COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2601 **Cir. Ct. No. 2011SC188**

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

JEANNE MARIE RIESE,

PLAINTIFF-APPELLANT,

V.

BERTCH CABINET MFG., INC. AND FLOOR TO CEILING, A DIVISION OF NELSON LUMBER & HOME, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Bayfield County: JOHN P. ANDERSON, Judge. *Reversed and cause remanded for further proceedings.*

¶1 PETERSON, J.[1] Jeanne Riese, pro se, appeals an order dismissing her small claims action against Bertch Cabinet Manufacturing, Inc. and Floor to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Ceiling, A Division of Nelson Lumber & Home, Inc.[2] Riese argues the court erred by refusing to admit into evidence and consider an affidavit and a cost estimate. We agree and reverse and remand for a new trial.

BACKGROUND

¶2 Riese brought a small claims action against Bertch for defective cabinetry. She alleged that, within ten months of purchasing custom cabinetry from Bertch, she noticed the cabinetry's finish around various knobs was shiny and coming off. Riese requested that Bertch replace her defective cabinetry pursuant to a limited lifetime warranty.

¶3 At trial, Riese first established, through direct examination of one of Bertch's employees, that she purchased high-end, high-quality cabinets with a premium finish. The cabinets were warranted "to be free from defects in material or workmanship for as long as they are owned by the original purchaser." The warranty, however, did not cover normal wear and tear. Bertch would not replace Riese's cabinetry because it determined the deterioration was normal wear and tear.

¶4 Riese then testified that the cabinets were installed in August 2007. By May 2008, Riese observed the cabinetry's finish was coming off. Riese explained that between August 2007 and May 2008, the cabinets were only used on a limited basis because she and her husband were often not in residence. She introduced pictures showing the finish deterioration.

[2] We refer to the defendants collectively as Bertch.

¶5 Riese also moved to introduce an affidavit from Jerry Tuttle. Tuttle averred that he has twenty-six years' experience in the cabinetry manufacturing and finishing industry and is president of Cabaret Cabinetry. After personally examining Riese's cabinets, he stated that he has "not seen finish coming off like this in the last 10 years, since significant improvements were made in … cabinetry materials." He explained that the finish was coming off because there was a weakness in the final clear coat and it was "interacting with something, probably normal hand oils, causing the top clear coat to become gummy and soft peeling of the paint/glaze." Tuttle stated, "In my experience, it is only a matter of time before there are more finish issues. This issue does not represent normal wear and tear of quality cabinetry." Finally, Riese moved to admit a cost estimate for replacement cabinetry.

¶6 The court refused to admit the affidavit and cost estimate into evidence because they were hearsay. The court also reasoned that it could not consider the hearsay documents because they went to essential factual findings. The court then summarily denied Riese's claim.

DISCUSSION

¶7 On appeal, Riese concedes that the affidavit and cost estimate are hearsay. She argues that, pursuant to WIS. STAT. § 799.209(2), the court erred by concluding it could not admit the hearsay documents into evidence or consider them in its determination.

¶8 WISCONSIN STAT. § 799.209 governs the procedures for small claims proceedings. Subsection (2) provides:

> The proceedings shall not be governed by the common law or statutory rules of evidence except those relating to

> privileges under ch. 905 or to admissibility under s. 901.05. The court or circuit court commissioner shall admit all other evidence having reasonable probative value, but may exclude irrelevant or repetitious evidence or arguments. An essential finding of fact may not be based solely on a declarant's oral hearsay statement unless it would be admissible under the rules of evidence.

¶9 We conclude the circuit court erred by excluding Riese's affidavit and cost estimate from evidence because they are hearsay. In a small claims proceeding, the rules of evidence apply only to privileges and the admissibility of certain test results. WIS. STAT. § 799.209(2). All other evidence is admissible if it has "reasonable probative value." ***Id.*** Bertch does not argue the documents do not have reasonable probative value. As a result, Riese's hearsay documents are admissible.

¶10 Although the hearsay documents are admissible, WIS. STAT. § 799.209(2) forbids a court's essential factual findings to be based "solely" on an "oral hearsay statement." The court in this case reasoned it could not consider the hearsay documents because they related to an essential finding, namely the condition of the cabinets and damages.

¶11 First, at least for the condition of the cabinets, the affidavit was not the sole piece of evidence Riese offered. She also testified and presented pictures showing the damage. WISCONSIN STAT. § 799.209(2) only prohibits a court from basing an essential factual finding *solely* on an oral hearsay statement. Here, the affidavit was not the sole evidence of the cabinets' condition.

¶12 Second, and more fundamentally, WIS. STAT. § 799.209(2) only forbids a court from relying on *oral* hearsay statements to support an essential finding. WISCONSIN STAT. § 908.01(3) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in

evidence to prove the truth of the matter asserted." In turn, § 908.01(1) defines a "statement" as either an oral, written, or nonverbal assertion. Because § 799.209(2) only prohibits a small claims court from relying on an oral hearsay statement to make an essential finding, it follows that there is no prohibition against the court relying on a written hearsay statement for such a finding. The affidavit and the cost estimate are written, not oral. Consequently, the court was not prohibited from relying on Riese's written hearsay documents.

¶13 Bertch, however, argues the court could not rely on the documents because they were simply oral statements reduced to writing. We disagree. As discussed above, the legislature has distinguished oral statements from written ones, *see* WIS. STAT. § 908.01(1), and the plain language of WIS. STAT. § 799.209(2) does not include a prohibition on written hearsay statements. We will not read such a prohibition into the statute. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 (we are bound by statute's plain language). Further, Bertch's interpretation would render the term "oral" in § 799.209(2) mere surplusage. *See* ***Donaldson v. State***, 93 Wis. 2d 306, 315-16, 286 N.W.2d 817 (1980).

¶14 Because the circuit court erroneously determined it could not admit the written hearsay statements into evidence or consider them when making its factual determinations, we reverse and remand for a new small claims trial.

By the Court.—Order reversed and cause remanded for further proceedings.

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