**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

April 2, 1996

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(1), 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. 95-2437

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

**WALTER L. BENTS,**

**Plaintiff-Appellant,**

**v.**

**FLEETWOOD MOTOR HOMES OF INDIANA, INC.,**

**Defendant-Respondent,**

**FOX R. V. SALES, INC.,**

**Defendant.**

APPEAL from a judgment of the circuit court for Chippewa County: RODERICK CAMERON, Judge. *Reversed and cause remanded with directions.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Walter L. Bents appeals a judgment dismissing his claim under Wisconsin's "lemon law." He argues that credible evidence supported the jury's verdict and the trial court erroneously directed a verdict

dismissing his claim against Fleetwood Motor Homes of Indiana, Inc. We agree. We reverse and remand with directions to reinstate the jury's verdict and enter judgment on the verdict.[1]

Walter Bents purchased a mobile home in October 1991. After bringing the unit into the dealer several times for repairs, he eventually brought suit against Fleetwood, the manufacturer, under Wisconsin's lemon law. Bents claimed that the furnace was defective and the carbon monoxide sensors were defective.

After a two-day jury trial, the jury found in favor of Bents. At motions after verdict, the trial court found that no credible evidence supported the jury's findings that (1) Fleetwood was provided an opportunity to repair the two alleged defects at least four times within the express warranty period or one year from the date of first delivery, without successful repair; and (2) the motor home was out of service for at least thirty days. The court directed a verdict in favor of Fleetwood.

Wisconsin's lemon law, § 218.01, STATS., provides that if a motor vehicle does not conform to an express warranty and the owner reports the nonconformity to the manufacturer or the manufacturer's authorized representative and makes the motor vehicle available for repair before expiration of the warranty, here one year after the first delivery of the motor vehicle, the nonconformity shall be repaired. Section 218.015(2), STATS. If after the manufacturer is afforded a reasonable opportunity to attempt repair, and the nonconformity cannot be repaired, the consumer is entitled to refund or replacement under § 218.015(2)(b), STATS. ***Vultaggio v. GMC,*** 145 Wis.2d 874, 884, 429 N.W.2d 93, 96 (Ct. App. 1988).

The manufacturer or its representative has been given a reasonable opportunity to attempt repair of the nonconformity if within one year of first delivery of the motor vehicle, (1) it has attempted to repair the same nonconformity covered by warranty at least four times and the nonconformity

[1] Bents also argues that the trial court erroneously denied its motion for summary judgment. Because we dispose of the appeal on other grounds, we do not reach this issue. ***Sweet v. Berge,*** 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

continues, or (2) the motor vehicle is out of service because of warranty nonconformities for a total of at least thirty days. Section 218.015(1)(h), STATS.

To be out of service for an aggregate of thirty days does not require that the motor home be in the repair facility for thirty days, only that the motor home is not capable of rendering the services warranted due to the nonconformity. ***Vultaggio,*** 145 Wis.2d at 886, 429 N.W.2d at 97. It may remain in the consumer's possession and be driven. ***Id.*** The notice and opportunity to repair must be sufficient to enable the manufacturer or its dealer to attempt to repair the nonconformity the owner alleges. ***Id.***

> The standard to review the sufficiency of evidence to support a jury verdict is whether there is any credible evidence to support it.
>
> The credibility of the witnesses and the weight afforded their individual testimony is left to the province of the jury. Where more than one reasonable inference may be drawn from the evidence adduced at trial, this court must accept the inference that was drawn by the jury. It is this court's duty to search for credible evidence to sustain the jury's verdict.

***Fehring v. Republic Ins. Co.,*** 118 Wis.2d 299, 305-06, 347 N.W.2d 595, 598 (1984) (citation omitted).[2]

[2] The trial court characterized its ruling as one based upon the sufficiency of the evidence, and both parties agree that the standard of review is whether credible evidence supports the verdict. Neither party argues that the "clearly wrong" standard applies. *See* ***Foseid v. State Bank of Cross Plains,*** 197 Wis.2d 772, 787, 541 N.W.2d 203, 209 (Ct. App. 1995). We therefore apply the "credible evidence" standard of review. We observe that we would reach the same result applying either standard based upon the record here.

Reviewing the testimony and all reasonable inferences in the light most favorable to the verdict, we are satisfied that sufficient credible evidence supports the verdict. In November 1991, a few weeks after Bents purchased the mobile home, Bents returned the unit into the dealer to have the carbon monoxide sensor checked because it went off. Carbon monoxide is a odorless, poisonous gas. The dealer replaced the sensor unit. A short time later, in December, when Bents was on a trip, the sensor went off again. He pulled the battery and opened a window. Because of illness, Bents did not use the unit again until July of 1992, at which time he took it to the dealer for repair.

When Bents returned the vehicle for repairs in July, he complained of an odor in the bedroom when the generator ran. Fox testified that persons sometimes mistake burning eyes and nostrils as an odor. The dealer tested for carbon monoxide with the generator running, but not with the furnace running. The test indicated no carbon monoxide was present. The July repair order stated "sensor in bedroom, order new one." Mark Fox, the dealer, testified that he had no new sensors in stock in July.

In August, Bents took the unit in to the dealer for several repairs, but made no complaint regarding the carbon monoxide sensor. In September, he again took the unit in for repairs, but made no further complaint about the carbon monoxide sensor. On October 6, 1992, Bents again took the unit in for repairs, and, among other things, the carbon monoxide sensor was replaced. Shortly thereafter, Bents left for the West coast, and, by the time he got to Minneapolis, the sensor alarm went off again. There is no dispute that the one-year warranty expired on October 11, 1992.

Bents took the unit back to the dealer on December 28 and the sensor was replaced. The repair order stated that it was the second one that was replaced. In January 1993, Bents took the unit in for unrelated complaints. In March 1993, he took the unit to the dealer because the sensor alarm sounded when the furnace was running. Bents and his wife were experiencing burning eyes and runny noses, common symptoms of carbon monoxide poisoning. Fox experienced similar symptoms when he tested the unit with the furnace running. Fox removed the furnace and discovered a crack or hole in the heat chamber, and the gas line leading to the furnace was "crimped off, twisted" from over-tightening.

Robert Farrel, a mechanical engineer and Bents' expert witness, testified that he reviewed the material Fleetwood and Fox provided as a result of discovery, including photos, manuals, correspondence, depositions, and the unit itself after it was repaired. He testified to a reasonable degree of engineering certainty that the carbon monoxide sensors were going off because there was carbon monoxide present in the cabin of the vehicle and that its source was the furnace. A warranty service report stated that the heat exchanger assembly was cracked. He testified that a crack in the heat exchanger would enlarge as the unit heated up and cooled down. Hot gases would attack it and literally eat away at it. He found no other potential source of carbon monoxide.

A service bulletin from Fleetwood dated March 10, 1991, making a general reference to sensor units being returned that were actually functioning properly, stated: "Once the unit is installed and operating in a coach, the only substance that will cause the unit to alarm is carbon monoxide."

Credible evidence and reasonable inferences therefrom support the jury's verdict. The jury could have reasonably believed that the carbon monoxide sensors were sounding because of the presence of carbon monoxide in the cabin due to a defective furnace. The jury could have believed that when Bents took the unit in to be serviced in November 1991 and July 1992, Fox misdiagnosed the problem as a faulty sensor when in fact the furnace was emitting carbon monoxide.

The jury could have believed that Fox knew of a potential carbon monoxide problem in July because it tested for it and decided to order a new sensor. The jury could have inferred that when Bents returned the unit to Fox in August and September, Fox had notice of the carbon monoxide problem but did not replace the sensor because none was in stock. The jury could have further found that on October 6, Bents again took the unit in to have the carbon monoxide problem fixed and Fox at that time replaced the sensor a second time. The jury therefore was entitled to find that Bents presented the vehicle to Fox to have the carbon monoxide problem repaired in November of 1991, and in July, August, September and October of 1992, which would equal at least five times in one year since the date of purchase. Because it is essentially undisputed that the sensor continued to go off after it was replaced the first and second times and it was not until March 1993 that the defective furnace was discovered, the

jury could conclude that the nonconformity continued after Fox was given more than four opportunities to repair it.

Thus, the jury could have concluded that the vehicle was out of service for more than thirty days. In the event the sensors were functioning properly, the unit should not have been used because of the presence of carbon monoxide. In the event the sensors were not functioning properly, the unit should not have been used because of the dangers associated with undetected amounts of carbon.[3] The jury could have found that the nonconformity started in November of 1991 and was not solved until March 1993.

Fleetwood maintains that opposing inferences may be derived from the testimony. It argues, for example, that Bents took his vehicle in during January 1992, and made no complaint about the carbon monoxide problem, even though the furnace was no doubt in operation during the cold winter months, implying that the furnace must have been operating properly. Bents, however, testified that he had pulled the battery and forgot about the problem, and he was not using the vehicle much during that time frame due to illness.

Fleetwood further argues that when the vehicle was serviced, the service was completed in one day each time the vehicle was brought in. The evidence was undisputed, however, that the furnace defect was not discovered until March of 1993. The jury could reasonably find that a faulty carbon monoxide detector or a defective furnace, preventing the vehicle rendering the service warranted due to nonconformity, was not fixed the day the vehicle was serviced and that the problem was ongoing. ***Vutagglio***, 145 Wis.2d at 887-88, 429 N.W.2d at 97-98. As the trial court stated, either a defective furnace or defective carbon monoxide detector substantially impaired the safety of the

[3] Even in the absence of evidence of a defective furnace, the jury could have believed that the sensors were not working properly because they were sounding in the absence of carbon monoxide. From Bents' testimony and the repair order of July 1992, the jury could find that Bents took the vehicle in to repair the sensor in November 1991 and July 1992. Because Fox testified that the part was out of stock, the jury could have found that it was not replaced until October 6, even though Bents returned the vehicle in August and September, giving Fox an opportunity to repair it each time it was brought in. The jury could also believe that because Fox knew that the sensors were not in stock, and made a note to order new ones, it knew of the problem and intended to repair the new one when the sensors were restocked.

mobile home. The jury could have found from the evidence that either problem was continuous from November 1991 until March 1993.

Fleetwood further argues that Fox testified that ultra sensitive carbon monoxide detectors would be set off for a variety of reasons, including glue used in the construction of the home or fumes from passing cars. This contention, along with its others, essentially argues one set of inferences that could be drawn from the testimony. The role of an appellate court on review of the sufficiency of the evidence is not to assess weight and credibility. "This court is not to search the record on appeal for evidence to sustain a verdict the jury could have reached, but did not." ***Fehring,*** 118 Wis.2d at 305-06, 347 N.W.2d at 598.

Fleetwood states that when Bents took the vehicle in for repairs July 24, 1992, "a new carbon monoxide sensor was installed in his motor home ...." Fleetwood provides no record citation. Also, Fleetwood contends that in July 1992, "as Walter Bents indicated, the carbon monoxide detector was changed and Bents went on his merry way." Fleetwood again provides no record citation. Fleetwood proceeds to argue that it had inadequate notice of any carbon monoxide problem thereafter, because Bents made no further mention of carbon monoxide complaints until October 6. These arguments essentially make inferences that could be implied from the record. The jury, however, was entitled to draw opposing inferences from the record.

The record does not establish that a new sensor was installed in July 1992. It implies the contrary because Fox testified that they were out of stock. Also, Bents testified on direct that he could not remember whether a new one was installed in July. Although Fleetwood attempted to impeach him on cross with deposition testimony, the deposition testimony was hardly decisive. Also, the jury could have reasonably believed Farrel, the engineer. If so, replacement of the sensor in July would have been immaterial because the presence of carbon monoxide caused by a defective furnace had not yet been discovered.

Because credible evidence supports the jury's verdict, we reverse the judgment and remand the matter with directions to reinstate the verdict.

*By the Court.*—Judgment reversed and cause remanded with directions.

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