she owed Bouchette \$225 to remove and replace the rotted boards. Spatola then stated that Bouchette did not enclose her front porch as he testified because it was already enclosed. Spatola said that the wrapping of the front porch in vinyl siding and insulation was part of the initial bid. Finally, Spatola testified that she did agree to pay for the new vinyl windows; however, that agreement was made with the understanding that Bouchette would take back the old windows that did not fit.

¶12 The circuit court granted judgment in favor of Bouchette in the amount of \$2,169.67. Of that figure, \$1,965 was for the installation of the aluminum windows and door on the porch and \$204.67 was for the materials needed to install the vinyl windows. The court denied Bouchette's request for \$225 to remove and replace the rotted boards and \$280 to remove caulk from the storm windows. Bouchette did not object to any part of the court's ruling.

Discussion

¶13 On appeal, Spatola defines the issues as: (1) whether Bouchette submitted sufficient evidence to prove the allegations in his complaint; and (2) whether Spatola submitted sufficient evidence to prove the allegations in her counterclaim.

¶14 As an initial matter, we note that WIS. STAT. § 799.02 pertains to counterclaims in small claims actions and, by its language, anticipates that any such counterclaim will be filed with the court.² While Spatola vaguely argues in her brief that Bouchette failed to substantially perform under the Housing Authority contract, we find no evidence in the record that a counterclaim was ever filed and no evidence that the circuit court considered any counterclaim. Accordingly, we address only the first issue raised by Spatola.

¶15 “When considering the sufficiency of the evidence, we apply a highly deferential standard of review. Furthermore, the fact finder’s determination and judgment will not be disturbed if more than one inference can be drawn from the evidence.” *Jacobson v. Am. Tool Cos.*, 222 Wis. 2d 384, 389, 588 N.W.2d 67 (Ct. App. 1998). The circuit court’s findings of fact will not be set aside unless

² WISCONSIN STAT. § 799.02(1) provides:

If a counterclaim or cross complaint is filed, which arises out of the transaction or occurrence that is the subject matter of the plaintiff’s claim and which is beyond the limitations of s. 799.01, the person filing the same shall pay the fee prescribed in s. 814.62(3)(b), and the entire matter shall be tried under chs. 801 to 847 procedure, except that the counterclaim or cross complaint shall be deemed denied and a responsive pleading thereto is not required unless ordered by the court and the requirements for appearance by the parties shall be governed by s. 799.06(2).

clearly erroneous, and due regard shall be given to the opportunity of the circuit court to judge the credibility of the witnesses. *See id.* at 389-90; WIS. STAT. § 805.17(2).

¶16 On appeal, Spatola argues that the evidence presented at trial indicates that Bouchette was not entitled to a judgment in the amount of \$2,169.67. We disagree.

¶17 Bouchette testified that he was owed \$1,965 for the purchase and installation of the aluminum windows and door. At trial, Spatola acknowledged that the eight porch windows were not part of the initial bid. Bouchette also testified that he was owed \$204.67 for materials needed to install the vinyl windows, which he installed free of charge because Spatola was not happy with the manner in which the eight aluminum windows were installed. Spatola testified at trial that she agreed to pay for the new vinyl windows. In light of this testimony, we cannot conclude that the circuit court's finding that Spatola agreed to personally assume the cost of the aluminum windows and door, the vinyl windows, and the installation was clearly erroneous. We also cannot conclude that the court's inherent finding that Spatola also agreed to pay for the materials needed to install the vinyl windows was clearly erroneous.

¶18 Spatola next argues that Bouchette is responsible for the cost to install the windows because he failed to abide by the Housing Authority contract. Specifically, Spatola asserts that Bouchette failed to make a request in writing for additional funds to install the new windows. However, Bouchette testified that he and Spatola agreed that Spatola would assume the cost of the windows and installation. Nothing in Spatola's testimony disputes that assertion. Again, we

cannot conclude that the circuit court's finding that Spatola agreed to pay for the windows and installation herself was clearly erroneous.

¶19 Finally, Spatola seems to believe that Bouchette improperly charged her to enclose her front porch, despite that the front porch was already enclosed. We assume that Spatola believes that this charge was encompassed within the \$1,965 figure. Nevertheless, Bouchette's testimony indicated that the \$1,965 was for the cost of the aluminum windows and door and their installation only, which installation included framing in the windows. Although Bouchette testified that Spatola asked him to "close in her front porch," he subsequently clarified that statement in the following colloquy:

Q Does that photograph reflect the front of Ms. Spatola's house?

A Yes.

Q Does it show the porch?

A Yes.

Q On that porch there are somewhere around what, 6, 8 windows?

A Yes.

Q Were those windows in place when you started the work?

A No, they weren't.

Q All right. You said something about a half wall on the porch.

A That's this lower section right here. That was existing with this lower section right under the windows.

Q You're referencing the portion under the windows?

A Yes, that on the, on the building. That was existing, yes.

Q From the windows up, had that been framed in?

A Yes.

Q And –

A Then the roof was existing and the wall from the gable was existing.

Q Did you have to do framing work to put the windows in?

A Yes.

Bouchette’s testimony indicates that he did not attempt to charge Spatola to enclose a porch that was already enclosed. Rather, he charged Spatola to “close in her front porch,” in Bouchette’s words, by framing in the windows. The labor and materials required to frame in the windows are evident from Spatola’s own pictures taken inside her enclosed porch and introduced as an exhibit at trial.

¶20 Therefore, we affirm the circuit court’s judgment in favor of Bouchette in the amount of \$2,330.67, representing \$1,965 to purchase and install the aluminum windows and door, \$204.67 for materials required to install the vinyl windows, and \$161 for fees and costs.

By the Court.—Judgment affirmed.

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

