COURT OF APPEALS
DECISION
DATED AND FILED

January 24, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3119 **Cir. Ct. No. 2001CV12117**

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

GARY W. SEAVERT AND DEBRA SEAVERT,

PLAINTIFFS-RESPONDENTS,

V.

J. M. REMODELING & HOME REPAIR, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The issues on appeal are whether the findings by the trial court that J. M. Remodeling & Home Repair, Inc. breached a home repair

contract are clearly erroneous, and whether sufficient evidence established damages.[1] We affirm.

¶2 On May 12, 2000, Gary and Debra Seavert and J. M. Remodeling entered into a contract for roof and other repairs to property known as "Rusty's Sport Bar." The contract specified the work was to be done in a good and workmanlike manner. J. M. Remodeling completed the work in September 2000. In December, the Seaverts began having problems with the roof. An inside hallway entrance was also leaking. In April 2001, shingles blew off the roof, and fascia was detaching from the building. There were also areas where flashing was prying up from mortar. The Seaverts commenced a lawsuit in October 2001, alleging breach of contract and other causes of action. A trial was held to the court on July 8, 2004. After the conclusion of the trial, the court found that the contract was not performed in a good and workmanlike manner and that the Seaverts suffered damages of $19,300. This appeal followed.

¶3 Not surprisingly, this case primarily involves the conflicting opinions of expert witnesses. The Seaverts offered the testimony of Thomas Feiza, a licensed professional engineer. J. M. Remodeling offered the testimony of three expert witnesses. J. M. Remodeling argues on appeal that it did not breach the contract, and the trial court's findings are against the great weight and clear preponderance of the evidence. J. M. Remodeling insists that its witnesses provided "sufficient, detailed evidence to repudiate the claim of Seaverts' witness Mr. Feiza that [J. M. Remodeling] had breached the contract." We disagree.

[1] The findings of fact and conclusions of law were signed by the Honorable Maxine A. White on August 13, 2004. The order for judgment was signed by the Honorable Richard Sankovitz on October 18, 2004.

¶4 Findings of fact by the trial court will not be upset on appeal unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2003-04). In addition, when the trial court acts as the finder of fact, and where there is conflicting testimony, the trial court is the ultimate arbiter of the credibility of witnesses. ***Id.*** Further, 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. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 249-50, 274 N.W.2d 647 (1979).

¶5 At the conclusion of the trial, Judge Maxine White made the following findings of fact:

> 20. Mr. Feiza provided credible and compelling testimony that the defendant's replacement of the roof and other repairs was defective and below industry standards. At the time of his inspection on December 6, 2001 there were still some noticeable moisture, wetness, leaks and visible water damage, which resulted from improper flashing under the wall cladding, among other defects.
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> 21. On October 21, 2003, and on November 5, 2003, Mr. Feiza made two additional visits to the property, during which he reconfirmed the defects and leaks.
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> 22. Mr. Feiza provided convincing testimony that many areas of the roof, either the type or shape of material used for flashing, or the absence thereof, combined with loose and disengaged materials caused Mr. Feiza to conclude that the entire job of constructing flashing and other valley, vents and other construction aimed at water and moisture prevention was not performed in a "good and workmanlike manner" and were not performed according to industry standards.
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> 23. At trial, the defendant relied upon the testimony of three experts, Mr. Johnson, Mr. DeRitter, and Mr. Meldman. The defendant's experts who testified that the roof leak problems were caused by the age of the property, by deterioration unrelated to defendant's work, and by a need to add a total of 33 feet of flashing to the roof for a cost of between $12 and $15 per foot,

> for a total of $424 to $495, were all found to be less convincing than the detailed testimony of Mr. Feiza.
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> ….
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> 27. The Court finds that both the direct and reasonable inferences from the evidence support its conclusion that the defendant failed to provide "good and workmanlike" product to the plaintiffs in its performance on the contract and change order.

¶6 Quite simply, the trial court was offered testimony from both sides that was contradictory. Consistent with its function as trier of fact, the trial court resolved the controverted issues, giving credence to the testimony of the Seaverts' expert witness. With regard to J. M. Remodeling's expert witnesses, they were "all found to be less convincing than the detailed testimony of Mr. Feiza." This finding is not clearly erroneous. There is sufficient evidence in the record to support the trial court's choice.

¶7 Based upon Feiza's testimony, the trial court found that the Seaverts suffered damages in the amount of $19,300. J. M. Remodeling contends the damage estimates were speculative. It further argues that Feiza's estimates are inadmissible because they are not based upon his personal experience, but rather on his discussions with others who had not viewed the property. We are unpersuaded.

¶8 To warrant damages, the evidence must demonstrate that the injured party has sustained some injury and must establish sufficient data from which the trial court or jury could properly estimate the amount. ***Plywood Oshkosh v. Van's Realty & Const.***, 80 Wis. 2d 26, 31, 257 N.W.2d 847 (1977). The claimant generally has the burden of proving by credible evidence to a reasonable certainty his damage, and the amount thereof must be established at least to a reasonable certainty. Compliance with the rule of reasonable certainty does not make it

necessary for claimants to prove their damages with mathematical accuracy; rather, it is sufficient if damages can be estimated by the trier of fact with a reasonable degree of certainty. A claimant's mere statement or assumption that the claimant has been damaged to a certain extent without stating any facts on which the estimate is made is too uncertain. ***Id.*** at 31-32.

¶9 The record contains ample evidence upon which a reasonably certain estimate of damages could be made. Testimony established that Feiza was a licensed professional engineer who had been inspecting homes and resolving construction-related issues for the past ten years. Feiza testified that he inspected more than 4,000 roofs over that period, and that he was familiar with the standards of the industry. Feiza viewed the property on three separate occasions, and from those inspections was able to estimate what the cost of repairing the defective workmanship would be. Feiza offered reasonably certain testimony with regard to the various problems, and offered estimates to correct each problem he found with the work J. M. Remodeling performed. Feiza testified that based upon his inspections and his past experience, as well as discussions and estimates from other contractors, he was able to estimate the amount necessary to repair the damages. These estimates totaled $19,300, the figure the trial court used in assessing damages in this case. The damage amounts were not speculative.

¶10 Again, J. M. Remodeling insists that its witnesses provided detailed evidence to repudiate Feiza's damages testimony. J. M. Remodeling also argues without citation to authority that the damage figures accepted by the trial court were inadmissible because Feiza received the figures from unnamed contractors who had not personally viewed the property. However, WIS. STAT. § 907.03 permits an expert to base an opinion on facts or data that are not otherwise admissible as evidence. As the court stated in ***E.D. Wesley Co. v. City of New***

Berlin, 62 Wis. 2d 668, 675, 215 N.W.2d 657 (1974): "Most expert opinions are based partly upon hearsay; the opinion of an expert is accepted because he is in a position to accept or reject the hearsay because of his expertise or knowledge of what hearsay evidence should be relied upon by him in the affairs of everyday life." As is the case with medical experts, it is common for expert witnesses in construction disputes to rely on the reports and opinions of others in forming opinions that are within the scope of their own expertise. J. M. Remodeling's objections do not go to the admissibility but to the weight of Feiza's opinions. Moreover, the conflicting testimony presented by J. M. Remodeling's witnesses is again simply a matter of weight and sufficiency of the evidence. ***Cutler Cranberry Co. v. Oakdale Elec. Coop.***, 78 Wis. 2d 222, 233, 254 N.W.2d 234 (1977). The record provided the trial court with sufficient evidence to establish damages.

By the Court.—Judgment affirmed.

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