

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 19, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP775

Cir. Ct. No. 2011CV349

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

AGNESIAN HEALTHCARE, INC.,

PLAINTIFF-RESPONDENT,

V.

RTF MANUFACTURING COMPANY, LLC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed and cause remanded.*

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

¶1 PER CURIAM. RTF Manufacturing Company, LLC, appeals a judgment entered in favor of Agnesian Healthcare, Inc., ordering RTF to pay Agnesian \$28,783.64 in damages and \$13,062 in attorney fees for RTF's

violations of express and implied warranties and WIS. STAT. § 100.18 (2009-10).¹ RTF challenges the sufficiency of the evidence and the fee award. We affirm the judgment in its entirety and remand the case to the trial court for an award of appellate attorney fees pursuant to § 100.18(11)(b)2.

¶2 Agnesian was looking for refrigerators and/or freezers for storing medical products such as medicine and vaccines, for which temperature control within a narrow range is critical. RTF sells clinical refrigerator/freezers (“units”). Alan Del Ponte, Agnesian’s mechanical, refrigeration and freezer maintenance person, researched various manufacturers and units. Del Ponte located RTF’s website, which stated that RTF’s units were “designed for scientific, clinical and industrial use,” and equipped to “maintain standard operating temperatures of +4°C in the Refrigerator section and -20°C in the Freezer section, both with +/- 1°C differentials” and that its “new balanced refrigeration system ... maintains a temperature under varying load conditions and ambient temperature changes.” Agnesian purchased four units for \$28,783.64. The Warranty Certificate accompanying the units stated a one-year warranty on parts and labor and required Agnesian to pay transportation costs to return defective units.

¶3 Upon unpacking the units, Del Ponte noted that some of the walls and panels were bowed and warped. When he started up two of the units, they exhibited “large temperature swings” and one would not “pull down” to the range necessary to proper material storage. Del Ponte promptly called RTF.

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

¶4 RTF president Tom Finck visited Agnesian to inspect the units. He told Del Ponte that the room where Agnesian installed the units was too warm for them to operate properly. Finck also identified a number of other issues with the units, which Finck suggested were the result of post-delivery damage or alteration. Finck took notes during his inspection. RTF did not disclose them in discovery.

¶5 The parties were unable to resolve the problems with the units to their mutual satisfaction. RTF refused to give Agnesian a full refund unless Agnesian paid the \$2,000 return shipping charges and \$7,000 restocking. Agnesian refused and filed suit.

¶6 The trial court found that the units' defects occurred in manufacturing, not in transit or by Agnesian's mishandling; that the units were not merchantable or fit for their intended, clinical purpose; that RTF knew that Agnesian purchased the units for use in the medical industry; that the statements RTF published on its website claiming that the units would maintain standard operating temperatures with a +/- 1°C differential were untrue, deceptive or misleading; that Agnesian relied on RTF's website representations that the units were suitable for laboratory and clinical purposes; and that Agnesian suffered pecuniary loss as a result. The court also found that RTF's failure to disclose Finck's notes or advise Agnesian of their existence occurred in bad faith.

¶7 The trial court therefore concluded that RTF breached its express one-year warranty and its implied warranties of merchantability and of fitness for a particular purpose; that any limitations stated in the Warranty Certificate were unenforceable because they were not communicated beforehand and were undone by the breach of the express warranties; and that RTF's website representations violated WIS. STAT. § 100.18. The court ordered RTF to refund Agnesian's

\$28,783.64, to assume the full costs of retrieval and/or disposal of the units, and to pay Agnesian's attorney fees of \$13,062 under § 100.18 or WIS. STAT. § 804.12(2) as a sanction for violating the court's discovery order, or pursuant to the court's inherent authority. RTF appeals. Agnesian seeks a remand to determine appellate attorney's fees.

¶8 To prevail on its WIS. STAT. § 100.18 claim, Agnesian had to prove that (1) RTF made a representation to the public with the intent to induce an obligation, (2) the representation was untrue, deceptive or misleading, and (3) the representation caused Agnesian a pecuniary loss. *Novell v. Migliaccio*, 2008 WI 44, ¶44, 309 Wis. 2d 132, 749 N.W.2d 544; *see also* WIS JI—CIVIL 2418.

¶9 RTF submits that the trial court rested its finding of a WIS. STAT. § 100.18 violation on the fact that, until Finck visited Agnesian, RTF did not disclose the importance of ambient temperature to proper functioning of the units. The trial court found:

Both during and after the inspection, Tom Finck asserted that the units were not performing properly because they were operated in a room where the ambient temperature was too high. At different times, Tom Finck claimed that the highest ambient temperature in which the units could be operated was 72°F, 74°F, and 75°F. However, RTF did not note any ambient temperature restrictions on its website, in the technical manual that accompanied the units, or in any other manner prior to Tom Finck's inspection.

¶10 RTF correctly contends that nondisclosure does not support a claim under WIS. STAT. § 100.18. Section 100.18 “prohibits only affirmative assertions, representations, or statements of fact that are false, deceptive, or misleading” and that “[a] nondisclosure is not an ‘assertion, representation or statement of fact’” under the statute. *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶40, 270

Wis. 2d 146, 677 N.W.2d 233. This finding, Finding 15, does not stand alone, however.

¶11 Finding 16 states: “The ambient temperature restrictions asserted by Tom Finck are not credible because they were inconsistent and were not communicated until after Agnesian notified RTF of the unit’s defects.” The importance of the nondisclosure, therefore, was two-fold. First, it played a role in Finck’s credibility. When the trial court is the trier of fact, we must defer to its determination of witness credibility. *See Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980).

¶12 Second, the nondisclosure highlighted the inconsistency of what RTF affirmatively represented on its website: that the units would maintain specified standard operating temperatures with a “+/- 1°C differential” and would do so “under varying load conditions and ambient temperature changes.” The trial court found that those affirmative representations were untrue, deceptive or misleading because the units could do neither of those tasks, and that, contrary to those positive claims, Finck testified that RTF did not even attempt to manufacture the units to meet those standards. In particular, Finck’s emphasis on ambient temperature as an explanation for the units’ malfunction was directly at odds with the advertised claim that they would maintain a steady temperature under ambient temperature changes. The affirmative statements captured Agnesian’s interest; the nondisclosures pointed out their falsity. This is not a nondisclosure case.

¶13 RTF also challenges the WIS. STAT. § 100.18 claim on the basis that Agnesian failed to prove that it relied on RTF’s representations and that, even if it did, the reliance was unreasonable. We again disagree.

¶14 Del Ponte testified that Agnesian relied on RTF's website representations. RTF contends that is not proof of *Agnesian's* reliance because it was Del Ponte who identified RTF's product as suitable but his supervisor who placed the order. The supervisor did not testify. RTF asserts: "Del Ponte's 'purchasing decision' (a clever phrase) did not include placing the actual order (the actual purchase decision)," and therefore "it is impossible to tell what was relied upon and what ultimately became a part of the bargain." This is splitting hairs. Corporations of necessity act through their employees or agents. Through its agents, Agnesian searched for a product fitting its needs and relied on RTF's representations in purchasing the units.

¶15 Agnesian, through Del Ponte, specifically contended it relied on the website claim about the +/- 1°C differential. Del Ponte testified that he understood "+/- 1°C differential" to mean that the temperature would stay within 1°C of the set point. RTF contends that if Agnesian relied on the term for that meaning, it did so unreasonably. Finck testified that RTF did not manufacture these units to maintain temperatures within one degree of their settings. Rather, he said, the term means the temperature is adjustable in one-degree increments.

¶16 Reasonable reliance is not an element of a WIS. STAT. § 100.18 cause of action. *Novell*, 309 Wis. 2d 132, ¶53. The reasonableness of a person's reliance may be relevant, however, in determining whether there was a material inducement. *Id.* RTF draws an analogy between the reasonableness of Agnesian's claimed reliance and that of a buyer of a Superman cape advertised to enable flight. *See id.*, ¶40. Noting that Del Ponte testified that he never had seen a unit capable of the precise temperature control he claimed to believe the RTF unit could achieve, RTF contends Agnesian could not possibly have thought that an

“off the shelf non-special order” would prevent temperature fluctuation by more than one degree up or down.

¶17 Agnesian’s understanding does not seem far-fetched to us. Besides Del Ponte, its refrigeration expert testified that the website’s claim that the units were “equipped to ... maintain standard operating temperatures of +4°C in the Refrigerator section ... with [a] +/- 1°C differential[.]” means that “if you set that at 4 degrees C that temperature should not exceed 5 degrees C nor should it drop below 3 degrees C.” The trial court read it the same way. This is a far cry from the fantastical Superman-cape example where the court said it would be “hard pressed to say ... that a trial is required if an adult of normal intelligence who buys the cloak would have a claim under WIS. STAT. § 100.18 if the cloak did not let the buyer fly.” *Id.* (citation omitted). An adult of normal intelligence should be able to reasonably rely that the claims mean what Agnesian understood them to mean.

¶18 Having concluded that the evidence was sufficient to support a finding that RTF violated WIS. STAT. § 100.18, we also approve the trial court’s award of attorney fees under that statute and remand the matter for a determination of appellate attorney fees. *See* § 100.18(11)(b)2. (“Any person suffering pecuniary loss because of a violation of this section by any other person ... shall recover ... reasonable attorney fees”). Accordingly, we need not address either RTF’s further arguments that the evidence is insufficient to support Agnesian’s breach of express and implied warranty claims, or the propriety of attorney fees under WIS. STAT. § 804.12(2) or the court’s inherent authority.

By the Court.—Judgment affirmed and cause remanded.

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

