COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 98-3204

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

WALTER L. MERTEN,

PLAINTIFF-APPELLANT,

GRACE M. MERTEN,

PLAINTIFF,

V.

THERMO DYNAMIC SYSTEMS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Walter L. Merten appeals from a judgment on the counterclaim of Thermo Dynamic Systems, Inc., to recover for services rendered installing heating and air conditioning equipment in Merten's home. Merten

suggests that numerous errors were committed by the trial court during pretrial proceedings and at trial. We conclude that the trial court correctly exercised its discretion and affirm the judgment.

¶2 After Thermo Dynamic installed heat and air conditioning equipment, the furnace failed. Merten sought damages for breach of contract and negligence. The jury found that Thermo Dynamic was negligent and awarded Merten $320 damages. The jury also found an implied contract for installation of the heating and air conditioning equipment and awarded Thermo Dynamic $3945 on its counterclaim.

¶3 Merten first argues that the time for discovery was extended without a motion for such relief and without any basis. He claims that he was prejudiced by the extended discovery deadline because the first trial date was abandoned and the case was not tried until four years later.[1]

¶4 The trial was first set for June 5, 1995, and witness lists were to be exchanged ninety days before trial. Discovery was also to be completed ninety days before trial. On March 23, 1995, Thermo Dynamic moved to modify the scheduling order. Thermo Dynamic indicated that because Merten's witness list was not filed until the day discovery closed, it was impossible to conduct discovery with respect to Merten's witnesses. Upon hearing the request, the trial

[1] The first scheduling order was entered on August 29, 1994, after the circuit court clerk conducted a conference with the parties. Citing WIS. STAT. § 802.10(3) (1997-98), Merten suggests that only the trial court judge, and not the clerk, could conduct the scheduling conference. The scheduling order was entered without objection. Merten has not demonstrated that he objected to the clerk conducting the scheduling conference or that the clerk was not authorized by the trial court judge to do so. The issue is waived. *See* ***Allen v. Allen***, 78 Wis. 2d 263, 270, 254 N.W.2d 244 (1977). All further references to the Wisconsin Statutes are to the 1997-98 version.

court noted that the provision for exchanging witness lists and closing discovery did not comport with the court's intent. The court confirmed that the scheduling order should have required witness lists to be filed ninety days after the scheduling conference and closed discovery thirty days before trial. To remedy what it found to be its own error, the trial court extended discovery to fifteen days before the June 5, 1995 trial date.

¶5 Thus, Merten's contentions are not supported by the record. A motion for modification of the scheduling order was made. Modification of a scheduling order is a matter committed to the trial court's discretion. *See* ***Rupert v. Home Mut. Ins. Co.***, 138 Wis. 2d 1, 7, 405 N.W.2d 661 (Ct. App. 1987). The trial court exercised its discretion in this instance to correct an error made by the court and should be commended for doing so. *See* ***Muehrcke v. Behrens***, 43 Wis. 2d 1, 11, 169 N.W.2d 86 (1969). Contrary to Merten's claim, the first modification did not result in the adjournment of the first trial date. The trial court intended to preserve that trial date.

¶6 Merten complains that the June 1995 trial was adjourned without explanation. When a trial court fails to set forth reasons for a discretionary decision, this court may examine the record to determine whether facts exist that support the trial court's decision. *See* ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982). "We may independently search the record to determine whether it provides a basis for the trial court's unexpressed exercise of discretion." ***Farrell v. John Deere Co.***, 151 Wis. 2d 45, 78, 443 N.W.2d 50 (Ct. App. 1989). We look for reasons to sustain discretionary decisions. *See* ***Prosser v. Cook***, 185 Wis. 2d 745, 753, 519 N.W.2d 649 (Ct. App. 1994).

¶7 On May 26, 1995, Merten filed a motion to compel answers to interrogatories and request for production of documents. The trial court was going to hear the motion on June 5, 1995, and the trial was to begin June 6.[2] Merten wrote the court a letter indicating that even if his motion to compel was granted, he would not have sufficient time to review the discovery and follow up on it before the trial started.[3] Merten harked back to the change in the scheduling order as creating the time problem. By a letter the court received on June 2, 1995, Merten indicated that he had not gotten any response from the court on his request to have the motion heard earlier. Merten withdrew his discovery motion and indicated his desire to commence the trial on June 6. Nevertheless, the trial court adjourned the trial by a notice of June 2, 1995. Adjournment was a proper exercise of discretion when the trial court was faced with a claim by a litigant that discovery had been denied, particularly where the litigant traced the problem back to the court's own error in the original scheduling order. Merten's claims of prejudice induced the trial court to take remedial action. It is well established that where a party has induced certain action by the trial court, he or she cannot later complain on appeal. *See* ***Zindell v. Central Mut. Ins. Co.***, 222 Wis. 575, 582, 269 N.W. 327 (1936). Even though Merten withdrew his motion, the court had been made aware of potential prejudice Merten was claiming. Adjournment was appropriate to foreclose any later claim of error.

[2] The trial date had been changed to June 6, 1995, because a reserve judge was assigned to preside over the trial.

[3] Merten contends that his motion to compel should have been heard on May 30, 1995, as originally set before a reserve judge. Merten would also have lacked adequate time to have meaningful discovery even if his motion to compel had been heard on that date.

¶8 Merten contends that it was just unfair that the June 1995 trial was adjourned until May 14, 1996, and then adjourned several more times until it finally commenced on April 21, 1998. Except for the adjournment of the May 27, 1997 trial date, Merten does not make any specific arguments about subsequent adjournments of the trial. We do not consider any claim not specifically argued. *See* ***Fritz v. McGrath***, 146 Wis. 2d 681, 686, 431 N.W.2d 751 (Ct. App. 1988).

¶9 On the May 27, 1997 trial date, Thermo Dynamic filed a motion to dismiss the complaint because Merten failed to join an indispensable party, his wife Grace M. Merten. The trial was adjourned to June 23, 1997, in order to provide Merten with ten days to amend his pleadings to add his wife as an indispensable party. Merten claims that by not earlier asserting it, Thermo Dynamic waived the right to assert the defense of the failure to add an indispensable party. However, Thermo Dynamic had asserted the defense as an affirmative defense in its answer. *See* WIS. STAT. §§ 802.02(3), 802.06(2)(a)7. The defense had long been part of the case. Merten's action was subject to dismissal, but the trial court fashioned a less harsh remedy by providing Merten the opportunity to amend his pleading. The resulting adjournment was a proper exercise of discretion.

¶10 Merten claims that the trial court erroneously exercised its discretion with respect to the handling of exhibits at trial. He suggests that it was improper for the court to defer ruling on the admission of exhibits until the close of testimony, to refuse to permit the jury to look at exhibits after the related testimony, and to refuse to send all the exhibits into the jury room during deliberations. The general conduct of trial is largely within the discretion of the presiding judge. *See* ***Brons v. Bischoff***, 89 Wis. 2d 80, 90, 277 N.W.2d 854 (1979).

¶11 We first note that Merten has not established by record citation an objection to the trial court's directive that the admission of exhibits would await the close of evidence or that the jury would not be allowed to see the exhibits immediately after the related testimony. It is not the duty of an appellate court to sift and glean the record to find places where proper objections have been made. *See* ***Zintek v. Perchik***, 163 Wis. 2d 439, 482-83, 471 N.W.2d 522 (Ct. App. 1991), *overruled on other grounds by* ***Steinberg v. Jensen***, 194 Wis. 2d 439, 534 N.W.2d 361 (1995). Without an objection, the claim of error is waived. *See* ***Allen v. Allen***, 78 Wis. 2d 263, 270, 254 N.W.2d 244 (1977).

¶12 Inasmuch as all the exhibits offered at trial were received into evidence, Merten cannot establish prejudice from the trial court's decision to wait until the close of evidence to determine the admissibility of the exhibits. There were seventy-eight exhibits in all. It was simply more efficient for the court to defer ruling on acceptance until the close of the evidence. Likewise, permitting the jury to handle the exhibits during the testimony would have been time consuming and detracted from the ongoing testimony.

¶13 Merten's claim that the jury was not provided exhibits is false. The jury initially went into deliberations without the exhibits as the trial court and parties determined what exhibits were appropriate. A short break was taken to give Thermo Dynamic an opportunity to review the numerous exhibits and determine which ones, if any, were objectionable. The parties also looked for "clean" copies of various documents to substitute for documents that had been marked up during trial. While that was happening, the jury sent out a note asking for the exhibits. The court ruled that the jury was to have all the exhibits except

exhibit number two.[4] The jury was provided with an exhibit list with the reference to exhibit number two and withdrawn exhibits redacted.

¶14 Whether exhibits should be sent to the jury room is within the trial court's discretion. *See* ***Douglas-Hanson, Co. Inc. v. BF Goodrich Co.***, 229 Wis. 2d 132, 153, 598 N.W.2d 262 (Ct. App. 1999), *aff'd*, 2000 WI 22, 607 N.W.2d 621. Exhibit number two is the only exhibit on which Merten can base a claim that the trial court improperly withheld evidence from the jury. That document was a letter Merten had sent to Thermo Dynamic. During the trial, portions of the letter were highlighted. A "clean" copy of the document could not be produced. The trial court refused to admit the exhibit because of the highlighting but recognized that Merten was not prejudiced since statements in the letter were made part of the record during the testimony. It was not an erroneous exercise of discretion to withhold that exhibit from the jury.

¶15 What Merten really complains about is that once the exhibits went to the jury, the verdict was reached in a short amount of time. He argues that "[t]he jury was under the gun to quit by 5:00 because the court offered no alternative." He further opines that the jury would not have had a sufficient amount of time to review all the exhibits and render its verdict by the deadline. The trial court did not impose any deadline on the jury. While the presiding judge had to leave that day by 4:30, the trial court stated that the jury would be allowed to work until 10:00. The jury was told that the judge and the litigants were leaving and that once the verdict was reached it would be read the following Monday. Mere

[4] Merten maintains in his reply brief that there is no record that the exhibits were actually provided to the jury. On motions after verdict, the trial court referred to the fact that the jury had the exhibits.

speculation about the jury's use of exhibits cannot support a claim of error with respect to the handling of the exhibits.

¶16 At trial, Peter Aasen was called as a witness by Merten. Aasen has a heating and sheet metal business. Thermo Dynamic asked that Aasen's testimony be limited because Merten had not supplemented his interrogatory answer when he became aware that Aasen would testify about remedial options and their associated costs.[5] The court excluded any testimony about the corrections of any problems with the heating system as it related to damages. Aasen was allowed to testify about his inspection and critique of Thermo Dynamic's work. Merten argues that it was error to limit Aasen's testimony.

¶17 Merten failed to make an offer of proof on that portion of Aasen's testimony which was excluded. An offer of proof is a condition precedent to review of the alleged error. *See* ***Broadhead v. State Farm Mut. Auto. Ins. Co.***, 217 Wis. 2d 231, 241, 579 N.W.2d 761 (Ct. App. 1998). Even considering the issue, we conclude that the trial court properly exercised its discretion. It is within the discretion of the trial court to exclude otherwise admissible evidence if its admission will be unduly time consuming or the evidence is cumulative to evidence already admitted. *See* ***Carlson v. Drews of Hales Corners, Inc.***, 48 Wis. 2d 408, 419, 180 N.W.2d 546 (1970).[6] The trial court found that Aasen's

[5] In response to a discovery interrogatory about what each proposed witness would testify, Merten stated: "Each witness will testify as to industry standards and practices with respect to the installation of heating and cooling systems in residences. No written reports have been requested or submitted."

[6] WISCONSIN STAT. § 904.03 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(continued)

testimony bearing on damages would needlessly delay the proceeding since Merten was not sure as to the exact content of Aasen's testimony. It also found that damages evidence had been provided by another witness. Merten was unable to assure the court that Aasen's testimony would differ from that provided by the other witness. The trial court considered appropriate factors when it looked to undue delay and the cumulative nature of the testimony. The ruling to limit Aasen's testimony was a proper exercise of discretion.

¶18 Merten argues that the trial court made errors with respect to the jury instructions. The trial court has broad discretion when instructing a jury as long as the instructions fully and fairly inform the jury of the rules and principles of law applicable to the particular case. *See* ***Nowatske v. Osterloh***, 198 Wis. 2d 419, 428, 543 N.W.2d 265 (1996).

¶19 Merten first claims that the trial court should have given the *falsus in uno* instruction. He claims that Robert Wiedenhofer, Thermo Dynamic's president, gave false testimony as to whether he had received exhibit number two (Merten's letter), whether he had been asked to provide a breakdown of the installation hours, that certain holes were drilled and that new dampers had been installed. Because the jury found that Thermo Dynamic was negligent, Merten contends that Wiedenhofer's denials about using improper installation methods were deliberate falsehoods.

The exclusion of evidence under WIS. STAT. § 904.03 is a question of trial court discretion. *See* ***Fantin v. Mahnke***, 113 Wis. 2d 92, 95, 334 N.W.2d 564 (Ct. App. 1983).

The *falsus in uno* instruction, WIS JI—CIVIL 405, provides:

> If you become satisfied from the evidence that any witness has willfully testified falsely as to any material fact, you may, in your discretion, disregard all the testimony of such witness which is not supported by other credible evidence in the case.

¶20 The decision whether to give the *falsus in uno* instruction is within the broad discretion of the trial court. *See* ***Ollman v. Wisconsin Health Care Liab. Ins. Plan***, 178 Wis. 2d 648, 658, 505 N.W.2d 399 (Ct. App. 1993). The instruction is not favored. *See* ***id.*** at 659. Thus, the instruction is "appropriate only in situations where a witness willfully and intentionally gives false testimony relating to a material fact, and is not proper where there are '[m]ere discrepancies in the testimony that are most likely attributed to defects of memory or mistake.' ***State v. Williamson***, 84 Wis. 2d 370, 394, 267 N.W.2d 337, 348 (1978)." ***Ollman***, 178 Wis. 2d at 659-60.

¶21 It is not enough that Merten believes Wiedenhofer lied. As the trial court recognized, a credibility battle was on. However, that does not give rise to the level of deliberate falsehoods supporting a *falsus in uno* instruction. The jury was instructed to determine the credibility of witnesses and that it had the freedom to reject any testimony it believed false. That was sufficient. We conclude that the trial court properly exercised its discretion in denying the *falsus in uno* instruction.

¶22 Merten requested but was denied an instruction on the content of WIS. ADMIN. CODE §§ ATCP 110.02(2)(g) and 110.05(2).[7] He wanted the court to

[7] WISCONSIN ADMIN. CODE § ATCP 110.02 provides in part:

> No seller shall engage in the following unfair methods of competition or unfair trade practices:

(continued)

instruct the jury that the code applies in this situation and that the code required the contract to be in writing because payment was sought before completion of the installation.[8] *See* § ATCP 110.05(1)(a). Whether there were sufficient credible facts to allow the giving of the instruction is a question of law which we review de novo. *See* ***Farrell***, 151 Wis. 2d at 60.

¶23 We agree with the trial court that it was not clear that the administrative code applies to the parties' arrangement. Whether Thermo Dynamic required payment for materials before completion of the entire contract

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> ....
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> (2) PRODUCTION AND MATERIAL REPRESENTATIONS. Misrepresent directly or by implication that products or materials to be used in the home improvement:
>
> ….
>
> (g) Are of sufficient size, capacity, character or nature to do the job expected or represented.

WISCONSIN ADMIN. CODE § ATCP 110.05(2) provides in part:

> (2) If a written home improvement contract is required under sub. (1), or if a written home improvement contract is prepared using the seller's pre-printed contract form, the written contract shall be signed by all parties and shall clearly, accurately and legibly set forth all terms and conditions of the contract, including:
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> ....
>
> (c) The total price or other consideration to be paid by the buyer, including all finance charges. If the contract is one for time and materials the hourly rate for labor and all other terms and conditions of the contract affecting price shall be clearly stated.

[8] On appeal, Merten makes no specific argument that an instruction under WIS. ADMIN. CODE § ATCP 110.02(2)(g) should have been given or how the facts supported such an instruction.

was a matter in dispute because the scope of the oral contract between the parties was something the jury needed to decide. Wiedenhofer testified that Merten asked him to order equipment and obtain it for Merten without a markup. Wiedenhofer was willing to do this because Merten was a neighbor who had helped Wiedenhofer transplant trees on his property. Wiedenhofer did not think that Thermo Dynamic was going to install the equipment because it did not perform residential installations. Merten acknowledged that Wiedenhofer had said that Thermo Dynamic would not do the installation. He further testified that Wiedenhofer agreed to do the installation based on a bid from another contractor. If the contract included the installation, the request for payment for the equipment came before completion of the contract and was required to be in writing under the administrative code. However, if the installation was not part of the original contract for purchase of equipment, the payment for the equipment before installation was complete would not have placed the agreement under the code. It was not an erroneous exercise of discretion to refuse Merten's proposed instruction informing the jury of the administrative code. This is particularly true given the trial court's finding that Merten's proposed instruction offered nothing different than the negligence instruction.

¶24 Merten next claims that it was improper to use the unjust enrichment instruction. As instructions were discussed, Merten did not object to the unjust enrichment instruction. The failure to object constitutes waiver of the claim of error. *See* ***id.*** at 67.

¶25 Merten argued during formulation of the verdict questions that it was duplicitous to ask the jury whether there was an implied contract and whether Merten had been unjustly enriched. To the extent that he repeats that claim on appeal, we reject it. Merten's claim suggests that an election of remedies was

required. However, the doctrine of election of remedies is disfavored. *See* ***Tuchalski v. Moczynski***, 152 Wis. 2d 517, 520, 449 N.W.2d 292 (Ct. App. 1989). Alternate theories of recovery may be submitted to the jury as long as there is not a double recovery.[9] *See* ***Lambert v. Wrensch***, 135 Wis. 2d 105, 129, 399 N.W.2d 369 (1987). There was no possible double recovery here. The jury was asked to determine what sum of money "remains" due and owing to compensate Thermo Dynamic. Under either theory of recovery, the damages question accounted for any sums Merten had already paid.

¶26 We turn to Merten's claim that the award of damages was contrary to the evidence. When reviewing whether there is sufficient evidence to sustain a jury verdict, we must review the evidence in a light most favorable to the verdict. *See* ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis. 2d 462, 472, 529 N.W.2d 594 (1995). We will sustain a jury's award if there is any credible evidence that supports the verdict. *See* ***id.*** When more than one inference may be drawn from the evidence presented at trial, we are bound to accept the inference drawn by the jury. *See* ***id.*** This standard is even more appropriate when, as here, the jury's verdict has the approval of the circuit court. *See* ***id.***

¶27 The substance of Merten's argument is that the jury lacked sufficient time with the exhibits to properly analyze the issue of damages. Again, error cannot be predicated upon speculation of the jury's review of the exhibits. The jury alone determines when deliberations have come to an end and whether a

[9] Having answered "yes" to the verdict question on whether an implied contract existed, the jury should have skipped the verdict question as to whether Merten had been unjustly enriched. Nonetheless, the jury answered the unjust enrichment question affirmatively. The jury's finding of unjust enrichment was superfluous but demonstrates that any error with respect to the submission of alternate theories of recovery was harmless. The jury would have found in favor of Thermo Dynamic in either case.

verdict is determined. There was conflicting evidence about the repairs necessary and the amount of time required to install the equipment. In light of countervailing evidence, the jury was entitled to reject Merten's assessment of damages. There was credible evidence to support the damages award.

¶28 Merten's final argument pertains to the trial court's failure to afford him every item of costs that he sought. Specifically, he claims entitlement to the amounts denied for photography ($27.18), sheriff's fees ($20.76), telephone ($32.50), and cost of experts ($2005). Here, both parties recovered and the taxation of costs was within the trial court's discretion. *See* ***Mid-Continent Refrigerator Co. v. Straka***, 47 Wis. 2d 739, 751, 178 N.W.2d 28 (1970); WIS. STAT. § 814.035(2). Merten argues that the trial court erroneously exercised its discretion because it did not provide a separate and definitive reason for denying each portion of cost.[10] The reduction in costs was driven by the trial court's finding that the matter had been "overtried." The court commented on the unnecessary length of the trial and indicated that the disparity between the amount recovered and the costs of the litigation warranted a substantial reduction in costs. The finding of overtrial is not clearly erroneous and provides a proper basis for the trial court's exercise of discretion.

¶29 Merten also requested the reasonable expenses incurred in proving matters which Thermo Dynamic refused to admit. *See* WIS. STAT. § 804.12(3). Sanctions under § 804.12(3) are within the trial court's discretion. *See* ***Elfelt v. Cooper***, 163 Wis. 2d 484, 498, 471 N.W.2d 303 (Ct. App. 1991). Merten argues

[10] As to the denial of expert witness fees, the trial court noted that certain witnesses were not used in an expert capacity and that Merten had failed to provide an itemization by hours of the time Aasen spent inspecting the equipment in contrast to consulting with Merten about trial issues.

that the jury's finding of causal negligence on the part of Thermo Dynamic entitles him to costs with respect to the denial of every paragraph in his request to admit pertaining to acts of negligence. The trial court found that the existence of negligence was fairly in dispute and therefore Thermo Dynamic had reasonable grounds to believe that it might prevail on the matter. One of the four exceptions listed in § 804.12(3) was found to exist, and an award of expenses to Merten was properly denied. *See* ***Michael A.P. v. Solsrud***, 178 Wis. 2d 137, 148, 502 N.W.2d 918 (Ct. App. 1993).

By the Court.—Judgment affirmed.

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