COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0983

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

GRAEME J. PAXTON AND LAVERNE PAXTON,

PLAINTIFFS-RESPONDENTS,

V.

VULCAN BASEMENT WATERPROOFING COMPANY OF WISCONSIN, INC.,

DEFENDANT-APPELLANT,

ABC INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Vulcan Basement Waterproofing Company of Wisconsin, Inc., appeals from a judgment in favor of Graeme J. and Laverne

Paxton for damages occasioned by the failure of an interior drain tile system installed in the Paxtons' home. Vulcan seeks a new trial because of errors in the trial, including the granting of default judgment on liability as a discovery sanction, and because the jury's verdict is contrary to the evidence. Vulcan also argues that remittitur should have been granted because the damages are excessive, not supported by sufficient evidence and limited by contract. We affirm the judgment.

¶2 To rectify water problems in the basement of their home, the Paxtons contracted with Vulcan for the installation of an interior drain tile system. After the system was installed, the Paxtons continued to experience basement water problems. In this lawsuit, they alleged six causes of action against Vulcan: negligence, breach of contract, breach of warranty, negligent misrepresentation, strict responsibility and intentional misrepresentation, and false advertising in violation of WIS. STAT. § 100.18 (1997-98).[1] The trial court granted a default judgment on liability and a jury trial proceeded on damages only. Judgment, including costs and attorney's fees, was entered against Vulcan for $40,160.91.

¶3 The trial court declared a default judgment as to liability because Vulcan had not timely produced its insurance policy. The request for production of the insurance policy was made on February 14, 1997. The insurance policy was not produced until the Friday before the trial started on Monday, July 27, 1998.

¶4 A trial court's decision to grant a default judgment as a discovery sanction is discretionary and will not be disturbed unless the trial court has erroneously exercised its discretion. *See* ***Geneva Nat'l Community Ass'n v.***

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Friedman, 228 Wis. 2d 572, 579, 598 N.W.2d 600 (Ct. App. 1999). "A discretionary decision will be upheld if the trial court has examined the relevant facts, applied a proper standard of law, and, utilizing a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.***

¶5 We reject Vulcan's first argument that under WIS. STAT. § 804.12, the trial court could not impose a sanction unless it had first entered an order compelling production, and that order was disobeyed. While § 804.12 outlines the procedure to follow when a party seeks an order compelling discovery, it is not the only provision authorizing a sanction by the trial court. WISCONSIN STAT. § 805.03 permits the court, upon failure of any party to comply with the statutes governing procedure, to make "such order in regard to the failure as are just, including but not limited to orders authorized under s. 804.12 (2) (a)."[2] The record demonstrates here that Vulcan did not comply with discovery rules and the trial court's directive that the policy be produced.

¶6 A request for the policy was made in the Paxtons' first set of interrogatories, request to admit and request for production of documents served February 14, 1997. Under WIS. STAT. § 804.09(2), a response to the request for documents was required within thirty days. When the deposition of David Bakke, Vulcan's manager, was taken on November 18, 1997, he did not bring the policy with him despite that the notice of deposition required the production of the policy. On March 20, 1998, the Paxtons filed a motion to compel production of the insurance policy. The motion outlined thirteen separate requests over approximately a one-year period for production of the policy. The motion to

[2] WISCONSIN STAT. § 804.12(2)(a)3 authorizes the court to enter an order "rendering a judgment by default against the disobedient party."

compel was withdrawn when the parties entered into a written stipulation that the policy would be produced by April 6, 1998.[3] At a hearing held on April 20, 1998, Vulcan's attorney explained that he was having difficulty obtaining the policy from Vulcan's New York owner. The trial court made it clear that the insurance policy would have to be produced if mediation between the parties was unsuccessful, and the case was going to be tried in July. The trial court required all experts to be deposed by June 1, 1998. When Vulcan changed attorneys on July 20, 1998, the policy still had not been produced.[4] Vulcan places all fault with its first attorney, who was replaced on July 20, 1998.

¶7 However, the trial court found that Vulcan's New York owner was directing the litigation and "basically blowing the whole thing off." The court found that Vulcan itself had been dilatory in some respects. This is not a case of merely visiting the sins of the attorney on the client.

¶8 Vulcan argues that the trial court failed to find that its conduct was egregious. A trial court is not required to use "magic words" in effectuating its adjudication. *See* ***Michael A.P. v. Solsrud***, 178 Wis. 2d 137, 151, 502 N.W.2d 918 (Ct. App. 1993) ("[T]he trial court's failure to use the 'magic words' does not amount to reversible error."). We recognize that severe sanctions such as a default judgment should not be employed for violation of "trivial procedural orders."

[3] The trial court did not enter an order based on the parties' stipulation because the stipulation also contained the proviso that the case would be tried by a jury even though the jury fee had not been timely paid. After a hearing, the trial court set the matter for a jury trial.

[4] The July 20, 1998 hearing was to address Vulcan's request to adjourn the trial and for substitution of counsel. The trial court denied the request for adjournment. Vulcan suggests that it timely produced the insurance policy because the trial court extended discovery to July 24, 1998. However, the extended deadline was only to permit Vulcan to depose the Paxtons or their experts.

Geneva Nat'l Community Ass'n, 228 Wis. 2d at 580. Granting a default judgment may be an erroneous exercise of discretion if the offending party can establish a clear and justifiable excuse for the delay. *See* ***id.***

¶9 In granting the default judgment, the trial court found that the Paxtons had been denied "a pretty basic piece of discovery" and a substantive right to effectively name the insurance company as a party. The court also indicated that it believed production of the insurance policy was an easy problem to resolve, and that when it first addressed the problem, it thought the matter could be taken care of in two weeks. The court commented that the delay in producing the policy put the Paxtons, through no fault of their own, in a position of having to contend with issues that should have long been resolved in the case. At the postverdict motion hearing, the trial court confirmed that the failure to produce the policy was "about as egregious as it gets in terms of trial preparation" and that "this was so over the top, if you will, in terms of the attitude taken by Vulcan that this wasn't anything that really should have been in front of me. That this was so basic that they ought to go out and get it." The court found that Vulcan had taken an "absolutely inexplicable and indefensible position" regarding production of the policy. The trial court's ruling was based on its overall reading of the record.

¶10 Here, like ***Geneva National Community Ass'n***, where we affirmed a default judgment as a sanction for the failure to comply with discovery requests, the conduct "harms not only the parties, but also the judicial system's effectiveness." ***Id.*** at 583 (citation omitted). The record demonstrates that the trial court found the conduct to be egregious, balanced the interests of each party, including the Paxtons' advanced age and the length of time the case had been pending, and found that there was no justifiable excuse for not timely producing

the policy. It was a proper exercise of discretion to grant the default judgment on liability.

¶11 Vulcan next argues that despite the default judgment as to liability, it should have been allowed to present testimony and jury instructions with respect to causation.[5] What Vulcan really questions is the scope of the trial court's default judgment on liability. Citing ***Sharp v. Milwaukee & Suburban Transp. Corp.***, 15 Wis. 2d 268, 112 N.W.2d 597 (1961), Vulcan contends that a judgment on liability leaves causation issues for trial.

¶12 In ***Sharp***, the plaintiff sought to recover for injury to her elbow when one of the defendant's bus operators negligently closed the door on her right arm as she was boarding the bus. *See* ***id.*** at 268. In the first appeal, the supreme court reversed the jury's original verdict and a new trial was granted on the issue of damages only. *See* ***id.*** at 269 n.1. After the new trial, the trial court concluded that the defendant had introduced evidence beyond the scope of the appellate mandate and granted yet another new trial. *See* ***id.*** at 269. The defendant had introduced evidence that the bus door had impact only with the plaintiff's forearm and not her elbow and expert testimony that the plaintiff's employment was a logical cause of the injury. *See* ***id.*** at 270. In determining the scope of the appellate mandate, the supreme court reviewed the issues that had been raised and addressed in the first appeal. It noted that an issue bearing on causation had not

[5] Specifically, Vulcan claims that the testimony of its manager, David Bakke, was unduly restricted when asked questions about whether the Vulcan pressure relief system, if fully functional, could have handled the heavy rain and flooding conditions the Paxtons experienced in 1996 and 1997. Vulcan also contends that the Paxtons' cause of action under WIS. STAT. § 100.18 should have been dismissed because there was insufficient evidence to establish a causal connection between the alleged false advertising and the Paxtons' damages. Vulcan sought and was denied jury instructions and special verdict questions on causation.

been addressed because it related to damages. *See* ***id.*** at 271. To suggest that a trial on damages also includes causation, Vulcan seizes upon the following statement in ***Sharp***: "Because we said that these points related to damages, the new trial must include whatever issue could be made as to whether the blow described by plaintiff caused the tennis elbow." ***Id.*** at 271-72.

¶13 The value of ***Sharp*** is questionable considering that the trial court's order for a second new trial on damages was affirmed because the supreme court concluded that the defendant had offered evidence beyond the mandate of a new trial on damages only.[6] *See* ***id.*** at 273. What we take from ***Sharp***, however, is not that a trial on damages necessarily encompasses causation, but that the mandating court is to determine the scope of its mandate that there be a trial on damages only. Recognizing the trial court's discretion to determine the breadth of its default judgment is consistent with the discretion the trial court exercises in determining the appropriate discovery sanction.

¶14 The trial court granted default judgment on liability on all theories pled. During the testimony, the court interjected to prevent Vulcan from touching upon causation. The trial court permitted Vulcan to explore mitigation of damages evidence. In this instance the trial court's default judgment extended to causation. The trial court properly exercised its discretion in excluding evidence, jury instructions and verdict questions bearing on causation.[7]

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[6] The supreme court concluded that it was error to permit the defendant to introduce evidence in the second trial that was inconsistent with the plaintiff's testimony in the first trial as to how the accident occurred and the location of the impact. *See* ***Sharp v. Milwaukee & Suburban Transp. Corp.***, 15 Wis. 2d 268, 273, 112 N.W.2d 597 (1961).

[7] With respect to causation, Vulcan failed to make an offer of proof and thus has not preserved the issue for appellate review. *See* ***State v. Williams***, 198 Wis. 2d 516, 538, 544 N.W.2d 406 (1996).

¶15 The jury was asked to determine damages for the Paxtons' loss of personal property, damage to the furnace and water heater, and past and future costs of remediation. Vulcan argues that the jury's answers in each category are contrary to the great weight of the evidence, and, therefore, the trial court should have granted a new trial. A new trial may be granted in the interest of justice when the jury findings are contrary to the great weight and clear preponderance of the evidence, even though the findings are supported by credible evidence. *See* ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993), *aff'd*, 190 Wis. 2d 623, 528 N.W.2d 413 (1995). Such a motion is within the discretion of the trial court and will not be reversed on appeal unless the trial court clearly exercised its discretion erroneously. *See* ***id.*** Our role is not to seek to sustain the jury's verdict, but to look for reasons to sustain the trial court. *See* ***id.***

¶16 Vulcan contends that there was no evidence of the fair market value of the items of property damaged by the failure of the tile system and that the jury was left to speculate as to value. We disagree. A tradesman testified as to the repairs and replacement of the Paxtons' water heater and furnace. He indicated that the furnace had no market value. Where the property damaged has no ascertainable market value, the cost of repairs is the measure of damages. *See* ***Krueger v. Steffen***, 30 Wis. 2d 445, 450, 141 N.W.2d 200 (1966). An engineer explained the costs of remediation efforts, including an analysis of the electrical costs to run sump pumps. He also expressed his opinion that construction charges to repair water damage to the "rec room," stairs and basement were reasonable. In his testimony, Paxton itemized items of personal property damaged. An owner is competent to give opinion evidence on value. *See* ***Wilberscheid v. Wilberscheid***, 77 Wis. 2d 40, 48, 252 N.W.2d 76 (1977). The testimony regarding damages was uncontroverted. Bakke, Vulcan's manager, testified that he did not dispute the

amounts claimed but that he felt some of the damage was brought on by the Paxtons' failure to allow Vulcan to make repairs. The jury was entitled to reject Vulcan's theory that damages could have been mitigated. The jury could decide the question of damages on the evidence presented and the trial court properly exercised its discretion in denying the motion for a new trial.[8]

¶17 Finally, Vulcan claims that the Paxtons' damages were limited by contract to $1995, the amount paid for services under the contract. The law does not favor exculpatory contract provisions. *See* ***Arnold v. Shawano County Agric. Soc'y***, 111 Wis. 2d 203, 209, 330 N.W.2d 773 (1983). To be enforceable the exculpatory contract must clearly, unambiguously and unmistakably explain to the consumer that he or she is accepting the risk of the other party's negligence. *See* ***Yauger v. Skiing Enters., Inc.***, 206 Wis. 2d 76, 78, 557 N.W.2d 60 (1996).

¶18 The contract the Paxtons signed was a form contract. It provides: "No action may be maintained under this agreement in any amount greater than the amount paid to Vulcan under this agreement." This single sentence appears at the end of a paragraph and is not set out in any different type or highlighting than any other language in the contract. By appearance alone, the contract does not permit the court to conclude, with certainty, that a consumer would be fully aware of the nature and significance of the limitation on damages sentence. *See* ***id.*** at 88. Moreover, the language used does not fairly convey the message that the Paxtons were accepting the risk and financial burden of Vulcan's negligence. The reference to maintaining an action "under this agreement" can be read to limit only

[8] For the same reasons, we summarily reject Vulcan's claim that the trial court should have granted remittitur because the jury's award is excessive and not supported by sufficient evidence.

breach of contract actions and permit other types of actions. An exculpatory provision must use explicit language that recovery for all negligence is waived or limited. The Vulcan contract fails to do so. The trial court correctly ruled that damages are not limited by the contract.

By the Court.—Judgment affirmed.

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