COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2146 **Cir. Ct. No. 2011SC198**

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

BRET L. HALVERSON,

PLAINTIFF-RESPONDENT,

V.

EMPIRE DIESEL PERFORMANCE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Empire Diesel Performance appeals a judgment awarding Bret L. Halverson $1100 in damages, plus costs, resulting

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g)(2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

from a breach of implied warranty on a turbocharger sold to Halverson. Empire Diesel contends that the judgment was not based on the evidence before the court. For the reasons we explain below, we affirm.

BACKGROUND

¶2 Halverson contacted Empire Diesel to upgrade the performance of his truck's engine so that it could be used at "pulling events." Empire Diesel sold Halverson a turbocharger for $2200 and installed it in the truck. About a month later, the turbocharger stopped functioning properly. Halverson suspected that the turbocharger was defective and contacted Empire Diesel. Halverson returned the turbocharger to Empire Diesel so that the owner, Chad Remakel, could inspect it.

¶3 Remakel indicated to Halverson that the turbocharger may be defective due to a manufacturing flaw. Halverson requested a new turbocharger, and Remakel contacted the manufacturer of the turbocharger, Extreme Machine. Instead of replacing the turbocharger, Extreme Machine repaired the turbocharger and sent it back to Empire Diesel.

¶4 Halverson refused to accept the turbocharger because he believed that it remained defective. Halverson contacted Remakel to ask whether he could return the turbocharger and obtain a refund. According to Halverson, Remakel informed him that the manufacturer would refund the money if he returned the turbocharger. However, a few days later, Remakel told Halverson that the manufacturer would not provide a refund. Halverson asked Remakel for the manufacturer's contact information.

¶5 Halverson contacted Extreme Machine. Extreme Machine told Halverson that they would not refund his money but offered to build Halverson a

new turbocharger. Halverson accepted and sent the turbocharger to Extreme Machine in New York. After a few weeks, Halverson contacted Extreme Machine and was informed that Extreme Machine would not build him a new turbocharger. Extreme Machine did not return the turbocharger to Halverson.

¶6 Halverson filed a small claims complaint against Empire Diesel and Extreme Machine for $2200, the cost of the turbocharger. Following a bench trial, the court entered judgment awarding Halverson half of the cost of the turbocharger, $1100, plus costs. The court dismissed the claim against Extreme Machine.

¶7 The court explained that Halverson had the burden to show by a preponderance of the evidence that Empire Diesel had breached an implied warranty. The court further explained that Empire Diesel could not claim that there was no implied warranty on the turbocharger without demonstrating that it conveyed that fact to Halverson. Because Empire Diesel failed to show that it conveyed to Halverson that there was no implied warranty on the turbocharger, the court entered judgment in favor of Halverson. Empire Diesel appeals.

DISCUSSION

¶8 The issue on appeal is whether the evidence presented at trial supported the circuit court's finding that Empire Diesel breached an implied warranty on the turbocharger.

¶9 We apply a "highly deferential" standard of review to the circuit court's findings of fact and do not set aside those findings unless clearly erroneous. ***Royster–Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530. A court's findings are clearly erroneous when they

are against the great weight and clear preponderance of the evidence. ***Id.***, ¶12. Under this standard, we do not set aside a finding of fact even if the evidence would permit a contrary finding, as long as the evidence permits a reasonable person to make the same finding. ***Id.*** We search the record for evidence to support the court's decision and not for evidence to oppose it. ***Id.***

¶10 As an initial matter, we observe that Empire Diesel's arguments are undeveloped. We may decline to review undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Nonetheless, we choose to briefly address what we perceive to be Empire Diesel's arguments on appeal.

¶11 Empire Diesel appears to make three arguments on appeal. First, Empire Diesel argues that, because the testimony revealed that there are no implied warranties on turbochargers, the court's ruling was not based on the facts in evidence. Second, Empire Diesel argues that its final invoice to Halverson clearly stated its policy on implied warranties. Finally, Empire Diesel argues that the court's finding of fact that the turbocharger was not abused was contrary to the evidence presented at trial. We consider and reject each argument in turn.

¶12 As indicated above, Empire Diesel argues that the court's findings were clearly erroneous because the evidence presented at trial demonstrates that there are no implied warranties on turbochargers. It appears that Empire Diesel contends that, although the law provides that a seller must convey the exclusion or modification of an implied warranty to the buyer, the law also provides that an implied warranty can be excluded or modified by course of dealing or course of performance or usage of trade. *See* WIS. STAT. §§ 402.315, 402.316(2), (3)(d).

¶13 At trial, Remakel testified that "[n]inety percent" of turbocharger manufacturers do not offer warranties on turbochargers because they are easy to break. Extreme Machine testified that it does not provide a warranty on its turbochargers. However, Halverson testified that he knows of many custom manufacturers who do provide warranties on turbochargers. Based on the evidence presented at trial, we conclude that a reasonable inference may be drawn that some companies do not provide an implied warranty on turbochargers and a competing inference that other companies do. We do not upset the court's findings of fact even if the evidence would permit a contrary finding. *See* ***Royster–Clark***, 290 Wis. 2d 264, ¶12. Accordingly, we reject Empire Diesel's contention that the court's findings were clearly erroneous because the evidence demonstrates there are no implied warranties on turbochargers.

¶14 Empire Diesel next argues that the court's findings of fact are clearly erroneous because the final invoice sent to Halverson clearly stated Empire Diesel's policy on implied warranties. However, Empire Diesel did not attempt to admit the final invoice as evidence or present facts to show that it conveyed to Halverson that Empire Diesel disclaimed any implied warranty. We do not consider evidence not in the record. *See* ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981). While Empire Diesel refers us to purported "exhibits" in the appendix of its brief, we limit our review to the record and will not consider a brief's appendix, which attempts to supplement the record. *See* ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989).

¶15 Finally, Empire Diesel argues that the court's finding of fact that the turbocharger was not abused was contrary to the evidence presented at trial. According to Empire Diesel, the facts establish that the turbocharger failed because of improper use. At trial, Halverson indicated that he did not do anything

to cause the turbocharger to fail, whereas Extreme Machine testified that the turbocharger failed because of improper use. The circuit court determined that the turbocharger "stopped working for whatever reason" and that, "[t]here isn't any evidence that persuades this court that it was abused in any way." Because there is evidence to support the court's finding of fact, we sustain that finding. *See* ***Royster–Clark***, 290 Wis. 2d 264, ¶12.

CONCLUSION

¶16 Because the circuit court's findings of fact are not clearly erroneous, we affirm.

By the Court.—Judgment affirmed.

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