

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 16, 2015

Diane M. Fremgen
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. 2014AP1117

Cir. Ct. No. 2011CV1752

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**ALAN GOLDBERG, INDIVIDUALLY AND AS TRUSTEE OF THE
GOLDBERG FAMILY TRUST U/D/O 5/20/98 AND
WENDY A. GOLDBERG, INDIVIDUALLY AND AS TRUSTEE OF
THE GOLDBERG FAMILY TRUST U/D/O 5/20/98,**

PLAINTIFFS-APPELLANTS,

v.

MICHAEL DiMAGGIO AND CANDACE S. DiMAGGIO,

DEFENDANTS,

PELLA CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
JUAN B. COLÁS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Alan Goldberg, Wendy Goldberg, and the Goldberg Family Trust (collectively, “Goldberg”) appeal a circuit court order that granted Pella Corporation’s motion to dismiss Goldberg’s breach of warranty claim against Pella at the close of the plaintiffs’ case. Goldberg contends that the court erred by dismissing Goldberg’s breach of warranty claim against Pella because: (1) Pella’s warranty established coverage for Goldberg’s claim based on condensation on Pella windows and doors in Goldberg’s home; (2) Pella’s admission that the condensation was not consistent with the proper functioning of its windows and doors established a prima facie case of breach of warranty; (3) there was no evidence to establish that an exclusion to the warranty coverage applied; and (4) dismissal was inconsistent with the court’s decision denying a motion to dismiss Goldberg’s claim against the sellers of the house for failing to disclose the condensation as a defect. We reject these contentions and affirm the circuit court’s order dismissing Goldberg’s claim against Pella.

¶2 In March 2010, Goldberg filed a warranty claim with Pella. Goldberg claimed that the Pella windows and doors in Goldberg’s home were exhibiting condensation that resulted in icing and frosting. Pella denied the claim.

¶3 In April 2011, Goldberg filed this action against Pella for breach of warranty. Goldberg also included claims against Michael and Candace DiMaggio (collectively, “DiMaggio”), based on DiMaggio failing to disclose the condensation problem prior to Goldberg purchasing the home from DiMaggio.

¶4 At the close of Goldberg’s case at a bench trial, Pella and DiMaggio both moved to dismiss Goldberg’s claims against them. The circuit court granted Pella’s motion to dismiss, finding that Goldberg had the burden to show that the condensation was caused by a defect in the material or workmanship of Pella’s

products¹ and that Goldberg had not met that burden. The court denied DiMaggio's motion to dismiss, finding that the condensation was evidence of a "defect" as defined in the real estate condition report, that is, a condition that would have a significant adverse effect on the value of the property. Goldberg appeals the order granting Pella's motion to dismiss Goldberg's breach of warranty claim.

¶5 After the plaintiff has presented his or her evidence in a trial to the court, the defendant may move to dismiss "on the ground that upon the facts and the law the plaintiff has shown no right to relief." WIS. STAT. § 805.17(1) (2013-14).² When deciding a motion to dismiss under § 805.17, the circuit court is not required to view the evidence in the light most favorable to the plaintiff. *Meas v. Young*, 138 Wis. 2d 89, 95 n.4, 405 N.W.2d 697 (Ct. App. 1987). Rather, the court may make factual findings and dismiss the case if it concludes that the plaintiff has failed to establish a prima facie case. *Household Utilities, Inc. v. Andrews Co.*, 71 Wis. 2d 17, 24-25, 236 N.W.2d 663 (1976); § 805.17(1).

¶6 Here, the question is whether Goldberg established a prima facie case for breach of warranty, a question of law that we decide independently. *See Madison Reprographics, Inc. v. Cook's Reprographics, Inc.*, 203 Wis. 2d 226, 238, 552 N.W.2d 440 (Ct. App. 1996) (we review de novo whether the facts of a case meet a particular legal standard). We uphold the circuit court's underlying

¹ The circuit court specifically mentioned only windows, but no party argues that there is any significance to a distinction between the windows and doors in this case.

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

factual findings under the clearly erroneous standard. WIS. STAT. § 805.17(2); *Madison Reprographics, Inc.*, 203 Wis. 2d at 238.

¶7 Goldberg argues first that Pella’s warranty covers condensation issues on Pella windows and doors even if the condensation is not due to a “defect” in the windows and doors themselves. Goldberg acknowledges that the relevant section of Pella’s warranty covers “a defect in materials or workmanship of your Pella product not covered by the glass warranty.” However, Goldberg points to language elsewhere in the warranty materials to argue that the warranty coverage is not limited to “defects.”

¶8 Goldberg argues that, read as a whole, Pella’s warranty also provides coverage for “problems,” “malfunctions,” and “failures.” Goldberg cites the section titled “The Pella Pledge,” which states that, “should you ever have any *problems* with your products, this warranty represents our commitment to address and fairly resolve them”; the “Limitations” section, which excludes specified “*problems*” as well as consequential damages based on “a product defect or *malfunction*”; and the glass warranty, which covers a “*failure* of the glass.” (Emphasis added.) Goldberg argues that the term “defect” in Pella’s warranty is thus ambiguous, and must be construed against Pella, citing *Maryland Arms Ltd. P’ship v. Connell*, 2010 WI 64, ¶23, 326 Wis. 2d 300, 786 N.W.2d 15. Goldberg argues that, construing the term “defect” against Pella, condensation issues fall within Pella’s warranty coverage for “problems,” “failures,” and “malfunctions.”

¶9 Additionally, Goldberg argues that the warranty’s exclusion of coverage for “problems caused by high humidity (condensation and frost)” necessarily means that there *is* coverage for condensation and frost that is *not* caused by high humidity, even in the absence of a “defect.” Goldberg asserts that,

because the limitation excludes coverage for condensation and frost caused by high humidity, but does not expressly exclude coverage for condensation and frost *not* caused by high humidity, the warranty must cover all cases of condensation that are not caused by high humidity. See *Anderson v. American Family Mut. Ins. Co.*, 178 Wis. 2d 835, 840, 505 N.W.2d 433 (Ct. App. 1993) (“[S]pecific mention of one or more matters is considered to exclude other matters of the same nature not expressly mentioned.”). Goldberg then asserts that, if a “defect” were required for the warranty to apply, the “high humidity” exclusion would be rendered meaningless. In other words, Goldberg argues that, if a “defect” were necessary to trigger coverage, that “defect” would always be the cause of the condensation; thus, there would be no need to exclude “problems caused by high humidity.” See *Maryland Arms*, 326 Wis. 2d 300, ¶45 (“[C]ontract language should be construed to give meaning to every word, ‘avoiding constructions which render portions of a contract meaningless, inexplicable or mere surplusage.’” (quoted source omitted)). We are not persuaded.

¶10 As Pella points out, the first step in our analysis is to determine whether the warranty applies; only if the warranty applies do we then turn to the warranty’s limitations. See *American Family Mut. Ins. Co. v. American Girl, Inc.*, 2004 WI 2, ¶24, 268 Wis. 2d 16, 673 N.W.2d 65. We also agree with Pella that the plain language of the warranty requires “a defect in materials or workmanship,” and that the plain requirement for a “defect” cannot be avoided by a creative reading of other parts of the warranty materials. Moreover, we disagree with Goldberg’s reading of the warranty materials as a whole as expanding the coverage granted by the warranty itself; nothing in the language cited by Goldberg purports to grant coverage in the absence of a defect. Accordingly, we reject Goldberg’s contention that the warranty applies even in the absence of a defect.

¶11 Next, Goldberg argues that Pella’s admission in discovery that the formation of condensation was not consistent with the proper functioning of its windows and doors was an admission of a “defect,” establishing a prima facie case of breach of warranty. We disagree.

¶12 Goldberg’s interrogatory to Pella reads as follows: “State whether the formation of moisture, ice, and/or frost on any interior portion of the Pella windows and/or sliding doors installed for residential use is always consistent with the proper performance of those windows and/or sliding doors.” Pella provided the following response:

Assuming that the questioner seeks Pella’s corporate knowledge with respect to this interrogatory, Pella states that the formation of moisture, ice, and/or frost on any interior portion of Pella windows and/or sliding doors installed for residential use is not consistent with the proper performance of those windows and/or sliding doors. There are many factors independent of the product (e. g. windows and/or sliding doors) that may contribute to the formation of moisture, ice, and/or frost on any interior portion of any window and/or sliding door installed for residential use, including, but not limited to, humidity, inside temperature, outside temperature, weather, and installation.

¶13 The circuit court found that Pella’s admission, as a whole, conveys “that there may be conditions under which the formation of moisture is consistent with proper performance of the windows and not due to improper performance of the windows.” Goldberg disputes this interpretation, arguing that the second sentence of Pella’s answer does not negate the clear statement in the first sentence that the formation of moisture is not consistent with the proper performance of Pella’s products. We do not share Goldberg’s reading of Pella’s answer. Rather, we agree with the circuit court that, read in its entirety, Pella’s answer indicates that the formation of moisture is not consistent with the proper functioning of

Pella products, but that there are various conditions that may cause moisture to form on the windows and doors even if the windows and doors are functioning properly. Accordingly, we reject Goldberg's argument that Pella's answer to Goldberg's interrogatory established a prima facie case of breach of warranty.

¶14 Next, Goldberg contends that there was no evidence that the "high humidity" exclusion applied. As explained above, however, we do not reach the question of whether an exclusion applies if the warranty does not provide coverage in the first place. Because we conclude, as an initial matter, that Goldberg did not establish a prima facie case that the warranty provided coverage, we do not reach his argument based on the warranty's high humidity exclusion.

¶15 Finally, Goldberg argues that the court's order granting Pella's motion to dismiss was inconsistent with the court's decision to deny DiMaggio's motion to dismiss. Goldberg contends that the court's finding that Goldberg put forth evidence that DiMaggio failed to disclose a "defect" as to the condensation cannot be reconciled with the court's finding that Goldberg had not put forth any evidence of a "defect" as required by Pella's warranty. Again, we disagree.

¶16 The circuit court granted Pella's motion to dismiss because Goldberg had failed to establish a prima facie case that the condensation on the Pella windows and doors in Goldberg's home resulted from a "defect" in the Pella products as opposed to some other condition of the house. Separately, the court denied DiMaggio's motion to dismiss because the condensation itself was a "defect" of the house that DiMaggio was required to disclose to Goldberg. Because the court's ruling as to Pella was based on Goldberg's failure to show a "defect" of the Pella windows and doors, and the court's ruling as to DiMaggio

was based on Goldberg showing a “defect” as to the house, we disagree with Goldberg’s claim that the rulings were inconsistent.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

