COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 01-0283

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

SUSAN SHOEMAKER,

PLAINTIFF-APPELLANT,

V.

THE HEARST CORPORATION, A DELAWARE CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] Assuming, *arguendo*, that the Good Housekeeping Seal provided an express, limited warranty to Susan Shoemaker and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). All further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

that such a warranty was breached during the course of the move provided by Wheaton Van Lines, Inc., we conclude that the breach was cured by the payment of an agreed-upon amount for all damaged, destroyed or lost personal property belonging to Shoemaker. Additionally, we conclude the circuit court did not err in awarding statutory costs to The Hearst Corporation. Accordingly, we affirm the judgment of the circuit court.

BACKGROUND

¶2 Shoemaker paid Wheaton $3,185.60 to move her household furnishings from Aurora, Colorado, to Edgerton, Wisconsin. The move did not go well. When the truck was unloaded in Edgerton, Shoemaker discovered that some of her furnishings were damaged or destroyed and that other items had been lost. She filed a claim against Wheaton for more than $11,000, which she asserted was the cost of repair of the damaged items and replacement of the missing or destroyed ones.

¶3 Wheaton hired Klein-Dickert, Co., to provide an independent review of the repair and replacement costs, and then it offered Shoemaker $3,345.45 to settle all claims relating to the move. Shoemaker countered, and Wheaton and Shoemaker ultimately agreed upon a payment of $4,625.33 to settle all claims arising out of the move. The settlement agreement on the checks Shoemaker cashed stated, "I hereby release and forever discharge Wheaton Van Lines, Inc., its agents and employees from any and all claims of whatsoever nature with respect to the property involved in the shipment."

¶4 This lawsuit is brought against The Hearst Corporation, the owner of *Good Housekeeping* magazine where Wheaton advertised its services and whose

Good Housekeeping Seal Wheaton displayed. *Good Housekeeping* magazine published the following description of the seal:

> LIMITED WARRANTY:
>
> > If any product[2] that bears our Seal or is advertised in this issue of the magazine … proves to be defective at any time within two years from the date it was first sold to a consumer, we, Good Housekeeping, will replace the product or refund the purchase price. This policy covers you, the consumer, whether you bought the product or it was given to you (by the buyer).
> >
> > ….
> >
> > This warranty gives you specific legal rights, and you may also have other rights, which vary from state to state.

Based on the above limited warranty language, after settling with Wheaton, Shoemaker attempted to reclaim from Hearst the $3,185.60 she paid to Wheaton for the move. Hearst refused to pay, stating that Shoemaker had already been compensated for any defect in the move through her settlement with Wheaton. Shoemaker then sued Hearst in small claims court for, among other things, breach of warranty, alleging that she had relied on the Good Housekeeping Seal in selecting Wheaton. When the small-claims court granted judgment to Hearst, she sought *de novo* review in the circuit court. It concluded that Wheaton's payment to Shoemaker constituted accord and satisfaction, granted summary judgment for Hearst, and awarded statutory costs to it as the prevailing party. Shoemaker

[2] The warranty of the Good Housekeeping Seal, by its express terms, covers only products. However, the record is replete with Hearst's expansion of those terms to cover services as well, and Hearst does not argue that the move is not a "product." Therefore, we do not address the scope of the warranty further.

appeals the dismissal of her breach of warranty claim and the award of statutory costs.[3]

DISCUSSION

Standard of Review.

¶5 We apply the same summary judgment methodology as the circuit court. ***Cemetery Servs., Inc. v. Department of Regulation & Licensing***, 221 Wis. 2d 817, 823, 586 N.W.2d 191, 194 (Ct. App. 1998). We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or of law. ***Id.*** If we conclude that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. ***Id.*** If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which entitle the opposing party to a trial. ***Id.***

Breach of Warranty.

¶6 "A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended to relieve the promisee of any duty to ascertain the fact for himself, and amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue." ***American Med. Sys. v. Medical Eng'g Corp.***, 794 F. Supp. 1370, 1400

[3] Shoemaker also sued Hearst under theories of fraud, pursuant to WIS. STAT. § 100.18, and of estoppel. Although Shoemaker's appeal raises issues related to these claims, her arguments are insufficiently developed for us to address them, and we decline to do so. ***Truttschel v. Martin***, 208 Wis. 2d 361, 369, 560 N.W.2d 315, 319 (Ct. App. 1997).

(E.D. Wis. 1992), *aff'd in part and rev'd in part*, 6 F.3d 1523 (7th Cir. 1993). However, some courts have held that the parties to a contract may create an express warranty that applies to the sale of services. *See, e.g.*, ***Southwestern Bell Tel. Co. v. FDP Corp.***, 811 S.W.2d 572, 574 (Tex. 1991) (concluding that telephone company breached an express warranty by failing to print an advertisement correctly); ***Hawkins v. McGee***, 146 A. 641, 643 (N.H. 1929) (holding that doctor who promised a patient a "hundred per cent perfect hand" breached a warranty by providing a hairy hand instead).

¶7 In Wisconsin, warranty law generally applies to goods and products and makes the plaintiff whole by providing recovery from the manufacturer for the cost to repair the damage or to replace the goods or products. ***State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.***, 225 Wis. 2d 305, 317-18, 592 N.W.2d 201, 206 (1999). Here, we are not dealing with a product,[4] and the person who provided what is alleged to be a defective service is not the subject of this lawsuit. Additionally, Wisconsin law requires privity of contract between the parties before liability can be founded on breach of express warranty. ***Twin Disc, Inc. v. Big Bud Tractor, Inc.***, 582 F. Supp. 208, 215 (E.D. Wis. 1984) (citing ***Paulson v. Olson Implement Co.***, 107 Wis. 2d 510, 319 N.W.2d 855 (1982); ***Barlow v. DeVilbiss Co.***, 214 F. Supp. 540 (E.D. Wis. 1963)). However, it is possible in certain limited circumstances to create privity through the formation of a unilateral contract where the consideration for that contract is provided by a third party. ***Paulson***, 107 Wis. 2d at 517, 319 N.W.2d at 858. Furthermore, when an express warranty is the subject of a plaintiff's claim, there is a right to cure the defect

[4] Express warranties are also part of the common law in Wisconsin, and they have been applied to transactions which did not involve goods or a product, such as real estate. ***Dittman v. Nagel***, 43 Wis. 2d 155, 161, 168 N.W.2d 190, 193 (1969).

under Wisconsin statutory warranty provisions. *See* ***Carl v. Spickler Enters., Ltd.***, 165 Wis. 2d 611, 621-22, 478 N.W.2d 48, 52 (Ct. App. 1991) (holding a motorist who claims a breach of warranty for a defective vehicle loses that claim if he does not afford an opportunity to cure the defect).

¶8 Most of the warranty cases in Wisconsin arise under the Uniform Commercial Code, but as we are not dealing with goods, the UCC provisions are not applicable to the claim at issue. ***Dittman v. Nagel***, 43 Wis. 2d 155, 161, 168 N.W.2d 190, 193 (1969); WIS. STAT. § 402.313(1). However, the principles contained in that body of law can provide guidance in reaching our conclusion here.

¶9 Our review of the record leads us to conclude that the right to display the Good Housekeeping Seal and its express warranty was promised to Wheaton to provide to its customers if Wheaton purchased advertisements in the *Good Housekeeping* magazine. As Shoemaker has shown no direct actions between her and Hearst, the only way she could have any warranty rights under the Good Housekeeping Seal (and we do not decide here whether she has such rights) is if Wheaton had provided consideration for the formation of a unilateral contract between Shoemaker and Hearst, or if she were a third-party beneficiary of the contract between Wheaton and Hearst. *See* ***Paulson***, 107 Wis. 2d at 517, 319 N.W.2d at 858; ***Pappas v. Jack O.A. Nelsen Agency, Inc.***, 81 Wis. 2d 363, 370, 260 N.W.2d 721, 725 (1978). However, if a warranty had developed through either means, we conclude that such a warranty would contain a right to cure any defect for which a breach was claimed, as that is a general principle of Wisconsin warranty law. *See* ***Carl***, 165 Wis. 2d at 621-22, 478 N.W.2d at 52; ***Rich Prods. Corp. v. Kemutec, Inc.***, 66 F. Supp. 2d 937 (E.D. Wis. 1999).

¶10 The defects in the move were damaged, destroyed or lost personal property which belonged to Shoemaker. Wheaton paid Shoemaker for all property that was damaged, destroyed or lost during the move. Therefore, by the payment of $4,625.33, it cured the defect that resulted in the claimed breach of warranty. Shoemaker accepted this payment in full satisfaction of "all claims of whatsoever nature with respect to the property involved" in the move from Colorado to Wisconsin. Because the defect that is the subject of Shoemaker's suit against Hearst has been cured, we therefore conclude that the circuit court acted correctly in dismissing the breach of warranty claim.

Statutory Costs.

¶11 Shoemaker also contends that Hearst should not have been awarded statutory costs under WIS. STAT. § 814.03. Section 814.03 is not an optional provision in litigation when the plaintiff does not prevail. Costs to the prevailing defendant are mandatory. ***Strong v. Brushafer***, 185 Wis. 2d 812, 818, 519 N.W.2d 668, 671 (Ct. App. 1994). The circuit court awarded appropriate statutory costs. Accordingly, we affirm its judgment in all respects.

CONCLUSION

¶12 Assuming, *arguendo*, that the Good Housekeeping Seal provided an express, limited warranty to Shoemaker and that such a warranty was breached during the course of the move provided by Wheaton, we conclude that the breach was cured by the payment of an agreed upon amount for all damaged, destroyed or lost personal property belonging to Shoemaker. Additionally, we conclude the circuit court did not err by awarding statutory costs to Hearst. Accordingly, we affirm the judgment of the circuit court. No costs on appeal to either party.

By the Court.—Judgment affirmed.

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