COURT OF APPEALS
DECISION
DATED AND RELEASED

June 6, 1995

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2407

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

HOPPE BUILDERS, INC.,

Plaintiff-Appellant,

v.

SHAUN L. MOERSFELDER,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed in part; reversed in part.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Hoppe Builders, Inc., appeals from the trial court's award of damages to Shaun L. Moersfelder in connection with the home Hoppe Builders constructed for her. Hoppe Builders argues that (1) Moersfelder did not establish a *prima facie* case of negligence; (2) the trial court erred in awarding Moersfelder damages contrary to the contract; (3) the trial court's award of damages for negligent construction of the home was excessive

and contrary to law; and (4) the trial court's findings of fact are clearly erroneous. We affirm in part and reverse in part.

Hoppe Builders designed and constructed a home for Moersfelder for a contract price of $86,861.[1] The parties also agreed on a statement of extra charges and credits, with an additional balance due Hoppe Builders of $3,563.44. At trial, Moersfelder still owed Hoppe Builders $6,563.44, but she had terminated her business relationship with the company because of complaints she had with the construction of her home.

Hoppe Builders sued Moersfelder for the balance due on the contract. Moersfelder filed a counterclaim for $11,000, alleging that Hoppe Builders was negligent in several respects in constructing her home. The trial court awarded Hoppe Builders its entire claim of $6,563.44, but it awarded Moersfelder a total of $19,643 on her counterclaim. Hoppe Builders appeals.

Hoppe Builders presents four issues for our review, and we address them *seriatim*.

A. Prima facie case of negligence.

Hoppe Builders argues that Moersfelder did not present any competent expert testimony controverting the testimony of Gary Hoppe, who designed the home, and other witnesses stating that the home was designed and built according to industry standards. Hoppe Builders contends, therefore, that she has not presented a *prima facie* case of negligence.

"Negligence requires a duty of care on the part of the defendant, a breach of that duty, and an injury caused by the breach. Duty is the exercise of reasonable care whenever it is foreseeable that one's conduct may cause harm to

[1] The parties later signed a note lending $15,000 of this amount to Moersfelder. At the time of trial, Moersfelder still owed $3,000 on this note.

another." ***Kaltenbrun v. City of Port Washington***, 156 Wis.2d 634, 641, 457 N.W.2d 527, 529 (Ct. App. 1990) (citation omitted).

John Heisler, an architect, testified as an expert for Moersfelder that the home was not built according to industry standards in several respects, and that Hoppe Builders breached its duty of care in constructing the home. Hoppe Builders did not object to that testimony, but now argues that Heisler was applying the wrong standard of care—that of an architect and not a designer.

Section 901.03, STATS., provides in part:

> (1) EFFECT OF ERRONEOUS RULING. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
>
> (a) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.

By failing to object to Heisler's expert testimony in the trial court, Hoppe Builders has thus waived any objection it had to the competency of Mr. Heisler as an expert witness. Furthermore, how much weight to give Mr. Heisler's expert testimony was a matter for the trial court to consider. *See* ***State ex rel. T.R.S. v. L.F.E.***, 125 Wis.2d 399, 401, 373 N.W.2d 55, 56 (Ct. App. 1985) ("The weight of the evidence is a matter solely for the factfinder, and it is not the function of an appellate court to review such questions."). Hoppe Builders does not challenge any other element of Moersfelder's claim for negligence, and we conclude that Moersfelder has made a *prima facie* case of negligence. *See* ***Kaltenbrun***, 156 Wis.2d at 641, 457 N.W.2d at 529.

B. Damages contrary to the contract.

Hoppe Builders contends that, in two instances, the trial court awarded damages to Moersfelder for costs that the contract specified would be borne by her. We agree.

1. Insurance proceeds.

While gravel was being poured into the garage cavity area of the construction site, a garage wall collapsed and had to be rebuilt. Moersfelder made a claim for the damage to her insurance company. Her insurance company paid Hoppe Builders the entire $1,600 directly, and Moersfelder suffered no out-of-pocket loss.[2] The trial court found that Hoppe Builders was negligent in construction of the wall, and it ordered Hoppe Builders to reimburse her $1,600 because she had paid the premiums for the insurance coverage.

The contract between the parties provided in part:

> The Buyer shall, prior to commencement of the work and until full payment is made to Builder, keep the building insured by Contractors Multiple Perils all risk coverage against loss or damage by fire, windstorm, and all other hazards, *including* vandalism, theft, and *basement collapse*, naming the Builder as additional insured and loss payee....

(Emphasis added.) The interpretation of a contract is a question of law that we review *de novo*. ***Edwards v. Petrone***, 160 Wis.2d 255, 258, 465 N.W.2d 847, 848 (Ct. App. 1990).

[2] As Hoppe Builders points out, the trial court erred in finding that Moersfelder paid the insurance proceeds to Hoppe Builders.

The contract specifically provided that loss or damage by all other hazards were to be covered by Moersfelder's insurance, with Hoppe Builders as a loss payee. The plain language of the contract did not limit coverage for hazards only to *basement* collapse, but merely listed that event as an example of a covered item. The contract also provided that the cost of "excavation cave-in corrections" would be borne by Moersfelder. The insurance required by the contract was to cover just such a risk. Hoppe Builders, as loss payee, was entitled to the proceeds as reimbursement to it for repairing the collapse. Thus, contrary to Moersfelder's argument, the collateral source rule does not apply. *See* ***W. G. Slugg Seed & Fertilizer, Inc. v. Paulsen Lumber, Inc.***, 62 Wis.2d 220, 228, 214 N.W.2d 413, 417 (1974) (subsequent collateral recovery by plaintiff will not reduce amount of defendant's liability). We conclude that the trial court erred in awarding Moersfelder damages of $1,600, equal to the insurance payment to Hoppe Builders.

2. Basement dry wall.

The house plans provided that the basement of the home would be unfinished with five-eighths-inch styrofoam insulation on the walls. When Hoppe Builders applied for the building permit, the inspector required it to use one-inch styrofoam on the exposed basement walls to meet the energy code. When the building inspector made his final inspection of the basement, he required Moersfelder to cover that foam insulation with dry wall. The trial court found that the required dry wall was "occasioned by the use of an efficient insulation system. [Moersfelder] was unaware of the increase in cost, but does reap the benefit of its installation. [Moersfelder] should be awarded 50 percent of that cost, to wit, the sum of $2,630."

The contract between Moersfelder and Hoppe Builders provided: "Any changes, alterations, or extras from the plans or specifications, which may be required by any public body or inspector, which increases costs, shall constitute an extra and shall be paid by Buyer, and shall not require written approval from Buyer." As noted above, we review the interpretation of a contract *de novo*. ***Petrone***, 160 Wis.2d at 258, 465 N.W.2d at 848.

Moersfelder does not dispute that building codes require the dry wall, but argues that Hoppe Builders was negligent in its choice of basement insulation. Her expert testified that if Hoppe Builders had used another type of insulation, the dry wall would not have been required. However, Gary Hoppe's testimony is undisputed that the building inspector required the thicker insulation and then the dry wall over it. Neither party argues that the costs associated with the dry wall were not an "extra." Under the terms of the contract, Moersfelder must bear the cost of the dry wall mandated by the building inspector, and we reverse the trial court's award of $2,630 to Moersfelder.[3]

C. Allegedly excessive award for negligent construction.

[3] Hoppe Builders argues that the cost of installing dry wall in the home's basement was far less than Moersfelder contends. Whatever the cost of the dry wall, however, it is Moersfelder's responsibility.

Hoppe Builders argues that the trial court's award of $19,643 in damages was "disproportional to contract amount [*sic*] and there was no showing as to actual loss of value to Moersfelder."[4] Hoppe Builders does not, however, argue that any specific portion of the award was excessive. An appellate court will not consider arguments "broadly stated but never specifically argued." ***Fritz v. McGrath***, 146 Wis.2d 681, 686, 431 N.W.2d 751, 753 (Ct. App. 1988). We decline to address this issue.

[4] As noted above, we have already reduced that amount by $4,230.

D. Trial court's finding of fact as to plumbing location.

Hoppe Builders argues that the trial court incorrectly awarded Moersfelder the cost of relocating basement plumbing. The trial court found: "[Hoppe Builders] did not locate plumbing according to contract and plans, and in fact stated that it was not measured, resulting in an improperly positioned bathroom. The cost of relocation of said plumbing is in the sum of $2,870."

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the ultimate facts and state separately its conclusions of law thereon.... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

RULE 805.17(2), STATS. How much weight to give testimony is a matter for the trial court to consider. *See* ***State ex rel. T.R.S.***, 125 Wis.2d at 401, 373 N.W.2d at 56. We affirm on this issue.

Moersfelder testified that the location of the basement plumbing was "at least 12 inches" off from the location in the blueprints. She testified that this error would make her bathroom shorter by twelve inches and that "every time you'd open up the door it would hit against the whirlpool." Gary Hoppe explained: "[T]here is no accurate measurements [*sic*] on the prints where each item goes. There's dimensions [*sic*] on there, but they're not accurate dimensions. It's a future room." When he was asked whether the basement arrangement accurately reflected the plans, he replied: "I don't know that because I didn't measure all the total dimensions.... I never ever had an accurate measurement, it was a presumed measurement." Although Hoppe Builders points out that Gary Hoppe did measure the plumbing placement and found it adequate, it fails to note that this measurement occurred *after* the plumbing was installed, after Moersfelder had expressed concerns to him about the plumbing location.

The trial court's finding indicates that it chose to credit Moersfelder's testimony more than Gary Hoppe's, and it is not clearly erroneous.

Conclusion

We reverse the trial court's award to Moersfelder of $1,600 for the garage wall collapse and $2,630 for dry wall installation. We affirm the judgment of the trial court in all other respects.

By the Court.—Judgment affirmed in part and reversed in part.

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