COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 31, 1997

NOTICE

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.

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No. 96-3160

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

JAY MORGAN AND MARY SUSAN MORGAN,

PLAINTIFFS-RESPONDENTS,

V.

DIANE M. STEWART AND ALLIANCE ART PUBLISHING,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Sawyer County: WARREN WINTON, Judge. *Affirmed.*

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

PER CURIAM. Diane Stewart and Alliance Art Publishing (hereinafter "Stewart") appeal a judgment that awarded Mary and Jay Morgan damages for breach of art sale and real estate sale contracts. Stewart contracted to sell the Morgans real estate, including a residence. Stewart, an art dealer and art businesswoman, also contracted to sell the Morgans $20,000 of art from her art

inventory. The Morgans paid Stewart $20,000 for several pieces of art they had chosen from Stewart's inventory, but the parties then encountered a dispute over how to value Stewart's art inventory. Stewart maintained that the Morgans agreed to buy $20,000 of her art inventory at her retail list price and to pay extra for framing; the Morgans maintained that Stewart agreed to sell them $20,000 of her art inventory at her cost, with no charge for framing. The trial court implicitly accepted the Morgans' testimony and awarded them money damages for the art purchase money they had paid Stewart. The trial court also awarded the Morgans money damages for repair costs for the residence's chimney and the heating system.

We must accept the trial court's findings unless clearly erroneous. *See* ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). We must also accord substantial deference to the trial court's assessment of the credibility of witnesses and the weight of their testimony. *See* ***Laribee v. Laribee***, 138 Wis.2d 46, 54-55, 405 N.W.2d 679, 683 (Ct. App. 1987). On appeal, Stewart makes four basic arguments: (1) the art sale was an essential part of an indivisible contract controlling a combined art and real estate transaction; (2) the trial court improperly excluded evidence to show that the art sale and real estate sale contracts were really one indivisible contract; (3) the trial court wrongly required Stewart to return the money the Morgans paid her for the unconsummated art sale; and (4) the trial court made erroneous factual findings concerning the art valuation, framing, chimney repair, and heating system issues. We reject Stewart's arguments and therefore affirm the judgment.

Stewart does not seek to rescind or invalidate the real estate sale; she seeks to keep the purchase money the Morgans paid her for the art they selected from her art inventory. She seemingly bases this position on a claim that the art

sale and real estate sale contracts were really one indivisible contract. Even if the two contracts constituted one indivisible contract, Stewart may not keep the purchase money the Morgans paid her for their art selections. The Morgans may sue for the part of the indivisible contract that Stewart breached, *see* CORBIN ON CONTRACTS § 948, at 930 (1952) (one vol. ed.), and they may recover damages. *See* CORBIN § 946, at 925-27; *see also* ***Schwartz v. Syver***, 264 Wis. 526, 531-32, 59 N.W.2d 489, 492 (1953). The trial court's restitution of the Morgans' purchase money was an appropriate recovery. Restitutionary damages restored the parties to the status quo on the art sale. *See* BLACK'S LAW DICTIONARY 1180-81 (5th ed. 1979); *see also* ***Harris v. Metropolitan Mall***, 112 Wis.2d 487, 496-97, 334 N.W.2d 519, 524 (1983) (citing RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981), and 5 CORBIN ON CONTRACTS § 1104, at 558 (1964)). The award also rested on adequate evidence that Stewart breached the art sale contract. The Morgans testified that Stewart agreed to sell them $20,000 of art, measured by her cost, with free framing, and the trial court could rightly find their testimony credible.

The trial court properly stopped its inquiry at this point, without going behind the prices the parties apportioned to the art and the real estate in their contracts. In effect, Stewart sought to have her partial breach on the art sale invoke the contract law doctrine of "part performance." *See* 12 WILLISTON ON CONTRACTS § 1473, at 220-24 (3d ed. 1970). If the trial court had allowed Stewart to show that her part performance on the indivisible contract's real estate side had, by itself, conferred a benefit on the Morgans, she evidently would have argued that this part performance allowed her to keep all or part of the Morgans' art purchase money as her own quasi-contractual restitutionary damages. Parties who furnish part performance of indivisible contracts may hold nonbreaching

parties liable for quasi-contractual restitution if the part performance confers a substantial net benefit on the nonbreaching parties. *See* ***Schwartz***, 264 Wis. at 531-32, 59 N.W.2d at 492 (quoting 5 WILLISTON ON CONTRACTS § 1473, at 4118-19 (2d ed. 1937)). This doctrine seeks to resolve two conflicting contract law policies. On the one hand, parties who materially breach contracts should not be able to stop their performance whenever they please and then force the nonbreaching party who contracted for full performance to pay defaulting parties for their part performance. ***Id.*** On the other hand, if a breaching party receives nothing for his part performance, a nonbreaching party may sometimes receive more than fair compensation for the injury he sustains, with the breaching party sustaining a forfeiture. ***Id.***

The part performance doctrine, however, does not empower courts to award breaching parties damages that exceed the prices that the parties apportioned individual items in their contract. *See* RESTATEMENT OF CONTRACTS § 351, at 603-04 (1932). Although courts may sometimes make breaching parties recover less than a ratable portion of a specific contract price if their part performance conferred a lesser net benefit on the nonbreaching party, *see* ***Bankers Life & Cas. Co. v. Bellanca Corp.***, 288 F.2d 784, 788-89 (7th Cir. 1961), the opposite is not true; breaching parties may not recover more than the price that the parties apportioned individual items in the contract. *See* RESTATEMENT § 351, at 603-04; 12 WILLISTON ON CONTRACTS § 1485, at 312-14 (3d ed. 1970); *see also* ***Valentine v. Patrick Warren Constr. Co.***, 263 Wis. 143, 164-65, 56 N.W.2d 860, 870-71 (1953); ***Manning v. Ft. Atkinson Sch. Dist.***, 124 Wis. 84, 104-05, 102 N.W. 356, 363 (1905). Here, Stewart and the Morgans evidently considered the real estate sale and art sale one indivisible contract; nonetheless, this does not enlarge Stewart's rights. The parties' contract mutually apportioned specific

prices to the real estate and the art; this limits Stewart's recovery to no more the specific $270,000 price the parties mutually apportioned to the real estate, regardless of whether they valued the real estate at some higher amount and used the art sale to bridge the gap. The Morgans are entitled to the benefit of their bargain, and any other result would reward Stewart for breaching the contract. *See* RESTATEMENT § 357, at 623-24, & comment g, at 627; *see also* 12 WILLISTON ON CONTRACTS § 1485, at 312-14 (quoting ***Manning***, 124 Wis. at 104-05, 102 N.W. at 363). Therefore, we conclude that Stewart's claim of integration of the two contracts is not relevant, and any alleged error would be harmless.

Finally, the trial court had sufficient evidence to award the Morgans damages for their chimney and heating system repair costs. First, Stewart points out that the real estate contract notified the Morgans of the chimney's repair needs. The Morgans testified, however, that Stewart understated the chimney's problems; her agent identified only $150 in repairs, understating actual costs by over $2,800. We are satisfied that the trial court properly awarded the Morgans damages for the difference. The real estate contract's general notice of chimney defects would not protect Stewart from specific misstatements as to the defects' magnitude. Her statements were sufficient to induce the Morgans' justifiable reliance. *See* ***Loula v. Snap-On Tools Corp.***, 175 Wis.2d 50, 54, 498 N.W.2d 866, 868 (Ct. App. 1993). Second, the Morgans testified that Stewart agreed to provide them a new above-ground oil tank and that she instead furnished a rusty, secondhand tank. This testimony supported the trial court's finding that Stewart had breached this aspect of the real estate transaction. In short, the Morgans provided sufficient evidence to support all of the trial court's findings; none were clearly erroneous.

By the Court.—Judgment affirmed.

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