COURT OF APPEALS
DECISION
DATED AND FILED

July 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1266 **Cir. Ct. No. 2009CV219**

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

IVI NORTH, INC., A WISCONSIN CORPORATION,

PLAINTIFF-RESPONDENT,

V.

B&B METALS PROCESSING CO., INC., A WISCONSIN CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. B&B Metals Processing Company appeals a judgment entered on a jury verdict finding that B&B breached its contract with IVI North, Inc. B&B contends that the trial court erred with respect to its

treatment of the trial exhibits and jury instructions and challenges the sufficiency of the evidence supporting the jury's verdict. Seeing no error, we affirm.

¶2 IVI, formerly Industrial Ventilation, Inc., fabricates custom orders and industrial ventilation systems. B&B is an auto salvage yard and metals recycling facility. B&B contracted with IVI to design and install a vacuum "Car Shredder Debris Collector" system to remove "fluff" from the salvageable metal. Fluff—materials like plastic, vinyl, leather, cloth, sponge, foam and glass—is what remains after junked automobiles are stripped and shredded. The contract was silent as to expectations or guarantees regarding the percentage of fluff removal or whether the system would eliminate the need for repeating the fluff-removal process, or "rerunning shred."

¶3 Almost immediately, B&B complained that the system did not perform properly. B&B claimed the system plugged easily and required rerunning shred, still with unsatisfactory fluff removal. IVI partly reconfigured the system and put in a motor with twice the horsepower. B&B remained unhappy. It claimed that it purchased the system because IVI represented that it would remove ninety percent of the fluff without rerunning shred. After paying $18,205 of the $65,000 contract price, B&B stopped making payments.

¶4 IVI filed suit alleging breach of contract, unjust enrichment in the alternative and misappropriation; the latter two claims were dismissed by stipulation before trial. B&B counterclaimed, alleging breaches of express and implied warranties and violations of WIS. STAT. § 100.18 (2009-10).[1]

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

¶5 The three-day trial centered on what each party claimed it represented and understood the other party to have represented. The testimony conflicted. The jury found that B&B breached its contract with IVI and awarded IVI $46,795, the amount B&B still owed on the contract. It also found that IVI did not breach any duties to B&B or violate WIS. STAT. § 100.18. The court denied B&B's motions after verdict.

¶6 B&B appeals. Additional facts will be supplied as needed.

Trial Exhibits

¶7 The trial court admitted a number of exhibits—B&B says fifty-two—outside the presence of the jury. B&B contends the trial court erred when it refused to grant a new trial after failing to inform the jury that those exhibits were admitted into evidence. We disagree.

¶8 First, B&B did not object at trial, thereby forfeiting its right to appellate review. *See* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612. We endorse the trial court's comments in that regard:

> [I]f a party wants to make an objection that the exhibits should be admitted in the presence of the jury or have the Court instruct the jury that the exhibits were admitted, that's a point that has to be made during the trial when it can be addressed. You can't wait until the trial is over before complaining about something, and then say that the Court should have done it.

¶9 Even so, witnesses used and referenced exhibits throughout the trial. The court also invited the parties to refer to the exhibits in their closing arguments, to pass them around to the jurors and to display the exhibits with the ELMO document projector. We reject B&B's logic that since the jury was told that closing arguments are not evidence, it would make the leap that the exhibits were

not evidence. B&B does not persuade us that the court erred or that the jury was confused.

¶10 B&B next takes issue with the trial court's decision not to automatically send all of the exhibits to the jury room during deliberations. It argued that the ELMO had certain limitations due to the size of some of the documents and the vantage point of some of the jurors. Although the court said it would attempt to accommodate a jury request if one was made, B&B argues that the court should have sent all exhibits to the jury room at the outset or, at a minimum, should have informed the jury that it could request admitted exhibits for its use during deliberations.

¶11 The trial court has broad discretion in determining whether to send exhibits to the jury room. ***Schnepf v. Rosenthal***, 53 Wis. 2d 268, 272, 193 N.W.2d 32 (1972). To sustain a discretionary ruling, an appellate court need only find that the trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a reasonable conclusion. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Factors the trial court should consider in determining whether an exhibit should be sent into the jury room include whether (1) it will help the jury to properly consider the case, (2) a party will be unduly prejudiced by submission of the exhibit, and (3) the exhibit could be subjected to improper use by the jury. ***State v. Anderson***, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74.

¶12 The court noted that the juror with the poorest view confirmed that he was able to view the images projected on the screen. The court further explained that sending the exhibits back to the jury room gives the physical exhibits more weight than they merit in a case where the issue was what was said

between the parties when the contract was being formulated. The postverdict motion briefing convinced the court that it had made the correct ruling:

> Frankly, in reading the briefs, I only feel stronger about the decision that I made at the time of the trial, and I think perhaps the best evidence of that lies in the argument that defense counsel made, that there's insufficient evidence in the record to support the … verdict …. All the citations were to oral testimony of the parties, none were to the exhibits.

¶13 The court considered the proper factors and explained its reasoning. The jury plainly did not need to be advised that it could ask for exhibits because it requested, and was granted, two. The court properly exercised its discretion.

Jury Instruction

¶14 The trial court refused to give B&B's proposed jury instruction regarding the implied warranty of fitness for a particular purpose and product specifications. Instead, it gave WIS JI—CIVIL 3202 Implied Warranty: Fitness For Particular Purpose. B&B contends that its proposed instruction was a proper statement of the law and that the pattern instruction does not address a contract proposal with specifications.

¶15 A trial court also has wide discretion as to instructions. ***Kolpin v. Pioneer Power & Light Co.***, 162 Wis. 2d 1, 32, 469 N.W.2d 595 (1991). If the court's instructions adequately cover the law applicable to the facts, we will not find error in the refusal of special instructions even though the refused instructions themselves would not be erroneous. ***Id.***

¶16 The court explained that, while B&B's proposed instruction was "not inaccurate," it gave "a little more judgmental characterization of the law," and "the Court generally avoids instructions that can be interpreted as a comment

on the evidence one way or another." The trial court is correct that it should not comment on the evidence. *See* ***State v. Davidson***, 44 Wis. 2d 177, 192, 170 N.W.2d 755 (1969). Giving B&B's requested instruction may have elevated the existence of product specifications, a reliance factor favorable to B&B, over other factors. We see no error.

Evidence to Support the Verdict

¶17 B&B next asserts that no credible evidence exists to support the verdict answers that it breached its contract with IVI and that IVI did not breach the implied warranty of fitness. To the contrary, B&B contends, all the credible evidence established that IVI knew that B&B wanted a system that would avoid rerunning shred and that B&B was relying on IVI to design a system to fulfill that purpose, *see* WIS. STAT. § 402.315, and that its claim for breach of the implied warranty of fitness for a particular purpose provided a complete defense to IVI's action for the price. B&B also asserts that the credible evidence established that IVI made "untrue, deceptive or misleading" representations about the system's capabilities that materially induced it to enter into the contract, in violation of WIS. STAT. § 100.18. These arguments fail to persuade.

¶18 We will not upset a jury verdict if there is any credible evidence to support it, especially where, as here, the trial court explicitly approved the verdict by considering and denying postverdict motions. *See* ***Radford v. J.J.B. Enters., Ltd.***, 163 Wis. 2d 534, 543, 472 N.W.2d 790 (Ct. App. 1991). Our duty is to search for credible evidence to sustain the verdict the jury reached, not to search for evidence to sustain a verdict it could have reached but did not. ***Id.*** We will not overturn the verdict unless "there is such a complete failure of proof that the

verdict must be based on speculation." ***Morden v. Continental AG***, 2000 WI 51, ¶40, 235 Wis. 2d 325, 611 N.W.2d 659 (citation omitted).

¶19 The jury heard the following testimony. IVI sales engineer Richard Pence and IVI system designer Darwin Struensee both testified that they met with B&B's Ted Burrows to discuss what B&B wanted in a system. Both testified that Burrows had rejected alternate products in the industry because of significantly higher cost, footprints too large for B&B's available space, power requirements that would necessitate bringing in a new power supply feed, and/or exhaust that would entail the cumbersome process of getting a DNR permit. Both also testified that Burrows insisted on a system that worked within these limitations and that it was he who broached the idea of a vacuum system.

¶20 Pence testified that Burrows said he wanted ninety to ninety-five percent fluff collection; that he told Burrows when quoting the system that those percentages were "very high" and "very hard to obtain" for a system within B&B's limitations; that he told Burrows that, as "so much of the fluff was entangled," the IVI system "would not take away entangled fluff," only "fluff off the top of the conveyors"; that he never told Burrows that the system could achieve ninety-five percent fluff removal or would eliminate rerunning; and that Burrows never sought a guarantee to that effect.

¶21 Struensee likewise testified that he told Burrows that the vacuum system would be able to collect only fluff "that's not pinned … or weighted down by a slug of me[t]al that's the size of your fist"; that "any fluff that would be trapped or tangled, or a seat belt with a metal clip still on it, things of that nature[,] would be nearly impossible … to be sucked into a vacuum system"; and that he

did not tell Burrows that the system would avoid reruns or remove a definite amount of fluff.

¶22 Burrows testified that Pence assured him that IVI's system "[a]bsolutely … would cure from rerunning" and confirmed that if he had been told IVI could not guarantee the system would prevent rerunning he "[a]bsolutely [would] not" have entered into the contract. He also testified, however, that he and Pence discussed entangled fluff "many, many times"; that he, Burrows, "didn't expect their system to take it [entangled fluff] off," and that "pickers" would take it off by hand. It is for the jury to decide issues of credibility, to weigh the evidence and to resolve conflicts in the testimony. ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990).

¶23 IVI knew that B&B wanted a highly efficient system. There was credible evidence, however, that IVI told B&B that a ninety-five percent collection rate was unrealistic and that the vacuum system would be unable to remove entangled fluff. The contract did not mention a removal percentage or eliminating the need to rerun shred. The trial court noted that there was enough evidence to support a jury finding for either party and, had the jury found for B&B, IVI likely could not successfully attack the verdict. We agree. The evidence permits more than one reasonable inference to be drawn regarding what was said and what was understood. Because the jury chose to believe IVI's version, and because the evidence in support is not incredible as a matter of law, we must accept the inference supporting the jury's findings. *See* ***id.*** at 506-07.

By the Court.—Judgment affirmed.

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