COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2134 **Cir. Ct. No. 2012CV206**

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

THE BARABOO NATIONAL BANK,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

KATHLEEN A. BRONKALLA,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten, and Sherman, JJ.

¶1 BLANCHARD, P.J. Kathleen Bronkalla owned a house that served as collateral for a mortgage held by Baraboo National Bank. The Bank foreclosed on the mortgage and sold the house at a sheriff's sale. The Bank subsequently filed suit alleging that Bronkalla breached the mortgage agreement

with the Bank and committed conversion by removing from the house "fixtures" in which the Bank had an interest, without permission from the Bank. The circuit court granted partial summary judgment to the Bank on liability and a jury returned a verdict on damages in favor of the Bank.

¶2 Bronkalla appeals the decision of the circuit court granting partial summary judgment, challenging only the court's conclusion that the items that Bronkalla removed are "fixtures" as that term is used in the mortgage agreement. Separately, Bronkalla appeals the court's denial of her motion after verdict seeking a new trial on the ground that the jury was improperly instructed. The Bank cross-appeals the court's denial of its motion after verdict, in which the Bank contended that the court erred in failing to instruct the jury on punitive damages. For the following reasons, we affirm on all issues.

BACKGROUND

¶3 Bronkalla executed a note to the Bank secured by a mortgage on real property, which included a security interest in a house that Bronkalla had constructed as her own residence. The mortgage included the following language:

> For valuable consideration, Grantor mortgages and conveys to Lender all of Grantor's right, title, and interest in and to the following described real property, together with all existing or subsequently erected or affixed buildings, improvements and fixtures.

The mortgage further provided that Bronkalla granted to the Bank "a Uniform Commercial Code security interest in the Personal Property" defined in the mortgage, and that upon default, Bronkalla "shall not remove, sever or detach the Personal Property from the" mortgaged premises. The mortgage defines "Personal Property" as

> all … fixtures[] and other articles of personal property now or hereafter owned by Grantor, and now or hereafter attached or affixed to the Real Property; together with all accessions, parts, and additions to, all replacements of, and all substitutions for, any of such property; and together with all proceeds … from any sale or other disposition of the [Personal and Real] Property.

¶4 Bronkalla defaulted on the terms of the note and mortgage, resulting in foreclosure. Prior to the sheriff's sale of the property, Bronkalla removed a number of items from the house, including door knobs, light fixtures, bathroom mirrors, appliances, and a kitchen center island.

¶5 The Bank filed a complaint for breach of the mortgage contract and conversion based on Bronkalla's removal of the items from the house. As a remedy for breach of contract, the Bank sought, among other things, "replacement costs" of the removed items totaling $45,000. As a remedy for the alleged conversion, the Bank sought compensatory and punitive damages "in an amount to be determined by a trier of fact."

¶6 The Bank moved for partial summary judgment on liability and asked the circuit court to order a trial on damages. To support its summary judgment motion, the Bank submitted to the court (1) discovery responses in which Bronkalla admitted that she had removed or allowed to be removed the items at issue, and (2) photos depicting the house before and after Bronkalla removed items or had them removed.

¶7 The circuit court granted the Bank's motion for partial summary judgment. The court explained in part that, based on undisputed evidence in the record, all items that were removed were "fixtures" except for the washing

machine, dryer, and refrigerator.[1] The court scheduled a date for a trial on damages.

¶8 After the circuit court granted the Bank's motion for partial summary judgment, but prior to the scheduled trial on damages, the Bank moved to amend its complaint to include a request for double damages pursuant to WIS. STAT. § 844.19(2) (2013-14),[2] on the ground that Bronkalla's removal of the items constituted "tortious waste." The circuit court granted the Bank's motion to amend its pleadings. In its amended complaint, the Bank alleged that it was entitled to double damages for "tortious waste" under § 844.19(2) because Bronkalla's "possession" of the "fixtures" was "unreasonable," "resulted in physical damage" to the house, and "substantially diminished" the value of the house.[3]

[1] The circuit court determined that genuine issues of material fact remained regarding whether the washing machine, dryer, and refrigerator were fixtures. The Bank appears to have abandoned any argument regarding these three items before the circuit court, and in any event, the Bank abandons any such argument on appeal, and therefore we do not refer to these items again in this opinion.

[2] WISCONSIN STAT. § 844.19 addresses damages in cases involving interference with interests in or physical injury to property, and in its subsection (2) provides: "If the injury or interference constitutes waste, the court shall give judgment for double the damages found." All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] WISCONSIN STAT. § 844.19 does not define "waste." However, the Bank argued before the circuit court and now argues on appeal that "[t]ortious waste to real property comprises three elements: (1) unreasonable conduct, (2) which results in physical damage to property and (3) which substantially diminishes the value of such property in which others have an interest. *Cheteck State Bank v. Barberg*, 170 Wis. 2d 516, 522, 489 N.W.2d 385 (Ct. App. 1992)." Bronkalla did not argue to the circuit court, and does not argue now, that this was not the correct test to apply. In any event, whether this is the correct test, and whether or not Bronkalla's conduct constituted "waste," is not pertinent to any issue raised on appeal. We reference this topic only to explain the procedural and factual posture of the instant case and to provide background on the arguments raised by the parties on appeal.

¶9 During the trial on damages, the Bank elicited testimony from a contractor regarding the replacement cost of the removed items, which the contractor opined was approximately $34,000. The Bank also elicited testimony from two Bank employees that Bronkalla's removal of the fixtures "substantially reduced the value of the house."

¶10 After the close of evidence, the parties discussed the special verdict and jury instructions. The court proposed a special verdict question asking "What sum of money, if any will fairly and reasonably compensate the [Bank] for the taking of the fixtures from" the foreclosed upon property. The court further proposed that the jury instruction on this question would simply state the content of the special verdict question. Bronkalla did not object to this special verdict question or its use as a jury instruction.

¶11 Prior to and during the jury instruction conference, the Bank proposed a number of special verdict questions asking whether Bronkalla's removal of the fixtures constituted "waste." Counsel for the Bank argued that, while the Bank's theory of recovery was replacement costs for the removed items, the Bank could recover double damages pursuant to WIS. STAT. § 844.19(2) if the jury determined that Bronkalla's removal of the items was "unreasonable," caused damage to the property, and resulted in a substantial reduction in the value of the property. However, the circuit court rejected the Bank's proposal to include these "waste" related questions in the special verdict.

¶12 The Bank also asked that if the court were to reject its special verdict questions regarding "waste," that the court include a question relating to punitive damages. The court also rejected this proposed question, explaining that the issue of punitive damages "is a gatekeeper determination for the Court based upon all of

the evidence, and I don't believe the evidence supports a punitive damage claim here."

¶13 In its closing argument to the jury, the Bank argued that the replacement cost of the items that Bronkalla had removed was $34,000.

¶14 During deliberations, the jury presented the court with the following question: "Is $34,000 the benchmark of the damage? Can the sum awarded be higher or lower than $34,000?" After discussing the jury's question with counsel for both parties, the court responded to the jury: "There is no benchmark. You should answer the question based upon the evidence produced at trial." After further deliberations, the jury awarded the Bank $34,000 in damages.

¶15 Both Bronkalla and the Bank filed motions after verdict. Bronkalla argued, among other things, that the court should grant a new trial on the ground that the jury was improperly instructed as to damages. The Bank argued that it was entitled to a new trial on the ground that the circuit court erred in failing to instruct the jury on the issue of punitive damages or "waste." After a hearing on the motions, the circuit court denied both parties' motions.

¶16 Bronkalla now appeals, and the Bank cross-appeals.

DISCUSSION

I. BRONKALLA'S APPEAL

A. Grant of Partial Summary Judgment to the Bank

¶17 Bronkalla conceded before the circuit court and concedes on appeal that she removed and retained the items from the house without any form of permission to do so from the bank. There is no dispute that permission was

required for Bronkalla to remove "fixtures," as that term is used in the mortgage agreement, and, thus, Bronkalla does not dispute that if she removed "fixtures" this breached the terms of the mortgage and constituted conversion. The disputed summary judgment topic was whether any of the items Bronkalla removed were fixtures. Bronkalla's sole argument on appeal is that whether they were fixtures involves disputed factual issues, and, thus, the circuit court erred in granting partial summary judgment to the Bank.

¶18 We review a circuit court's grant of summary judgment de novo, independently of the circuit court, applying the same methodology. ***AccuWeb, Inc. v. Foley & Lardner***, 2008 WI 24, ¶16, 308 Wis. 2d 258, 746 N.W.2d 447. Summary judgment is appropriate only "if there are no genuine issues of material fact, and the moving party, having established a prima facie case, is entitled to judgment as a matter of law." ***Id.***; WIS. STAT. § 802.08(2). "Summary judgment materials, including pleadings, depositions, answers to interrogatories, and admissions on file are viewed in the light most favorable to the nonmoving party." ***AccuWeb, Inc.***, 308 Wis. 2d 258, ¶16.

¶19 For the following reasons we conclude on our de novo review that the Bank makes a prima facie case that the items that Bronkalla removed were fixtures, and that Bronkalla fails to point to a genuine issue of material fact on this topic based on the summary judgment submissions of the parties.

¶20 Both in the circuit court and on appeal, the parties have shared an implicit assumption regarding interpretation of the word "fixture" as it appears in the mortgage agreement. This assumption is based on a frequently repeated definition of "fixture" that appears in Wisconsin case law in various contexts. We understand the parties to agree that we should treat this case law definition as a

plain language interpretation of this term as it appears in the mortgage. For purposes of resolving this appeal, we assume without deciding that this is an appropriate means of determining the meaning of "fixture" as it appears in the mortgage.

¶21 Proceeding on this assumption, the parties agree that we are to consider the following factors in determining whether a given item is a "fixture" under the mortgage agreement: "'(1) [a]ctual physical annexation to the real estate; (2) application or adaptation to the use or purpose to which the realty is devoted; and (3) an intention on the part of the person making the annexation to make a permanent accession to the freehold.'" *See* ***Premonstratensian Fathers v. Badger Mut. Ins. Co.***, 46 Wis. 2d 362, 367, 175 N.W.2d 237 (1970) (quoted source omitted). Under the case law, these factors do not have equal weight; intent of the person affixing the item to "make a permanent accession" "is the primary determinant of whether a certain piece of property has become a fixture." ***Id.*** at 367, 371.

¶22 Bronkalla argues that the circuit court erred in granting the Bank summary judgment on the ground that a genuine issue of material fact exists as to the third factor. Bronkalla asserts that the Bank failed to make a prima facie case that Bronkalla "inten[ded] to make all the items … permanent fixtures to the property."

¶23 To the extent that Bronkalla is arguing that in order to make a prima facie case regarding intent, the Bank had to present evidence regarding Bronkalla's subjective intent at the time she purchased and affixed to the house the items she later removed, she is incorrect, as she acknowledges in her reply brief on appeal. The "intent" factor in determining whether the removed items are fixtures

> is "not the actual subjective intent of the landowner making the annexation, but an objective and presumed intention of that hypothetical ordinary reasonable person, to be ascertained in the light of the nature of the article, the degree of annexation, and the appropriateness of the article to the use to which the realty is put."

See ***Wisconsin Dep't of Revenue v. A.O. Harvestore Prods., Inc.***, 72 Wis. 2d 60, 69, 240 N.W.2d 357 (1976) (quoted source omitted); *see also* ***Premonstratensian Fathers***, 46 Wis. 2d at 372-73.

¶24 As referenced above, in order to present a prima facie case on summary judgment that "an objective and presumed" intent of a "hypothetical ordinary reasonable person" regarding the items that Bronkalla removed from the house was that those items be permanently annexed to the property, the Bank submitted "before and after" photos. We observe that these photos show that, before Bronkalla removed them, the items were affixed to the structure of the house in the manner that such items are typically affixed to a house. For example, the door knobs appear to be in place as functioning knobs and the bathroom mirrors are attached to the bathroom walls above bathroom vanities. We agree with the circuit court that these photos are sufficient to establish a prima facie case that the items Bronkalla removed were intended to be permanently annexed to the house.

¶25 Bronkalla argues that even if the Bank established a prima facie case that these items were fixtures, she submitted summary judgment evidence creating a genuine issue of material fact on this issue. Bronkalla points to the fact that, in her responses to the Bank's interrogatories and requests to admit, she stated that various of the removed items were "not attached" to the house and, therefore, a factual question remains regarding intent. However, it is plain from the summary judgment record that the items were annexed to the house. When Bronkalla was

presented with the "before and after" photos at her deposition, she admitted that the removed items were attached to the house, as depicted in the photos, at some point after construction of the house and prior to sheriff's sale, during the time she was subject to the terms of the mortgage. If Bronkalla means to argue that the items were "not attached" in a legal sense because at some point in time and for some length of time they were not attached to the house, she does not support that argument with citation to pertinent legal authority.

¶26 Bronkalla may mean to make a related argument, namely, that any items she purchased and installed in the house after she signed the mortgage cannot be fixtures. However, Bronkalla cites no authority to support this proposition and we reject this argument, to the extent she intends to make it, as wholly undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). In addition, we doubt that a developed argument to this effect could have merit. The mortgage agreement specifically states that the Bank's security interest in the fixtures includes an interest in those fixtures "now *or hereafter* owned by Grantor, and now *or hereafter attached or affixed to the Real Property*." (Emphasis added.)

¶27 In sum, we agree with the circuit court that the Bank established a prima facie case that the removed items were fixtures, and that Bronkalla failed to point to any evidence in the summary judgment submissions creating a genuine issue of material fact on this topic. We therefore affirm the circuit court's grant of partial summary judgment to the Bank.

B. Jury Instructions

¶28 Bronkalla's argument regarding the instructions presented to the jury at the damages trial is difficult to follow. Bronkalla argues:

> When the Bank first filed this action, it sought to recover solely the replacement costs of the fixtures it said were removed. The Bank confused the issue of what would be heard at trial by its late-filed amended complaint, in July 2013, in which it added a count of "tortious waste" under [WIS. STAT. §] 844.19(2) …, alleging that the value of the property had been substantially diminished.
>
> This filing muddied the waters as to which measure of damages the Bank was going to pursue, and the resultant trial included both testimony on replacement value and substantial diminution; but the jury was not told to use one or the other measure, resulting in a miscarriage of justice.

As best we understand this argument, it is that the Bank was required to argue only one measure of damages (replacement cost or diminution of value), but it instead argued both, which, in the absence of a jury instruction guiding the jury on which measure of damages to use, resulted in jury confusion that warrants a new trial.

¶29 There are multiple problems with this argument. First, Bronkalla fails to cite any on-point authority to support her assertion that the Bank was limited to presenting evidence of only the replacement value of the removed items. The only citation she provides supports the opposite conclusion. *See* ***Laska v. Steinpreis***, 69 Wis. 2d 307, 313-14, 231 N.W.2d 196 (1975) ("Evidence may be adduced by either party as to both diminished value and cost of repair with the lesser amount awardable under the two tests to be the proper measure of damages."). Second, the Bank in fact argued for replacement costs as its sole theory of recovery. The Bank argued diminution of value of the property only to establish "waste" under WIS. STAT. § 844.19(2) in order to receive double damages, as measured by the replacement value of the removed items. *See supra*

n.3. Third, as the Bank points out, Bronkalla did not object to the jury instructions and special verdict form presented to the jury. Failure to object at the instruction conference "constitutes waiver of any error in the proposed instructions and verdict." WIS. STAT. § 805.13(3).

¶30 Bronkalla argues in the following terms that her failure to object is not dispositive:

> Even where no specific instruction is requested, or no specific objections made as to instructions, a court must reverse a jury verdict and order a new trial if the jury was likely to be confused as to how to measure damages.

Bronkalla cites ***Laska*** to support this argument. In ***Laska***, the court granted a new trial even though no objection to the jury instructions had been made on the ground that, based on the instructions actually given regarding damages, justice was "probably miscarried." ***Laska***, 69 Wis. 2d at 316. Bronkalla apparently means to argue that justice was similarly miscarried here. For the following reasons, we disagree.

¶31 The Bank presented evidence that the replacement cost for the removed items was $34,000 and argued that the jury should award the Bank that amount. The jury returned a verdict in that amount. The fact that the jury sought clarification from the circuit court does not, in and of itself, support the conclusion that justice was miscarried. Further, the fact that the jury returned a verdict of $34,000 after seeking clarification in no way undermines the ordinary assumption that the jury understood its duties and tried to carry them out properly. Bronkalla was free to—and, as she notes on appeal, did—present evidence that the diminution in value of the property was a lesser amount than the replacement costs and was due to a failing economy rather than her removal of the items. *See* ***Laska***,

69 Wis. 2d at 314 ("[T]he person sued for damages, if he [or she] is dissatisfied with damages based on the one approach, can show … that damages based on the alternative test was a smaller sum."). The fact that the jury was not persuaded by Bronkalla's suggestion to award the Bank a lesser sum does not mean that justice was miscarried.

¶32 Based on various references to trial testimony in her appellate briefing, it appears that Bronkalla might mean to argue that the jury was not presented with sufficient evidence from which it could have reached $34,000 as a damages award. We reject this argument, to the extent that she intends to make it, on the ground that Bronkalla fails to come to terms with the heavy burden she faces in making this argument. *See* ***City of Milwaukee v. NL Indus.***, 2008 WI App 181, ¶¶20-21, 315 Wis. 2d 443, 762 N.W.2d 757 (A jury verdict will not be overturned "'if there is any credible evidence which, under any reasonable view, fairly admits of an inference that supports a jury's finding.'" (quoted source omitted)); *see also* WIS. STAT. § 805.14(1). Here, the contractor's testimony that the replacement cost of the removed items was $34,000 is a sufficient basis on which to uphold the jury's verdict.

¶33 To the extent that Bronkalla means to make any additional arguments on appeal, we fail to discern any that are developed and supported with citation to the record and legal authority, and we reject any additional arguments on that ground. *See* ***Pettit***, 171 Wis. 2d at 646-47.

II. THE BANK'S CROSS-APPEAL

¶34 The Bank argues that the court "committed prejudicial error when it refused to instruct [the jury] on the question of punitive damages."[4] Punitive damages are available "if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." WIS. STAT. § 895.043(3). The interpretation of a statute, and the question of "whether there is sufficient evidence to submit the question of punitive damages to the jury" are questions of law that we review de novo. ***Strenke v. Hogner***, 2005 WI 25, ¶13, 279 Wis. 2d 52, 694 N.W.2d 296.

¶35 We need not address whether the Bank presented sufficient evidence to submit a request for punitive damages to the jury. This is because in its principal brief in its cross-appeal, the Bank fails to cite the statute explaining when punitive damages are available, and also fails to explain how the evidence demonstrates that Bronkalla's conduct warranted submission of punitive damages to the jury based on the language of the statute. The closest the Bank comes is to argue that it "presented strong evidence supporting a finding by the fact finder that Bronkalla converted [the Bank's] property. Accordingly, it should have been left to the jury to decide whether this taking was done in an intentional disregard of the rights of [the Bank]." However, the Bank does not support its apparent position that if conversion is clearly shown, this necessarily demonstrates intentional disregard of the rights of another.

[4] The Bank abandons on appeal any issue related to the circuit court's decision not to adopt the Bank's proposed special verdict questions and instructions regarding "tortious waste."

¶36 Only in its reply brief does the Bank develop for the first time an argument that Bronkalla's conduct warranted the submission of punitive damages to the jury. We conclude that this comes too late, and we reject the argument on that ground. *See* ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶30 n.6, 305 Wis. 2d 658, 741 N.W.2d 256.

CONCLUSION

¶37 For the forgoing reasons, we affirm the decisions of the circuit court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.