COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1551

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

ESTATE OF HAROLD LARSON, BY REPRESENTATIVE BRUCE E. LARSON,

PLAINTIFF-APPELLANT,

V.

FOREST HILL MEMORIAL PARK, TAMINI KUBASH AND TOM POMIANEK,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed.*

WEDEMEYER, P.J.[1] The Estate of Harold E. Larson, by its personal representative, Bruce E. Larson (Larson), appeals from a judgment rendered in his favor against Forest Hill Memorial Park (Forest Hill).

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[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

Although Larson raises ten issues of trial court error, after review, this court condenses them to six: (1) whether Larson acted unreasonably in terminating his relationship with Forest Hill; (2) whether the trial court erred in granting judgment for $986; (3) whether the trial court erred in denying pre-judgment interest; (4) whether the trial court erred in denying attorney's fees under the Wisconsin Consumer Act; (5) whether the trial court erred in absolving two employees of Forest Hill of any personal liability for damages; and (6) whether the trial court erred as a matter of law in denying Larson the opportunity to make opening and closing arguments. For reasons set forth, this court affirms the trial court on each and every issue.

I. BACKGROUND

The evidentiary facts are substantially undisputed. On December 28, 1994, Larson, on behalf of the Estate of Harold E. Larson, ordered from Forest Hill a bronze memorial marker for the gravestone of his deceased father, Harold. The contractual relationship between the parties was embodied in a purchase agreement on Forest Hill's form. The purchase price was $1,395. The down payment was $700 with the balance of $695 due upon arrival of the ordered marker, and its approval by Larson. Larson supplied the art work for the intended marker, which was cast by a foundry subcontracted by Forest Hill. A zinc plate form of the proposed marker was accepted by Larson despite some flaws, and the balance of the contract price was paid. Upon review by others in the family, however, the marker was rejected. A second specimen was produced but, it too, was rejected. At this juncture, Larson demanded return of his money. Forest Hill refused claiming it had a ten-day cancellation policy in order to obtain a full refund. It did, however, offer to give Larson full credit or pay for another marker obtained from any other source. Larson refused these alternatives and commenced

this action against Forest Hill, Thomas Pomianek, and Tamini Kubash, employees of Forest Hill.[2] After a bench trial, the trial court ordered judgment for Larson against Forest Hill in the sum of $945 plus costs. In doing so, the court dismissed Larson's claim against Pomianek and Kubash, as individuals, denied Larson's claim for attorney's fees under the Wisconsin Consumer Act for bad faith, and denied his claim for pre-judgment interest. Larson now appeals.

II. ANALYSIS

A. Reasonableness Determination.

Larson's first claim of trial court error is the implicit conclusion made by the trial court that his decision to terminate the relationship with Forest Hill was unreasonable. This was the issue that this court asked the trial court to address on remand.

The question of reasonableness is a mixed one of fact and law. *See* ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis.2d 6, 19, 531 N.W.2d 597, 602 (1995). This court will not upset a trial court's findings of fact unless they are clearly erroneous. *See* ***Noll v. Dimicelli's, Inc.*** 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983).

When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses, *see* ***Gehr v. City of Sheboygan***, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977), and of the weight to be given to each witness' testimony, *see* ***Milbauer v. Transport Employes' Mut. Benefit Soc'y***, 56 Wis.2d

[2] This action was before this court once before in appeal No. 96-1612. Therein, this court reversed the trial court's dismissal of Larson's claim against Forest Hill and remanded for a new trial on the question of whether Larson's failure to approve the marker was reasonable.

860, 865, 203 N.W.2d 135, 138 (1973). This is especially true because the trier of fact has the opportunity to observe the witnesses and their demeanor on the witness stand. *See* ***Syvock v. State***, 61 Wis.2d 411, 414, 213 N.W.2d 11, 13 (1973).

The drawing of an inference on undisputed facts when more than one inference is possible is a finding of fact which is binding upon a reviewing court. *See* ***State v. Friday***, 147 Wis.2d 359, 370, 434 N.W.2d 85, 89 (1989). "It is not within the province of this court … to choose not to accept one inference drawn by a fact finder when that inference is a reasonable one." ***Id.*** at 370-71, 434 N.W.2d at 89.

After listening to the testimony of the witnesses, which essentially was uncontroverted, and to a degree participating in questioning the witnesses because Larson was *pro se*, the trial court made the following findings and conclusions. Larson reviewed the first version of the grave marker, approved it, paid for it and then, on afterthought, changed his mind. Forest Hill attempted to resolve the matter by granting Larson a credit. Forest Hill said it would pay for a subsequent marker out of the original $1,350 it received but Larson rejected the offer. Although the trial court found that the two versions of the marker Forest Hill presented to Larson were unacceptable, it also concluded that Larson's conduct in walking away from negotiations was also not acceptable because a substantial amount of money would have been returned to him. These findings of fact are clearly not erroneous and supply a satisfactory basis for the trial court's implicit conclusion that Larson's actions were not reasonable.

B. Judgment for $986.

Larson's second claim of error is that the trial court "issued a final judgment for $986 rather than $1,365 as determined at trial." The record belies this assertion. On May 15, 1998, the trial court reviewed the March 30, 1998, hearing transcript and then amended the previous judgment it had ordered to reflect an order for judgment of $945, plus costs. As evidenced by the bill of costs, this amounted to $986. For this reason, this claim of error is rejected.

C. Pre-judgment Interest.

Larson's third claim of error is the trial court's denial of pre-judgment interest on the judgment.

Whether a party is entitled to an award of pre-judgment interest is a question of law which is reviewed by an appellate court independent of the trial court's decision. *See* ***Loerhrke v. Wanta Builders, Inc.***, 151 Wis.2d 695, 706, 445 N.W.2d 717, 722 (Ct. App. 1989). Pre-judgment interest is recoverable "only on damages that are either liquidated or liquidable. In order to recover interest there must be a fixed and determinate amount which could have been tendered and interest thereby stopped." ***Imark Indus., Inc. v. Arthur Young & Co.***, 141 Wis.2d 114, 138, 414 N.W.2d 57, 67 (Ct. App. 1987), *rev'd in part on other grounds,* 148 Wis.2d 605, 436 N.W.2d 311 (1989).

Case law also gives some guidance as to when pre-judgment interest is not awarded. These circumstances include when there are multiple defendants and when there exists a genuine dispute. *See* ***Beacon Bowl, Inc. v. WEPCO***, 176 Wis.2d 740, 777, 501 N.W.2d 788, 803 (1993); ***Klug & Smith Co. v. Sommer***, 83 Wis.2d 378, 385, 265 N.W.2d 269, 272 (1978). The latter circumstance exists

here. It is clear from the trial record that Larson wanted all of his money returned and Forest Hill refused to do so. As the finder of fact, the trial court was left to determine what amount of refund Larson should receive. It took a great deal of questioning and prodding by the court to arrive at some measure of recovery for Larson and, at the same time, compensate Forest Hill for its costs. Because the damage issue was far from liquidable, the trial court was correct in denying pre-judgment interest.

D. Attorney's Fees.

Larson's fourth claim of error is that the trial court erred in denying him attorney's fees under the Wisconsin Consumer Act. From a review of the record, it appears that this claim is based on the refusal of Forest Hill to refund the amount Larson had paid it and from the double payment of a grave setting fee of $160. This claim of error is rejected for two reasons.

First, the trial court allowed Larson to amend his complaint to include return of the double payment. Nowhere in the trial record, however, can this court find any averment of a Consumer Act violation. In fact, in response to Larson's post-trial request for attorney's fees, the trial court concluded there was no Consumer Act violation because Forest Hill made reasonable efforts to grant a credit and pay for a new marker.

Secondly, if an issue, even though raised initially, is not argued in the briefs, it can be ignored by the court. *See* ***Riley v. Town of Hamilton***, 153 Wis. 582, 588, 451 N.W.2d 454, 456 (Ct. App. 1989). Moreover, even if an issue is raised and argued in some fashion, arguments inadequately briefed need not be addressed on appeal. *See* ***Grube v. Daun***, 173 Wis.2d 30, 64, 496 N.W.2d 106, 118 (Ct. App. 1992). Further, if an argument is undeveloped or unsubstantiated by

references to the record, the court need not address it. *See* ***Harris v. Kritzik***, 166 Wis.2d 689, 694, 480 N.W.2d 514, 516 (Ct. App. 1992). It is not this court's task to develop a proponent's argument or to establish its statutory or case law basis. Here, Larson cites no cases nor specific statutory authority for his claim. As a result, this court need not, and will not, entertain it.

E. Dismissal of Claims Against Employees.

Next, Larson claims the trial court erred in dismissing his claim against Pomianek and Kubash, employees of Forest Hill. The record reflects that Forest Hill was owned by Loewen Group International, Inc., a foreign corporation. At the completion of all the testimony, the trial court dismissed Larson's cause of action against the two employees. As in the previous claim of error, Larson sets forth no argument to support his claim nor is this court given the benefit of any authority upon which an argument could be made. For these reasons, we deem this claim abandoned.[3]

F. Opening and Closing Arguments.

Larson's last claim of trial court error concerns whether the trial court improperly denied him his right to make an opening and closing argument. Section 805.10, STATS., entitled "Examination of witnesses; arguments" reads in pertinent part: "The plaintiff shall be entitled to the opening and final rebuttal

[3] As a subset to his main claim of error, Larson claims error in the computation of costs in not allowing service fees for the two dismissed employees. Section 814.10, STATS., provides that if a party has an objection to the items constituting costs, it is necessary to file an objection to the bill of costs and petition the trial court within 10 days after the taxation of costs. Non-compliance with this provision is deemed a waiver of any objection. For lack of any record indicating compliance with this statute, this court concludes that such objection concerning service fees has been waived.

arguments." There is no question that Larson was entitled to such occasions for argument as a matter of right. The right, however, is not absolute. "A refusal by the trial court to permit the proper party to open and close is not necessarily prejudicial error." ***Carmody v. Kolocheski***, 181 Wis. 394, 396, 194 N.W. 584, 585 (1923). This rule was reaffirmed in ***Wells v. National Indem. Co.***, 41 Wis.2d 1, 8, 162 N.W.2d 562, 565 (1968). Here, as earlier observed, Larson, without counsel, was representing his father's estate. The trial court was aware of this circumstance and consequently conducted much of the questioning of witnesses to ascertain the nature of Larson's claim. In fact, Larson prevailed in his claim even though it was not to the extent he desired. Because there is no basis to conclude prejudice to Larson for the denial of his right to give opening and closing argument, this claim fails.

For all of the reasons stated above, this court affirms the judgment of the trial court.[4]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

[4] Forest Hill moves this court for frivolous costs and reasonable attorney's fees, alleging that Larson's appeal is frivolous. That motion is denied.