COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-3134 and 98-3196

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

DAVID PAGEL AND CATHERINE PAGEL,

PLAINTIFFS-RESPONDENTS,

V.

ROBERT GAFFNEY, A/K/A BOB GAFFNEY AND WENDY GAFFNEY, D/B/A GAFFNEY CONSTRUCTION,

DEFENDANTS,

WICKES LUMBER COMPANY,

DEFENDANT-APPELLANT.

DAVID PAGEL AND CATHERINE PAGEL,

PLAINTIFFS-RESPONDENTS,

V.

ROBERT GAFFNEY, A/K/A BOB GAFFNEY, AND WENDY GAFFNEY, D/B/A GAFFNEY CONSTRUCTION,

DEFENDANTS-APPELLANTS,

WICKES LUMBER COMPANY,

DEFENDANT-RESPONDENT.

APPEALS from a judgment and orders of the circuit court for Marathon County: WARREN WINTON, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Gordon Myse, Reserve Judge

PER CURIAM. This construction defect litigation arose between homeowners Catherine and David Pagel and the home builders, Robert and Wendy Gaffney, d/b/a Gaffney Construction (Gaffney), and the home plan drafter and materials supplier, Wickes Lumber Company. Wickes appeals, contending it had no obligation to the Pagels and had complied with its contract with Gaffney. Gaffney and Wickes both appeal the trial court's judgment awarding compensatory and punitive damages resulting from an off-center garage roof peak, contending that there was no damage from the defect and that punitive damages are unavailable in a contract action. They also assert that the court's order assessing costs against them in connection with their motion to dismiss the punitive damages claim was inappropriate.

Gaffney separately asserts: (1) the court's award of the cost of repair for defects other than the garage roof was in error because: (a) the alleged defects were not actually defects, (b) the repair of these defects constitutes economic waste, and (c) the Pagels failed to mitigate damages; (2) the court's order awarding double costs and interest for failure to accept a settlement offer was improper because the offer was ambiguous and contingent; and (3) the trial

court should have awarded Gaffney the contract balance. Finally, Gaffney also claims that the court erred by assessing it with any costs associated with replacing the garage roof, asserting that it is Wickes' responsibility.

We conclude that Wickes had contractual obligations to the Pagels and that it breached those obligations in connection with the off-center garage peak defect. We further determine that replacement cost damages were appropriate because no other credible evidence was presented to establish an alternative measure of damages. However, we also hold that the punitive damages award was inappropriate because Wickes and Gaffney had no independent tort duty to construct an on-center peak, and punitive damages are not available for a breach of contract. We conclude that awarding actual costs in connection with the defendants' motions to dismiss the punitive damages claim was inappropriate.

With respect to Gaffney's issues, we determine that: (1) the trial court's findings that the claimed defects were indeed defects were not clearly erroneous; (2) the repair cost was the appropriate measure of damages because Gaffney failed to present credible evidence to support an alternative measure; (3) the trial court's finding that the Pagels offered to permit Gaffney to repair or replace the existing defects and therefore mitigated damages is not clearly erroneous; and (4) the settlement offer was sufficiently clear to permit Gaffney to assess its exposure. We therefore affirm the trial court's decision on these matters.

Because we cannot find in the record that the trial court disposed of Gaffney's claim for the contract balance or the cross-claims between Wickes and Gaffney, we remand these issues to the trial court for determination. We also remand the issue of the allocation of the damages between Wickes and Gaffney in connection with the off-center garage peak and costs of the action because the

court did not explicitly rule on these items, and they may be affected by the court's resolution of the cross-claims. Therefore, we affirm in part, reverse in part and remand for further proceedings.

FACTS

The Pagels and Gaffney entered into a building contract whereby Gaffney would construct a home for the Pagels. The contract provided that Gaffney would construct the house according to a house plan and certain specifications. Wickes drew up the house plans with input from the Pagels and Gaffney and provided the majority of building materials. The Pagels, accompanied by Gaffney, met several times with Wickes' personnel.

As the site was being prepared for excavation, David Pagel requested that the garage be made two feet wider. Gaffney consented. The plans and drawings were not, however, changed to reflect the wider garage. Gaffney communicated to Wickes that the garage would be two feet larger, and Wickes ordered an additional roof truss, believing the garage was being expanded in length rather than width. No one measured the actual foundation, which was two feet wider than provided for in the original plans, although when the truss manufacturer's representative asked if he should, he was told by Gaffney's personnel that there was no need to do so. The roof trusses that ultimately arrived conformed to the original plan and were therefore built for a garage two feet narrower than existed. At that point, Wickes and Gaffney met and discussed several options to address the problem. Neither discussed the matter with the Pagels. Ultimately, Gaffney opted to use a girder truss and hand-frame the truss system. This resulted in the garage peak being one foot off-center. The Pagels did

not notice the defect until the siding was placed on the house. Despite discussions, nothing was done to reconstruct the roof.

The home was largely complete in 1995. Gaffney sent a final billing in May. The Pagels sent Gaffney several letters in June outlining items that needed to be repaired or replaced or completed. The Pagels retained a building inspector, who found sixteen building code violations during his inspection. They also retained a building contractor, Dan Barton, to inspect the home. Barton prepared a list of items that needed repair and provided cost estimates. Among the defects Barton found in the house were: (1) the roof was wavy due to inadequate gapping between the roof sheathing; (2) the garage slab settled toward the house and was no longer pitched toward the floor drain; (3) the basement floor was uneven and cracked; (4) the interior drywall was bowed in places and had a number of "nail pops";[1] (5) the interior floors were uneven between rooms as a result of Gaffney's failure to install subfloors of adequate thickness; and (7) the garage roof peak was off center.

In July, the Pagels filed suit against Gaffney to recover for breach of contract for alleged defects in the home. Gaffney counterclaimed for the balance due under the contract. The Pagels subsequently joined Wickes as a defendant in connection with the off-center garage peak. Wickes and Gaffney cross-claimed against each other on this defect as well.

Shortly before trial, the Pagels amended their complaint to allege punitive damages. Both Wickes and Gaffney filed partial summary judgment

[1] The record does not contain a definition of a "nail pop." "Nail pops" occur where the drywall is not tightly fastened to the stud or ceiling.

motions to dismiss the claim for punitive damages. The court denied the defendants' motions and awarded costs, including actual attorney fees, to the Pagels. It did not explain why actual costs associated with the motion were being awarded.

The trial was to the court, which found that the Pagels were customers of Wickes and that an implied contract existed between Wickes and the Pagels. The court further concluded that Gaffney and Wickes breached their contracts with the Pagels and that both Wickes and Gaffney were negligent in constructing the off-center garage roof. The trial court also found that Gaffney and Wickes both agreed to proceed with the girder construction, despite knowing it would result in an off-center peak, with Gaffney making the final decision to do so. Neither Gaffney nor Wickes informed the Pagels of the problem or decision. The court found the cost to reconstruct the roof was $14,910. It rejected the appraiser's testimony, offered by Wickes and Gaffney, that the defect was not easily observable. It also rejected her testimony that there was no diminution in value caused by the roof because she did not use the generally accepted method of comparing the value of the home with a defect to the value of the home without a defect. The trial court also found that Wickes' and Gaffney's decision to rectify the truss problem so as to cause the peak to be off center without informing the Pagels "constituted an outrageous act—willful or wanton misconduct in reckless disregard of the rights or interest of the plaintiffs."

The court further found the home was constructed with sixteen building code violations and twenty-nine defects. It found that the defects Barton

identified were indeed defects and that they all required repair or replacement.[2] The cost to correct the defects was $57,175.[3] The court concluded that the defects and violations were due to the contractor's negligence, i.e., its failure to exercise the required standard of care and to follow the terms of the building contract and plans. The trial court awarded judgment to the Pagels against both Wickes and Gaffney. The judgment against Wickes was for $14,910 actual damages for the garage roof peak, $25,000 punitive damages and costs. The judgment against Gaffney was for $57,125 actual damages, $25,000 punitive damages and costs.

Prior to trial, the Pagels had submitted offers to settle with Wickes for $14,000, and with Gaffney for $44,000. The Gaffney offer stated that the Pagels would settle for Gaffney's $44,000 payment, and indicated that if Wickes accepted the Pagels's $14,000, the Pagels would credit Gaffney that amount against the $44,000. The court awarded the Pagels double costs and interest because the judgments against both Wickes and Gaffney exceeded the offers to settle.

We will first examine Wickes' contention that it had no obligation to the Pagels, that it had fulfilled its contract with Gaffney, and then the joint assertions of Wickes and Gaffney. The joint issues involve the off-center garage

[2] The court relied on Barton's testimony to determine the existence of and the costs of remedying the defects. It found him to be a "very credible witness." It found that the building inspector's testimony supported Barton's testimony.

[3] The court's findings were that: (1) the roof was wavy, caused by the failure of Gaffney to gap one-eighth inch between sheets of roof sheathing, with a repair cost of $6,800; (2) the garage floor sunk, slopes toward the house, and was not pitched toward the floor drain, with a repair cost of $6,720; (3) the basement floor had high and low spots, was not sloped toward the floor drain and had an extensive crack that went all the way through the floor, with a repair cost of $11,130; (4) the drywall inside the house was bowed inward, the archways were too wide and that there were nail pops in every room, with a repair cost of $7,678; and (5) the floors in the house were not even, with a repair cost of $3,993.

roof peak. Initially, we address the trial court's determination that the garage roof needed to be reconstructed, then the punitive damage award against Wickes and Gaffney, and, finally, the order awarding actual attorney fees on the motion to dismiss the punitive damage claim.

After resolving the joint issues, we address Gaffney's issues. We first consider the court's rulings that the defects were significant, the cost of repair was the measure of damages and that the Pagels mitigated damages. Next, we will address the offer to settle and the court's failure to award Gaffney the contract balance. Finally, we address Gaffney's claim against Wickes.

Wickes' Contract Obligations to the Pagels

Wickes contends that it did not have a contractual relationship with the Pagels. It contends its contractual duty to draft plans and supply the necessary materials extended only to Gaffney. We disagree because the trial court's finding that the Pagels had an implied contract with Wickes was not clearly erroneous.

Whether an implied contract exists is a question for the fact finder. ***Patti v. Western Machine Co.***, 72 Wis.2d 348, 353-54, 241 N.W.2d 158, 161 (1976). When the trial judge acts as the finder of fact, and when there is conflicting testimony, the trial judge is the ultimate arbiter of the witnesses' credibility. ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 644, 340 N.W.2d 575, 577 (Ct. App. 1983). When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact. ***Id***. Further, findings of fact will not be set aside unless they are clearly erroneous. Section 805.17(2), STATS.

For a contract to exist there must be an offer, an acceptance and consideration. ***Goossen v. Estate of Standaert***, 189 Wis.2d 237, 247, 525 N.W.2d 314, 318 (Ct. App. 1994). The offer and acceptance need not occur expressly and may be implied. ***Theuerkauf v. Sutton***, 102 Wis.2d 176, 183-84, 306 N.W.2d 651, 657 (1981). "The essence of an implied in fact contract is that it arises from an agreement circumstantially proved." ***Id***. at 184, 306 N.W.2d at 657. The existence of an agreement is determined by the use of an objective standard. "[A]n implied [in fact] contract must be one which arises under circumstances which, according to ordinary course of dealing and common understanding of men, show a mutual intention to contract." ***Id***. at 185, 306 N.W.2d at 658 (quoted source omitted).

Wickes argues that it simply provided materials to Gaffney and therefore had no contract with the Pagels. The trial court determined that there was an implied contract between the Pagels and Wickes. The court found that the Pagels had met several times with Wickes and were Wickes' customers. Wickes developed the design and plans for the home and developed several options to deal with the two-foot-short trusses. On their face, the plans Wickes developed for the home indicated that they were for the Pagel home; the Pagels's names are on each page. The Pagels believed they were customers of Wickes and Wickes' personnel considered them customers. Wickes does not explain why these factual findings are clearly erroneous and, because they are supported by evidence in the record, we conclude that they are not.

Wickes, in its early meetings with the Pagels, proposed to draft the Pagels's house plan and provide the materials to build the home; the offer. The Pagels accepted the Wickes house plan and chose to use Wickes as the materials

supplier. Wickes would be paid for the materials by Gaffney, as the Pagels's agent; the consideration.

With respect to Wickes' breach, the trial court determined that Wickes did not change or modify the original plans, although being made aware of a change in the garage design. Wickes also failed to notify the truss manufacturer that the plans had been changed. The trial court further found that Wickes failed to deliver the correct trusses to the job site, thus breaching that duty as well. Wickes does not address why these findings are clearly erroneous and, given the record, we cannot say that they are.[4]

The obligations implied in the contract included Wickes' duty to ensure the correct materials were delivered to the job site in conformity with the house plan. Once it was aware of the problem with the trusses, it had an obligation to provide materials in accordance with the modified plan that would not result in a defect. *See* ***Colton v. Foulkes***, 259 Wis. 142, 146, 47 N.W.2d 901, 903 (1951) ("Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done …."). Because Wickes failed to obtain new trusses and developed a design change leading to the defective off-center roof, it breached the contract. We conclude that the record supports the trial court's finding that Wickes breached its contract with the Pagels.

Repair of the Garage Roof

[4] Our standard of review in connection with whether there was a breach is whether the trial court's finding of a breach was clearly erroneous. *See* ***Handicapped Children's Educ. Bd. v. Lukaszewski***, 112 Wis.2d 197, 205, 332 N.W.2d 774, 778 (1983).

The reasonable cost of repair rule and diminished value rule govern the measure of damages for defects in the performance of building contracts. *See* 3 DAN B. DOBBS, DOBBS LAW OF REMEDIES § 12.19(1), at 432 (2d ed. 1993). Where there is a breach of contract, the law attempts to give the parties exactly what they contracted for or, if this is not possible or feasible, then its equivalent in money. ***Tri-State Home Improve. Co. v. Mansavage***, 77 Wis.2d 648, 656, 253 N.W.2d 474, 477 (1977). Generally, the measure of damages is the cost of correcting the defect or completing the omission; with this money, the aggrieved party can specifically correct the defects and supply the omissions. ***W.G. Slugg Seed & Fertilizer v. Paulsen Lumber***, 62 Wis.2d 220, 225-26, 214 N.W.2d 413, 416 (1974).

> This measure of damages is practical and attains the desired result only when the correction or completion does not involve unreasonable destruction of the work done so that the cost of corrections is not materially disproportionate to the value of the corrections. If reconstruction and completion in accordance with the contract involves unreasonable economic waste, then the rule as to those defects is the difference between the value the building would have had if properly constructed and the value that the building does have as constructed.

Id. at 226, 214 N.W.2d at 416.

Wickes and Gaffney assert that the off-center roof was structurally sound and roof reconstruction results in economic waste. They argue that the trial court should have measured the damages by the diminution in value the defect caused. Under that measure, they contend there is no damage because there was no diminution in value. Although we agree that diminution in value is an appropriate measure when repair or replacement results in economic waste, Wickes and Gaffney failed to properly measure diminution in value and therefore

provided no credible evidence of the diminution in value. Absent that evidence, the cost of repair was the appropriate measure of damages.

The only evidence Wickes or Gaffney presented with respect to the diminished value caused by the off-center roof peak was from an appraiser who testified that the defect did not affect the value of the home. The appraiser did not compare the value of the home with the defect to the value of the home without the defect. Rather, she testified that she showed photographs of the home to people and because they did not object to the off-center peak, she opined that the defect caused no diminution in value. The trial court rejected this opinion, and we concur with its decision for two reasons.

First, the trial court is the ultimate arbiter of the credibility of witnesses. *See* § 805.17(2), STATS.; ***In re Estate of Dejmal***, 95 Wis.2d 141, 151-52, 289 N.W.2d 813, 818 (1980). It is not required to accept an expert's testimony. *See* ***Capitol Sand & Gravel Co. v. Waffenschmidt***, 71 Wis.2d 227, 233-34, 237 N.W.2d 745, 749 (1976). The trial court rejected the opinion because it determined that the appraiser had not compared the value of the home with the defect to the value of the home without the defect. The trial court therefore properly rejected the appraiser's testimony that the defect had no value.

Second, to warrant application of the diminution in value damage standard, Wickes and Gaffney needed to provide a measure of such diminution. Their appraiser's report specifically stated, "I have not appraised the subject property." The burden to produce evidence of the diminution of value rested upon them. *See* ***Laska v. Steinpreis***, 69 Wis.2d 307, 314, 231 N.W.2d 196, 200 (1975).

In ***Laska***, the supreme court said:

> [I]t is not the claimant's burden to produce evidence of both cost of repairs and diminution in value so that the trial court or jury can determine the lesser. Instead, our court has held that the person sued for damages, if he is dissatisfied with damages based on the one approach, can show, if such is the fact, that damages based on the alternative test was a smaller sum.

Id. (Footnote omitted.)

Because Wickes and Gaffney failed to meet their burden, we are left only with evidence of the cost to rectify the defect as the measure of damages. Nor can we conclude that rectifying the defect constitutes economic waste because there is no credible evidence of the reduced value caused by the defect.

Punitive Damages for the Off-Center Garage Roof Peak

We now examine the trial court's award of punitive damages in connection with the off-center roof peak. The Pagels rely on ***Brown v. Maxey***, 124 Wis.2d 426, 431, 369 N.W.2d 677, 680 (1985), in which the supreme court held that "the availability of punitive damage is not dependent upon the classification of the underlying cause of action, but, rather, upon the proof of the requisite outrageous conduct." ***Id***. (Footnote omitted.) They assert that if they prove the requisite "outrageous" conduct relative to a breach of contract claim, they are entitled to punitive damages. The Pagels, relying on ***Colton***, further assert that Wickes and Gaffney owed them a tort duty independent of the contract. Wickes and Gaffney assert that the punitive damages award was inappropriate because: (1) punitive damages are not permitted in breach of contract claims; (2) this is strictly a breach of contract claim; and (3) there is no independent tort duty at issue here. We agree with Wickes and Gaffney.

Punitive damages are in the nature of a remedy and are not to be confused with a cause of action. ***Brown***, 124 Wis.2d at 431, 369 N.W.2d at 680. The common law rule is that punitive damages are not to be awarded for simple breach of contract even if the breach is willful or malicious, so long as the breach does not amount to an independent tort. *See* 3 DOBBS, *supra*, § 12.5(2), at 117-18. Although there is language in ***Brown*** suggesting that punitive damages may be available regardless of the underlying cause of action, including a breach of contract clause, our courts have not so held. In ***Autumn Grove Joint Venture v. Rachlin***, 138 Wis.2d 273, 280-81, 405 N.W.2d 759, 762-63 (Ct. App. 1987), we rejected the propositions that ***Brown*** held that punitive damages are available on a simple breach of contract cause of action. ***Autumn Grove*** further held that such damages were not available for a breach of contract. We are, thus, in accord with the general rule that punitive damages are available in breach of contract actions only if a tort duty coincides with an obligation undertaken by contract. *See* ***id***. at 281, 405 N.W.2d at 763. We turn to whether there is a tort duty here existing independently of the contract.

The Pagels rely upon ***Colton*** as establishing a tort duty under the facts of this case. In ***Colton*** the court adopted the rule, previously cited, that "[a]ccompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract." ***Id***. at 146, 47 N.W.2d at 903. The Pagels also direct us to ***Brooks v. Hayes***, 133 Wis.2d 228, 235, 395 N.W.2d 167, 170 (1986), which favorably cites this language. In ***Landwehr v. Citizens Trust Co.***, 110 Wis.2d 716, 723, 329 N.W.2d 411, 414 (1983), our supreme court clarified ***Colton***, noting "that there must be a duty existing independently of the performance of the contract for a

cause of action in tort to exist." ***Landwehr*** cited Prosser, who explains: "The principle which seems to have emerged from the decisions in the United States is that there will be liability in tort for misperformance of a contract whenever there would be liability for gratuitous performance without the contract …." ***Id***. (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 92, at 617-18 (4th ed. 1971)). Although ***Brooks*** postdates ***Landwehr***, it does not disturb ***Landwehr***'s holding. ***Brooks*** did not involve the question of a tort duty. It instead held that a contractor has a *contractual duty* of due care in performing the construction contract. ***Brooks***, 133 Wis.2d at 231, 395 N.W.2d at 168. Therefore we apply ***Landwehr***'s inquiry of whether there is tort liability independent of the contract for constructing an otherwise functional and safe roof with an off-center peak.

The Pagels cite no authority for the proposition that there is a duty for someone who gratuitously builds a roof to build it with the peak properly centered. The claim here is that Wickes and Gaffney failed to construct the garage roof in accordance with the contract documents. The Pagels's complaint requesting punitive damages is telling in this regard. It alleges that the defendants "conspired to, and actually did, intentionally build the garage roof on Plaintiffs' home *substantially not in accordance with the plans agreed upon by the parties*, such that the peak of the garage roof is substantially off-center in relation to the rest of the garage and the plans …." (Emphasis added.) The claim is not that the garage roof was constructed in such a manner that it created concern for the safety of person or property; rather, that it was not constructed in accordance with the contract. We hold that such a claim sounds in contract and not tort. Although there is a tort duty to construct a building in such a manner that it not cause risk of

harm to person or property,[5] there is no evidence that the off-center roof peak created any such risk. We therefore reverse the punitive damages award.

We also reverse the trial court's award of actual attorney fees as costs in connection with its denial of the motion for partial summary judgment. The Pagels did not respond to Wickes' and Gaffney's arguments that the imposition of these costs was inappropriate.[6] We therefore deem that they are admitted. *See* ***Charolais Breeding Ranches v. FPC Secs. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments not refuted are deemed admitted). Additionally, because we reverse the trial court's award of punitive damages, we conclude that the motion for partial summary judgment was not frivolous or made in bad faith. *See* §§ 802.05, 802.08, 814.025, STATS.

Gaffney contends that the trial court permitted double recovery for the garage roof and costs because it included that damage amount in the award against Wickes and the award against Gaffney. The Pagels retort that the trial court held them jointly and severally liable to the Pagels for the garage roof. They contend that the law requires the Pagels to credit Gaffney any amount recovered from Wickes for the garage roof. It appears that the Pagels may be correct. *See* § 113.03, STATS. Because, however, the trial court did not address the cross-

[5] *See* ***Colton v. Foulkes***, 259 Wis. 142, 146, 47 N.W.2d 901, 903 (1951). Factually, ***Colton*** involved personal injuries sustained as a result of the faulty repair of a porch. ***Id***. at 144-45, 47 N.W.2d at 902-03. The rule it sets forth is appropriate for risks of harm to person or property. *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 92, at 659 (5th ed. 1984)

[6] Both Wickes and Gaffney assert that the only basis for the court to award actual attorney fees is if the contract or a statute so provided. The contract did not provide for attorney fees. The Wisconsin statutes that might provide attorney fees require a finding that the proceeding or pleading was frivolous or made in bad faith. *See* §§ 802.05, 802.08 and 814.025, STATS. They contend the motion was not frivolous, or in bad faith, a contention borne out by our holding on the underlying issue.

claims between Wickes and Gaffney, and that may affect the allocation of damages for the roof and costs of the action between them, we remand this issue to the trial court for determination.

Gaffney's Contentions on Other Defects

Gaffney contends that the trial court erred by finding that the remaining five items constituted defects and by awarding the Pagels the cost to repair/replace these items. The defects were: (1) the roof was wavy due to inadequate gapping between the roof sheathing; (2) the garage slab settled toward the house and no longer pitched toward the floor drain; (3) the basement floor was uneven and cracked; (4) the interior drywall was bowed in places and had a number of nail pops;[7] and (5) the interior floors were uneven between rooms because Gaffney failed to install subfloors of adequate thickness.[8] Gaffney makes three arguments in connection with these items. First, the Pagels received a dwelling built according to industry standards and, specifically, they received what they contracted for in each instance. Second, to rip out and replace the items would constitute economic waste. Finally, the Pagels failed to mitigate their damages by not permitting Gaffney to make repairs. We reject these arguments.

Initially, we address the standard of review. Whether the items constituted defects, their repair constitutes economic waste and whether the Pagels failed to mitigate damages are all questions of fact. We will not upset the trial

[7] With respect to the interior drywall defects, Gaffney only contends that Pagel failed to mitigate damages.

[8] On appeal, Gaffney did not address the additional defects the trial court found or the cost to remedy them. We therefore do not address those items. *See* ***Waushara County v. Graf***, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992) (appellate courts need not and ordinarily will not consider or decide issues not specifically raised on appeal).

court's factual findings unless they are clearly erroneous. Section 805.17(2), STATS. The trial court, not the appellate court, determines the weight of evidence and credibility of witnesses. *See* § 805.17(2), STATS.; ***Estate of Dejmal***, 95 Wis.2d at 151-52, 289 N.W.2d at 818. It is not required to accept an expert's testimony, even if uncontradicted. *See* ***Capitol Sand***, 71 Wis.2d 227, 233-34, 237 N.W.2d 745, 749 (1976). Gaffney ignores the standard of review before this court and rehashes evidence the trial court did not accept.

In each instance that Gaffney would have us conclude that there was no defect, Dan Barton, whom the trial court found to be "a very credible witness," testified otherwise. For example; he testified that Gaffney's failure to use generally accepted roof construction methods resulted in the sheathing sheets being too close and buckling when they expanded, causing the wavy roof. He opined that the garage floor had settled about one inch near the home due to inadequate compacting, that the whole floor tilted toward the house and that water on the floor puddled instead of flowing to the floor drain. He stated that there were numerous low spots on the basement floor, it was wavy and not sloped toward a floor drain in the basement contrary to specifications, and the floor had sunk. He also observed that there was a crack running all the way through the basement floor. Finally, he testified that the uneven floors from room to room were improper and constituted a visual defect and hazard. The trial court's findings relied on this evidence and were thus not clearly erroneous.

Gaffney contends that the trial court should not have awarded the cost to repair/replace these items. Gaffney does not, however, direct us to any other means by which to measure damages. Gaffney merely claims that the defects are not defects, a position rejected by the trial court, and that replacing them constitutes economic waste. Absent evidence of the diminution in value

caused by these defects, the cost of repair/replacement is the only available measure of damages.

Gaffney contends that the Pagels failed to mitigate damages by failing to permit the subcontractors or Gaffney on the premises to effect repairs. The trial court rejected this defense. It found that the best evidence on mitigation were the Pagels's letters to Gaffney, one as late as June 27, 1995, in which they listed the defects in the home and requested corrective action. Catherine Pagel also testified that the Pagels never told Gaffney not to come on the property to effect repairs until after the lawsuit was filed. Gaffney did not contact he Pagels to arrange for any repairs after the letters were sent. The trial court found these letters invited Gaffney to the home to correct the defects. This finding is not clearly erroneous.

Settlement Offer

Gaffney contends that the trial court erred by awarding sanctions under § 807.01, STATS.,[9] including double costs and interest. Gaffney claims the

[9] Section 807.01, STATS., provides, in pertinent part:

> (3) After issue is joined but at least 20 days before trial, the plaintiff may serve upon the defendant a written offer of settlement for the sum, or property, or to the effect therein specified, with costs. … If the offer of settlement is not accepted and the plaintiff recovers a more favorable judgment, the plaintiff shall recover double the amount of the taxable costs.
>
> (4) If there is an offer of settlement by a party under this section which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid. Interest under this section is in lieu of interest computed under ss. 814.04(4) and 815.05(8).

offer of settlement was ambiguous and did not allow them to assess their exposure. We disagree.

Whether an offer is unambiguous and therefore valid for purposes of § 807.01 STATS., is a question of law that appellate courts review de novo. ***Prosser v. Lueck***, 225 Wis.2d 126, 136, 592 N.W.2d 178, 182 (1999). Under § 807.01(3), STATS., when a plaintiff serves an offer of settlement which is not accepted by the defendant, the plaintiff is entitled to recover double the amount of taxable costs, if the plaintiff recovers "a more favorable judgment." Generally, a plaintiff has the burden to make an offer of settlement clear and unambiguous. ***Id***. at 127, 592 N.W.2d at 182. The defendant's only duty is to accept the offer in writing within ten days after its receipt, if so desired. ***Id***. "The offer must allow the defendant to fully and fairly evaluate his or her own exposure to liability." ***Id***.

We conclude that the Pagels's offer provided Gaffney with an opportunity to fully and fairly evaluate its exposure. The offer made clear that the Pagels would settle with Gaffney for $44,000. That the offer contained a commitment to adjust Gaffney's total settlement amount by $14,000 if Wickes accepted their separate offer did not make the offer to Gaffney any less clear or certain. Despite Gaffney's complaints that it could not evaluate the offer because of the claimed contingency of Wickes' acceptance of the offer, the Pagels's offer let Gaffney fully assess its exposure by indicating the amount of the settlement for which they believed Wickes was responsible. The offer informs Gaffney of the total amount the Pagels would take to settle and the amount of that settlement they were attributing to Gaffney.

Our holding also promotes the purpose of § 807.01, STATS., which is to encourage settlement and, accordingly, secure just, speedy and inexpensive

determinations of disputes. *See* ***Schmidt v. Schmidt***, 212 Wis.2d 405, 412-13, 569 N.W.2d 74, 78 (Ct. App. 1997); ***White v. General Cas. Co. of Wisconsin***, 118 Wis.2d 433, 438, 348 N.W.2d 614, 617 (Ct. App. 1984). We reject Gaffney's contentions that the settlement offer was ambiguous.

Gaffney Contract Balance

Gaffney contends that it was entitled to recover the amount due under its contract with the Pagels. It claims that the Pagels affirmed the contract when they sued under it and as such are required to pay the contract balance. Alternatively, Gaffney contends that it substantially performed the contract and is therefore entitled to the balance of the contract, less offsets for alleged defects. The Pagels respond that Gaffney failed to complete construction and did not pay all bills required to be paid. They list a number of uncompleted items, but attribute no monetary value to their completion. The Pagels contend that a contractor is not entitled to the contract balance unless he completes the contract. They assert that the substantial performance rule does not apply where the equities do not favor the contractor.

The trial court's eighteen-page decision does not address this claim, nor does its subsequent findings of fact, conclusions of law and judgment. Our review of the record fails to disclose the value of the claimed uncompleted work. Because we cannot determine why the trial court did not award the contract balance, we remand the case for a determination of the issue.

Gaffney Claim Against Wickes

Both Wickes and Gaffney filed cross-claims against each other in connection with the roof. The trial court's decision did not address these claims,

nor did the parties seek to have the trial court clarify its ruling on these claims. It did find both Wickes and Gaffney negligent and responsible for the off-center roof. It appears that the judgment against them is joint and several. It also found that Wickes breached its agreement with Gaffney to measure the foundation. Because the trial court, however, did not address the ramifications of that breach or whether the breach was excused by Gaffney's actions, we remand for determination of this issue by the trial court.

CONCLUSION

We conclude that Wickes had contractual obligations to the Pagels and that it breached those obligations in connection with the off-center garage peak defect. We further determine that the cost of replacement damages awarded by the trial court were appropriate because no other credible evidence was presented to establish an alternative measure of damages. We hold that the punitive damages award was inappropriate because Wickes and Gaffney had no independent tort duty to construct an on-center peak, and punitive damages are not available for a breach of contract. We also determine that awarding actual costs in connection with the defendants' motions to dismiss the punitive damages claim was inappropriate.

With respect to Gaffney's issues, we determine that: (1) the trial court's findings that the claimed defects were indeed defects was not clearly erroneous; (2) the repair cost was the appropriate measure of damages because Gaffney failed to present evidence to support an alternative measure; (3) the trial court's finding that the Pagels offered to permit Gaffney to repair or replace items and therefore mitigated damages is not clearly erroneous; and (4) the settlement

offer was sufficiently clear to permit Gaffney to assess its exposure. We therefore affirm the trial court's decision on these matters.

Because we cannot determine whether the trial court decided the disposition of Gaffney's claim for the contract balance or the cross-claims between Wickes and Gaffney, we remand these issues to the trial court for determination. We also remand the issue of the allocation of the damages in connection with the off-center garage peak and costs of the action, because the court did not explicitly rule on these items and they may be affected by the court's resolution of the cross-claims.

By the Court.—Judgment and orders affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.