COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-0806

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

KEN EHLE,

PLAINTIFF-APPELLANT,

V.

RICHARD DETLOR D/B/A DETLOR TREE FARMS,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waushara County: LEWIS MURACH, Judge. *Affirmed*.

DEININGER, J.[1] Ken Ehle appeals a judgment dismissing his small claims action against Richard Detlor. Ehle sued to recover the purchase price for some trees he bought from Detlor that died within a few months of the purchase. He claims the trial court erred in concluding that he could not recover

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

on the facts established at trial, and that the court committed several procedural errors. We reject Ehle's contentions and affirm.

BACKGROUND

Ehle, a resident of Racine County, owns property in Vilas County on which he had cleared some pine trees with the intention of replanting different types of trees. In May of 1996, he responded to a newspaper advertisement for Detlor's nursery business. Ehle visited the nursery in Waushara County and accompanied Detlor on a tour of the premises during which Detlor pointed out the various stock available for purchase. Detlor testified at trial that during this visit, he informed Ehle that the trees were available on either a wholesale or retail basis. If purchased wholesale, a purchaser must make claims for damaged stock within five days of receipt and no claims are honored on planted stock; a retail purchaser, however, is guaranteed that trees will survive for six months. Detlor's retail prices are about double those for the same trees purchased wholesale. Detlor testified that after he discussed this with Ehle, Ehle elected to purchase wholesale.

Ehle testified that he recalled no conversations whatsoever regarding guarantees or the difference between wholesale and retail purchases. He did admit to receiving Detlor's wholesale price list, however, which Ehle produced at trial. That document contains the following statements:

> Any claims must be made in writing within 5 days of receival [sic] of stock. Stock is delivered to UPS in best possible condition, any damage in shipment must be made with UPS. No claims honored on planted stock.

Ehle then purchased some 125 trees of various types and sizes, at wholesale prices, for a total of $2,528.25, which included delivery by Detlor to Ehle's land in Vilas County. Ehle took ten trees in his van, and the balance were delivered to

him. He signed a receipt for the delivered trees which included, above his signature, the words "all trees received in good order." The receipt also included the following statements, just below the signature line: "All claims must be made in writing within 5 days of stock receival [sic]. No claims made on planted stock." He paid the balance of the purchase price on delivery.

Ehle planted all of the trees and visited his Vilas County property every several weeks to inspect and water the newly planted trees. In mid-July, about six weeks after the planting, Ehle noticed that some of the trees were brown in color, and by early August, some of the trees had become "skeletons," that is, the trees had branches with no needles on them. It was then that Ehle first contacted Detlor, leaving a message with Detlor's wife to contact him. Subsequent contacts by phone and letter between Ehle and Detlor did not produce a resolution satisfactory to Ehle, so he commenced a small claims action in Racine County to recover $543, the purchase price for twenty-two trees that had died as of November 1996.[2]

Ehle testified at trial that, based on his experience and some conversations with other nursery owners, a 10% loss rate might be acceptable, but that the 20% rate he experienced was not. He stated that there had been adequate rainfall at his property during the summer of 1996, and that no other environmental factors contributed to the loss. In response to a question from the

[2] The Racine County Circuit Court, at Detlor's request, ordered venue changed to Waushara County because "[v]enue is not proper as required by s. 799.11, Wis. Stats." Under § 799.11(1)(e), STATS., venue in small claims actions is to be in the county specified by § 801.50, STATS., except for certain enumerated types of actions. Section 801.50, in turn, directs that venue in civil actions should be in the county where the claim arose; where real or tangible property which is the subject of the claim is situated; or where a defendant resides or does substantial business. Only if none of these apply, may venue be in some other county of the plaintiff's choosing. *See* § 801.50(2).

court, Ehle acknowledged that the trees he received were similar in size and appearance to the ones he viewed at the nursery, and that they were "substantially the same based on the sample that was shown to you."

Detlor testified at trial that a loss rate of 20% was not unexpected for "field potted" trees, such as those sold to Ehle. He also stated that the non-guaranteed, wholesale price, being half the retail, usually represents a better deal for customers buying in volume, as Ehle did. Detlor testified further that the five-day claim period allows wholesale purchasers to untie, measure and inspect stock for damage or "excessive dryness," and that exchanges are made if deficiencies in the delivered trees are noted and reported within five days of delivery. Planting, according to Detlor, constitutes acceptance of the tree and prevents an exchange or replacement. Finally, he testified that the second half of the summer of 1996 was dry and that the soil in Vilas County is generally rocky and "marginal."

In its oral decision at the conclusion of the trial, the court stated that the transaction was governed by the Uniform Commercial Code. It noted the conflict in the testimony regarding whether a discussion about the difference in guarantees between wholesale and retail sales had occurred prior to the sale, but found that there was no dispute that Ehle had been shown a sample of the merchandise he purchased and that the product delivered to him conformed to the sample. Thus, the court concluded that there was no breach of an express warranty.

The court next considered whether the trees were impliedly warranted to be "fit for the ordinary purposes for which they are used," and whether Ehle was entitled to revoke his acceptance of the goods because of a concealed defect. It concluded that Ehle had not borne his burden of proving that

a defect existed. Moreover, the court concluded that although the substance of any guarantee discussions was in dispute, the wholesale price list Ehle acknowledged receiving made clear that claims for replacement were not allowed after the trees were planted, which would tend to negate any implied warranty. Because "the burden of proof that is placed upon the plaintiff has not been sufficiently met," the court awarded judgment to the defendant, Detlor.

Ehle appeals the judgment entered in Detlor's favor.

ANALYSIS

Ehle cites no statutes, case law or other authority in support of his claims of error, nor does Detlor in response. Ordinarily, we do not consider arguments unsupported by references to legal authority. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980). We note, however, that both parties appear pro se in this court, as they did in the trial court. In keeping with the spirit and purpose of Chapter 799,[3] we will address the issues raised in this appeal despite the parties' failure to comply with our expectations regarding proper argument. *See* RULE 809.19(1)(e), STATS., (brief should contain argument containing contention of the party and reasons therefor, "with citations to the authorities, statutes and parts of the record relied on").

Ehle first complains that the trial court misinterpreted the Uniform Commercial Code in ruling that there was no implied warranty that the trees he

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[3] The purpose of small claims procedures is to provide parties "an inexpensive and speedy method" of resolving disputes where the amount in controversy is not great. *See* ***County of Portage v. Steinpreis***, 104 Wis.2d 466, 479-80, 312 N.W.2d 731, 737 (1981). Section 799.06(2), STATS., permits individuals to prosecute and defend small claims actions pro se.

purchased were fit for his intended use. As we have noted above, however, the trial court's ruling rested primarily on its finding that Ehle had not proven that the trees he purchased were defective. If Ehle did not prove a defect, the existence or not of warranties, either express or implied, would not impact the outcome.

We will only set aside a trial court's factual finding if it is "clearly erroneous," giving due regard to the trial court's ability to assess the credibility of the witnesses. *See* § 805.17(2), STATS. We have read the transcript of the trial and reviewed the exhibits presented to the court. The court's finding that no defect had been proven is not clearly erroneous. Ehle himself testified that the trees he received conformed to the samples he had viewed at Detlor's nursery, and that there were no observable problems when he accepted them as being "received in good order." The trial court was free to accept Detlor's testimony that an 80% survival rate was acceptable, especially under the relevant climate and soil conditions and Ehle's relatively infrequent inspections and watering in the weeks following the planting of the trees.

To the extent that Ehle's claim raises a question of statutory interpretation, we note that Ehle testified that he received no express warranty regarding the survival of the trees, and in fact, that no discussion of the guarantees or warranties occurred prior to his purchase. Thus, the court did not err in concluding that the only possible express warranty at issue would have been created by Detlor's presentation of "samples" to Ehle during the pre-sale nursery tour, s*ee* § 402.313, STATS., and that any such warranty had not been breached because the delivered trees conformed to the nursery samples. And, while Ehle couches his argument in terms of "fitness for intended use," the Code section dealing with an implied warranty of fitness for a particular purpose applies only where a buyer relies on a "seller's skill or judgment to select or furnish suitable

goods." *See* § 402.315, STATS. Here, it is undisputed that Ehle was experienced in planting and maintaining trees on his Vilas County property, and he selected the sizes and varieties of trees for his order.

Thus, the only implied warranty which might be argued to apply on the present facts is that of "merchantability" under § 402.314, STATS. As we have noted, even if an implied warranty of merchantability applied to this sale, the court's finding that the trees Detlor furnished were not defective is tantamount to a finding that the warranty of merchantability was not breached. That is, the court's decision makes it clear that it deemed the trees in question to be of "fair average quality," "fit for ordinary purposes," and to be "within variations permitted by the agreement." *See* § 402.314(2), STATS. Moreover, under § 402.316(3)(a), STATS., "all implied warranties are excluded by expressions like 'as is,' 'with all faults' *or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty."* (Emphasis supplied.) The statements contained in the wholesale price list and receipt which were provided to Ehle at or before the time he accepted the goods made clear that no claims for defects in the trees would be honored (1) beyond five days of their delivery, or (2) after the trees had been planted. This constitutes a clear communication to Ehle that no warranties or guarantees of any kind beyond those parameters were intended.

Thus, we conclude that the trial court did not err on either the facts or the law in awarding judgment to Detlor. Ehle also raises three claimed procedural errors which we will briefly address. First, he claims the court improperly considered copies of 1998 wholesale and retail price lists which Detlor had furnished in pre-trial submissions. To the contrary, the court never referred to these documents at all in its decision, and in fact, gave Ehle the benefit of some

doubt as to whether he had actually been informed of Detlor's retail guarantee policy. The court's conclusions regarding the nature of the agreement between the parties stem from statements on the 1996 wholesale price list, which Ehle acknowledged receiving prior to his order, and which he himself furnished to the court for its review at trial.

Next Ehle claims that venue should have remained in Racine County, or if not there, the case should have been transferred to Vilas County where the trees were planted. He claims that this was a "consumer transaction," and thus suit may be brought "where the consumer resides." *See* §§ 799.11(1)(b) and 421.401(1), STATS. We reject Ehle's contention. To qualify as a "consumer transaction," the trees he acquired from Detlor must be for "personal, family, household or agricultural purposes." *See* §§ 421.301(13) & (17), STATS. Nothing in the record establishes that Ehle's wholesale bulk-purchase of trees for planting on his Vilas County property comes within any of the four enumerated consumer purposes.[4] Thus, although venue may also have been proper in Vilas County, the case was not properly filed in Racine County, and the transfer to Waushara County did not constitute error. *See* footnote 2 above.

Finally, Ehle objects that he was somehow misled by the fact that a trial to the court was held at the first appearance in Waushara County. He claims that he thought that this was only to be a "first hearing," and that he would have "gladly paid to have a jury trial" if the court would have asked him if he wanted

[4] We do not know, for example, whether Ehle derives income from the property or holds it for investment purposes, or whether it is used solely for recreational purposes by him and his family. We do know that Ehle had planted some "300 to 400" trees on the property in past years, but we do not know if his goal was esthetic enhancement of the property or the future harvesting of trees from the land.

one. After Detlor was served with the summons and complaint to appear in Racine County, he filed a written answer stating his intention to contest the claim and requesting the transfer to Waushara County. When the file was received in Waushara County, the court sent both parties a "Notice of Hearing" explaining that the case was set for "Court trial" on March 13, 1998, at 10:00 a.m. Attached to the Notice is a "Pretrial Order" which gives a general explanation of small claims trial procedures and directs the parties to file with the court, at least one week before the trial, copies of all written materials relied upon, the names of witnesses and summaries of their testimony, and a narrative summary of the claim or defense. The order also requests each party to address specific questions posed by the court regarding aspects of the dispute.

Both parties complied with the pretrial order. Ehle filed a two-page summary of his case and provided various documents and photographs to the court on March 6, 1998. Nothing in Ehle's pre-trial submission indicates that he did not wish the trial to proceed as scheduled or that he wanted the matter tried to a jury, nor did he raise any objections when the court called the case for the bench trial on March 13. In short, the record does not support Ehle's claim on appeal that he was misled or prejudiced by the handling of his case after its transfer to Waushara County.

CONCLUSION

For the reasons discussed above, we affirm the trial court's judgment dismissing Ehle's claim against Detlor.

By the Court.—Judgment affirmed.

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