

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 13, 2004

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. 03-1041
STATE OF WISCONSIN**

Cir. Ct. No. 01CV000406

**IN COURT OF APPEALS
DISTRICT III**

RANDY PRATHER AND VERNITA PRATHER,

**PLAINTIFFS-RESPONDENTS-CROSS-
APPELLANTS,**

v.

**CURTIS CRANE, INDIVIDUALLY AND D/B/A CRANE KLAY
DEVELOPMENT, CRANE REALTY, CHRISTOPHER KLAY,
INDIVIDUALLY AND D/B/A CRANE KLAY DEVELOPMENT,**

DEFENDANTS,

NORSE BUILDING SYSTEMS,

**DEFENDANT-APPELLANT-CROSS-
RESPONDENT.**

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Barron County: FREDERICK A. HENDERSON, Judge.
Modified and, as modified, affirmed and remanded with directions.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Norse Building Systems appeals a judgment and an order denying its motion for reconsideration and a new trial. Norse claims: (1) the trial court erred by failing to grant Norse a continuance so that its witnesses could present live testimony, (2) we should exercise our power of discretionary reversal because justice has miscarried or because the real matter has not been fully tried, and (3) the trial court erred when awarding damages. Randy and Vernita Prather cross-appeal the portion of the judgment that denied them attorney fees and costs. We modify the trial court’s judgment by reducing the damage award by \$12,300 due to a duplication of damages and, as modified, affirm the judgment and order. Upon remand, we direct the circuit court to modify the judgment accordingly.

BACKGROUND

¶2 The Prathers purchased a Norse modular home from Curtis Crane, Christopher Klay, Crane Realty, and Crane-Klay Development (collectively “Crane-Klay”), a Norse home dealer. Crane-Klay provided the Prathers with an estimate for the home with the options the Prathers added. The Prathers accepted the estimate, and Crane-Klay then submitted an order form to Norse. Norse was to construct the home at its manufacturing plant according to the order specifications. One of the options the Prathers selected required Norse to cut holes for heating ducts and cold air returns throughout the home’s second floor. Norse failed to do this.

¶3 After the home’s construction was complete, Norse shipped it to the Prathers’ site in four separate units. During its transportation, Norse was to wrap the units in a weather tight lining to prevent snow and ice from accumulating on

the units' undersides so that water would not seep into the home's insulation. This was not properly done.

¶4 Vernita Prather testified she saw a large buildup of snow and ice had accumulated underneath the units. Apparently without adequately freeing the units of this buildup, Norse then assembled the modular units together. Norse misaligned the units when it set and bolted them together, causing gaps at each end of the home. The gaps were not closed, but rather were covered with finishing materials. The top and bottom units were also misaligned.

¶5 Sometime after the home was assembled, the snow and ice that accumulated on the units' undersides melted and caused significant damage. The Prathers had to replace their entire kitchen ceiling. Water also had seeped into the home's insulation. The Prathers' carpenter and building inspector, William Koepp, testified that wet insulation destroys the insulation's effectiveness. As a result, the home's exterior walls do not effectively retain heat.

¶6 The home also had many other problems: a design defect in the living room's cathedral ceiling caused heat to escape, sheetrock was cracked and buckling, a stair rail was improperly mounted, gaps in the structure allowed bats to enter the home, heat registers and cold air returns were misplaced throughout the first floor, an improper furnace was installed in the home (and was also improperly installed), and the siding on the home's south side was wavy and buckling.

¶7 The Prathers found themselves caught in the middle of a disagreement between Norse and Crane-Klay as to whose responsibility it was to fix the problems. While Norse and Crane-Klay continued to assign this duty to the other, the Prathers sued both Norse and Crane-Klay. Norse and Crane-Klay then cross-claimed against each other.

¶8 A two-day bench trial was scheduled. On the morning of the trial's first day, Crane-Klay and Norse dismissed their cross-claims with prejudice. At the close of their case-in-chief later that day, the Prathers announced that they reached settlement with Crane-Klay. Thus, Crane-Klay was dismissed.

¶9 The court then instructed Norse to proceed, but Norse replied its witnesses were not in court. Norse explained it assumed its witnesses would not be called to testify until the second day of trial, given that Crane-Klay was expected to proceed first. The court was not persuaded, but gave Norse an opportunity to contact its witnesses by telephone. Norse could only reach Kurt Kavanaugh, the vice-president of operations. It could not reach its key witness, Dennis Kron, a Norse representative who handles service warranty concerns. At the conclusion of Kavanaugh's testimony, Norse rested.

¶10 The trial court concluded that Norse's services, labor, skill and materials provided were incomplete, deficient and not in compliance with the contract. The court awarded damages for the following repairable defects: \$6,400 to attempt to correct the excessive air movement within the walls; \$5,900 to attempt to correct heat loss occurring at the cathedral ceilings; \$1,750 to replace a stair rail; \$1,280 to repair buckling and cracking drywall; \$1,000 for alternate living arrangements while the Prathers waited for the home to be completed; and \$500 to relocate cold air returns on the first floor. The court also awarded the following damages for out-of-pocket expenses the Prathers incurred: \$1,750 to replace the kitchen ceiling; \$869 for additional insulation; and \$250 to exterminate bats. Finally, the court additionally awarded the Prathers \$42,000 to represent the home's diminished value. The court based this figure on Randy Prather's opinion that the home incurred a 20% diminution and its finding that the home suffered uncorrectable structural problems. The sum of the damages totaled \$61,699.

¶11 The trial court did not allow the Prathers to recover their attorney fees and costs from Norse. While Norse's dealer agreement with Crane-Klay did allow "the prevailing party" in an action arising from the Norse/Crane-Klay relationship to recover attorney fees and costs, the agreement expressly provided that "[t]his agreement is not made for the benefit of any third parties." The court concluded this language unambiguously prevented the Prathers, as third parties, from recovering their attorney fees and costs.

¶12 The court later denied Norse's motion for reconsideration and a new trial. Norse appeals, and the Prathers cross-appeal the portion of the judgment denying them attorney fees and costs.

I. NORSE'S APPEAL

¶13 Norse first claims the trial court erroneously exercised its discretion by not continuing the trial after the Prathers finished presenting their evidence. *See Allen v. Allen*, 78 Wis. 2d 263, 274-75, 254 N.W.2d 244 (1977) (decision to grant or deny continuance lies with trial court's discretion). We conclude Norse has failed to properly preserve this issue for appeal.

¶14 After the trial court asked Norse to call its first witness, Norse explained why its witnesses were not present, yet never asked for a continuance. As indicated above, the court was not persuaded by Norse's explanation, but gave Norse an opportunity to present its witnesses' testimony by telephone. Norse could only reach one of its witnesses, Kavanaugh. At the conclusion of Kavanaugh's testimony, Norse again failed to request a continuance, this time on account that its key witness, Kron, was unavailable. When the court asked Norse if it had any other witnesses, Norse merely rested its case. Given Norse's failure to request a continuance either after the close of the Prathers' evidence or at the

conclusion of Kavanaugh's testimony, and by virtue of the fact that Norse then rested its case, the matter is not preserved for appellate review. See *Kutchera v. State*, 69 Wis. 2d 534, 543, 230 N.W.2d 750 (1975).

¶15 Norse next asks that we invoke our power of discretionary reversal under WIS. STAT. § 752.35¹ because the matter has not been fully tried or it is probable that justice has miscarried. We exercise our power of discretionary reversal only in exceptional cases. *Vollmer v. Luety*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). Norse fails to persuade us that this case is an exceptional one; thus, we decline Norse's request.

¶16 Norse contends it had legitimate contractual defenses against the Prathers' claim. However, because Norse could not reach its key witness by telephone, Norse argues the court prevented it from fully presenting its contract defenses.

¶17 Norse was not prevented from presenting its purported contract defenses. Instead, it was unable to adequately develop them because it chose not to prepare its witnesses for trial or have them available when the trial commenced.

¹ WISCONSIN STAT. § 752.35 states:

Discretionary reversal. In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

While testifying, Kavanaugh, the vice-president of operations, frequently stated he could not answer certain questions given that he had not recently reviewed his files related to this case. It is disingenuous for Norse to argue that the real controversy has not been fully tried, or that the interests of justice require reversal, given that its own witness could not answer simple questions regarding its own contracts the day before Norse told its witnesses to be at trial.

¶18 What is more, aside from the fact that Kavanaugh was ill-prepared, Norse has not provided us with an explanation as to why Kavanaugh could not have established the groundwork for Norse's contract defenses. After considering Norse's arguments, and upon our review of the record, we are satisfied the real controversy has been tried, and that the interests of justice do not require reversal.

¶19 Finally, Norse raises a myriad of issues regarding the damages award. It essentially argues: (1) the trial court's finding that the home had diminished value beyond the cost of repairs is baseless, (2) the trial court erred by awarding the Prathers a diminution value that included all of the repair costs, and (3) the diminution value is based upon speculation.

¶20 Norse first argues there is no basis for the trial court's finding that the home suffered a diminution value. We disagree and conclude the trial court's finding is not clearly erroneous. *See* WIS. STAT. § 805.17(2) (findings of fact shall not be set aside unless clearly erroneous).

¶21 A diminution value is awarded where defects cannot be repaired. *Jacob v. West Bend Mut. Ins. Co.*, 203 Wis. 2d 524, 541, 553 N.W.2d 800 (Ct. App. 1996). The record contains ample evidence from which the court reasonably concluded the home had a diminished value. Norse did not align the home's top and bottom sections properly when it bolted them together. This resulted in gaps

where the sections joined together, causing the structure to not be weather tight, which, in turn, contributed to air infiltration problems. The uncontroverted testimony indicates the misalignment cannot be fixed without tearing down the entire home. Another significant problem is the lack of ductwork in the home's second floor, due to Norse's failure to cut holes for heating ducts and cold air returns when the home was constructed at its factory. This caused considerable heating and cooling distribution problems on the second floor. Here again, the undisputed testimony indicates this problem cannot now be fixed. Based on these irreparable defects, the trial court's finding of a diminution value is not clearly erroneous.

¶22 Norse secondly claims the court awarded the Prathers a diminution value that included all of the repair costs. Generally, the measure of damages in a building construction case is "the cost of repairs or the diminution in value of the injured structure, whichever is smaller." *Engel v. Dunn County*, 273 Wis. 218, 222, 77 N.W.2d 408 (1956). However, if all defects cannot be repaired, the diminution value is also recoverable. *Jacob*, 203 Wis. 2d at 541. Diminished value, though, cannot include the costs of defects that can be repaired. *See id.* (Proper measure of damages "is the reasonable cost of remedying defects, so far as that can be done practicably, and the diminished value of the building so completed because of defects not so remediable." (Citations omitted)).

¶23 Randy Prather testified that he observed the home had air infiltration problems and that the home was difficult to heat. Based partly on this difficulty, Prather opined the home suffered a diminished value of at least 20%, resulting in roughly a \$42,000 loss. But his opinion seems to assume that nothing would be done to correct the heating problems and that these problems would have to be disclosed to future buyers. Koepp, however, testified that an attempt could be

made to remedy the heat loss occurring at the living room's cathedral ceilings for anywhere from \$5,500 to \$8,000. Koepp further testified that an attempt to correct the excess air movement within the walls, caused by damaged insulation, would cost approximately \$5,000 to \$8,000.² As indicated above, the trial court ultimately awarded Prather's figure of \$42,000 for diminution value as well as numerous repair costs, including the \$6,400 to attempt to correct the excessive air movement within the walls and \$5,900 to attempt to correct heat loss occurring at the cathedral ceilings.

¶24 Viewing Prather's opinion in light of Koepp's testimony, we agree with Norse that the court awarded duplicate damages, but agree only with respect to the repair costs for the cathedral ceilings and the air movement within the walls. Again, Prather's opinion assumed nothing would be done to correct the home's heating difficulties. Thus, in adopting Prather's diminished value of \$42,000, the trial court awarded a diminution value that assumed the heat loss problems would not be corrected, while it also awarded the Prathers the cost to correct some of the heat loss problems. This is a duplication of damages.

¶25 Therefore, the trial court's award of \$42,000 for diminished value must be reduced by \$6,400 and \$5,900. All other damages the trial court awarded are separate expenses the Prathers have already incurred or are reasonable figures to repair the problems that apparently can be fixed. Consequently, their award does not affect the diminution value.

² It should be noted that the estimates Koepp gives are for an attempt to fix the problem. The record does not contain any indication as to whether these problems are in fact repairable. Because Koepp gave specific dollar amount ranges it would cost to attempt to correct the problems, and because the trial court awarded a specific dollar amount for these repairs, we assume the trial court's figure is sufficient to repair the problems.

¶26 In a two-fold argument, Norse lastly claims the value of the diminution award is based upon speculation. Norse contends that Prather was not competent to offer an opinion as to his home's diminution value. However, a non-expert owner of real estate can testify to the value of the real estate, *Trible v. Tower Ins. Co.*, 43 Wis. 2d 172, 187, 168 N.W.2d 148 (1969), and the trier of fact determines the weight to be given to this testimony. *Id.* Nevertheless, Norse claims Prather's opinion "was simply pulled out of thin air, lacking basis, and is rank speculation." Norse, however, never objected to Prather's opinion as lacking foundation during the trial. As a result, this issue is waived. *See* WIS. STAT. § 901.03(1)(a); *State v. Rogers*, 196 Wis. 2d 817, 825-26, 539 N.W.2d 897 (Ct. App. 1995) (failure to raise a specific challenge in the trial court waives the right to raise it on appeal).

¶27 Norse also contends the trial court erred by including a repair cost for the damaged siding in the diminution value when no evidence supports what effect the damaged siding has on the home's value. We agree, but conclude the diminution value is nevertheless reasonable. *See Cords v. Anderson*, 80 Wis. 2d 525, 552, 259 N.W.2d 672 (1977). In reviewing damage awards, we will not substitute our judgment for that of the fact finder, but rather determine whether the award is within reasonable limits. *Id.* at 552-53. In making this determination, we view the evidence in the light most favorable to the damage award. *Id.* at 553. Given the irreversible structural defects the home has, due to its misalignment and the lack of proper ductwork on the second floor, and viewing this evidence in the light most favorable to the damage award, we conclude the diminution of value damages, subject to our modification above, is nevertheless reasonable.

II. THE PRATHERS' CROSS-APPEAL

¶28 The Prathers cross-appeal from the portion of the judgment that denied them attorney fees and costs. “The general rule, known as the American rule, is that attorney’s fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.” *Kremers-Urban Co. v. American Employers Ins. Co.*, 119 Wis. 2d 722, 744, 351 N.W.2d 156 (1984). The Prathers claim that their contract with Crane-Klay included a provision that incorporated by reference a section of Norse’s dealer agreement, which stated:

In the event of any dispute arising from Dealer [Crane-Klay] – NBS [Norse] relationship and/or involving third parties relating to the same, the prevailing party shall be entitled to recover all attorney’s fees and costs from the other parties.

The Prathers contend it is undisputed that this litigation stemmed from a dispute arising from the Crane-Klay and Norse relationship, and because they are the prevailing third parties they are entitled to recover all attorney fees and costs.

¶29 While the attorney fees provision, standing alone, appears to allow them to recover this cost, this appearance is foreclosed by the very next paragraph in the contract. It states, “This agreement is not made for the benefit of any third parties.” The agreement is between Curtis Crane, Christopher Klay, Crane Realty and Development, and Norse Building Systems. As far as the contract is concerned, the Prathers are third parties. We agree with Norse and the trial court that this clause’s language clearly and unambiguously establishes that the Prathers cannot recover attorney fees by means of the dealer agreement.

¶30 In summary, we order the judgment be modified to reduce the damage award by \$12,300. As modified, the judgment and order are affirmed. On remand, the trial court is directed to reduce the judgment by \$12,300.

By the Court.— Judgment and order modified and, as modified, affirmed and remanded with directions. Costs denied to both parties.

Not recommended for publication in the official reports.

