COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3147 **Cir. Ct. No. 2004SC1357**

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

AMERICAN TOTAL SECURITY, INC.,

PLAINTIFF-RESPONDENT,

V.

GENEVA SCHULTZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge.[1] *Reversed and cause remanded with directions.*

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[1] The Notice of Appeal says that Geneva Schultz is appealing from "the entire final Decision and Order." (Some uppercasing omitted.) Judgment was entered in the docket entries, *see* WIS. STAT. §§ 808.03(1)(c) and 799.10(2)(f), on September 10, 2004. We construe Schultz's Notice of Appeal as being from the judgment.

¶1 FINE, J. Geneva Schultz appeals from the order in this small-claims case, *see* WIS. STAT. ch. 799, directing that she pay American Total Security, Inc., $1,075.43 for house windows (in addition to her previous $3,000 down payment), and also directed American Total Security to deliver the windows to her.[2] We reverse and remand for further proceedings. We also deny American Total Security's motion for frivolous-appeal costs. *See* WIS. STAT. RULE 809.25(3).

I.

¶2 This is a dispute over a contract for the purchase and installation of seventeen windows Schultz ordered from American Total Security for a total price of $9,000, and memorialized by a "sales agreement" executed on November 11, 2003, by both her and Michael R. Marble, American Total Security's sole shareholder. (Uppercasing omitted.) As material to this appeal, the sales agreement reflected Schultz's down payment of $3,000 and, in hand-printed descriptions, recited her purchase of the following:

> 15 double hung replacement windows ½ screen
> 2 picture windows
>
> All windows beige color in beige color out Low e/Argon 7/8" thermo pane glass all windows[3] Bath room window obscure glass lower sash. All double hund [*sic*] top & bottom sash tilt in. Aluminum trim all windows complete

[2] The trial court also dismissed Schultz's counterclaim against American Total Security, but Schultz does not appeal that aspect of the trial court's ruling.

[3] Marble testified that "Low e/Argon" described "a film that is applied to the window that helps keep the house cooler in the summer and warmer in the winter" and that "[t]he argon is a gas that is between the window panes that it [*sic*] also provides more energy efficiency in there."

> Aluminum trim both front & rear. Breeze way exteriors.
> Aluminum trim over head garage door opening
> Aluminum trim color Alcoa leather. And matching calk.
> Approx. 4–6 weeks for delivery & installation

(Uppercasing and some capitalization omitted; footnote added.) Additionally, the windows were described, also in hand-printing, as "Soft Lite Replacement Windows." (Uppercasing omitted.) All discussions between Schultz and Marble in connection with the sale of the windows were at Schultz's home.

¶3 The trial court held a *de novo*-review evidentiary hearing on Schultz's appeal from a decision adverse to her entered by a court commissioner. *See* WIS. STAT. §§ 799.207(2) & (3); 757.69(8). Schultz did not testify at the hearing, apparently because of her health problems. Marble testified on behalf of his company and told the trial court that "around Thanksgiving" Schultz's son-in-law tried to get American Total Security to cancel the November 11, 2003, contract because Schultz had suffered a heart attack and could no longer afford to buy the windows. According to Marble, Schultz's son-in-law asked whether American Total Security could forego the installation and let Schultz buy the windows on what Marble described as "a cash and carry basis." Marble testified that he agreed, and sent to Schultz a proposed contract, which he dated January 8, 2004, for the windows, but that Schultz never signed it. The proposed new agreement recited in hand-printing that it was an "amended sales agreement from installation contract to cash and carry purchase." (Uppercasing omitted.) It listed the "balance cod" as $2,140, reflecting a $5,140 "sale amount" and a deposit of $3,000. (Uppercasing omitted.)

¶4 Marble testified that before execution of the November 11, 2003, agreement, he had several discussions with Schultz about the windows that she

wanted, and that, in his perception, she "knew exactly what she was doing" in ordering the window-installation and in signing the November 11 contract. He told the trial court that Schultz had agreed to windows manufactured by Soft Lite and, as phrased by Marble, "was imperative that she wanted" Soft Lite's "Imperial" window. He described the Imperial window as Soft Lite's "high end" window, as opposed to Soft Lite's "low-end" Barrington. Marble also testified, however, that the description of the ordered windows on the November 11, 2003, contract could apply to either the Imperial or Barrington window. Although conceding that there would be a "big difference" between the high-end Imperial window and the low-end Barrington window, Marble testified that the price differential was "not a basically significant" factor. Marble told the trial court that the November 11, 2003, contract did not specify the Imperial window Schultz had wanted because he "forgot to write down" Imperial on the document. When asked by the trial court how, based on what was written in the contract, Schultz would "know that what she was paying for was Imperial not Barrington," Marble replied, "[b]y the product that's delivered."

¶5 Schultz contended before the trial court, and argues on appeal, that the November 11, 2003, sales agreement violated WIS. ADMIN. CODE § ATCP 110.05(2)(b). American Total Security concedes that § ATCP 110.05(2)(b) applies to that agreement. Section ATCP 110.05 provides, as material to this appeal:

> **(1)** The following home improvement contracts and all changes in the terms and conditions thereof, shall be in writing:
>
> (a) Contracts requiring any payment of money or other consideration by the buyer prior to completion of the seller's obligation under the contract.

> (b) Contracts which are initiated by the seller through face-to-face solicitation away from the regular place of business of the seller, mail or telephone solicitation away from the regular place of business of the seller, mail or telephone solicitation, or handbills or circulars delivered or left at places of residence.
>
> **(2)** If sub. (1) requires a written home improvement contract or the buyer signs a written contract, the written contract shall be signed by all parties and shall clearly, accurately and legibly set forth all material terms and conditions of the contract, including:
>
> ….
>
> (b) A description of the work to be done and the principal products and materials to be used or installed in performance of the contract. The description shall include, where applicable, the name, make, size, capacity, model and model year of principal products or fixtures to be installed, and the type, grade, quality, size or quantity of principal building or construction materials to be used. Where specific representations are made that certain types of products or materials will be used, or the buyer has specified that certain types of products or materials are to be used, a description of such products or materials shall be clearly set forth in the contract.

As material to this appeal, the trial court determined that the November 11, 2003, contract did not violate § ATCP 110.05(2), even though, as expressed by the trial court in its oral decision, that there was "no dispute Mr. Marble messed up, and he admitted it, he did not put the style of window in the contract." The trial court explained:

> That's an important fact in this case. Because we have a manufacturer, according to the testimony, this manufacturer [Soft Lite] had only two windows, but some manufacturer's [*sic*] have ten's [*sic*] of windows ranging in price from really high to really low, and it could make a huge

> difference.[4] That's a problem. But in the -- in the greater scheme of things, I find that it doesn't rise to a violation of the code. And I find the most important reason is that I know now, based upon [Soft Lite's invoice to American Total Security for the windows], that these -- that Imperial windows, the higher end windows, were actually ordered, quite -- quite consistently with the contract dates, and were with a requirement date of November 19 of '03, some eight days after the signing of the contract. And so that, if what we now know were the windows Barrington windows, then Mrs. Schultz would have something. But what we now know is she got the -- she got the good windows, she got what she bargained for.

(Footnote added.)

II.

¶6 WISCONSIN ADMIN. CODE § ATCP 110.05(2) was promulgated under the legislative authority granted by WIS. STAT. § 100.20(2)(a):

> The department, after public hearing, may issue general orders forbidding methods of competition in business or trade practices in business which are determined by the department to be unfair. The department, after public hearing, may issue general orders prescribing methods of competition in business or trade practices in business which are determined by the department to be fair.

The "'[d]epartment'" is "the department of agriculture, trade and consumer protection." WIS. STAT. § 93.01(3). As the trial court found, American Total Security's November 11, 2003, sales agreement with Schultz violated § ATCP 110.05(2) by not specifying in the contract that Schultz had ordered and was going

[4] Marble's testimony on how many window styles Soft Lite sold is somewhat contradictory. He first testified that the company made "possibly about six to seven different variations of styles." He later testified that, at least as material to his dispute with Schultz, that there were two types of windows—the Imperial and the Barrington. We accept the trial court's finding that, as material here, Soft Lite made only the two types. *See* WIS. STAT. RULE 805.17(2) (A trial court's "[f]indings of fact shall not be set aside unless clearly erroneous.").

to get Imperial windows. The effect of that violation on this appeal is a legal issue that we analyze *de novo*. *See* ***Baierl v. McTaggart***, 2001 WI 107, ¶14, 245 Wis. 2d 632, 641, 629 N.W.2d 277, 281 (discussing residential lease in violation of WIS. ADMIN. CODE § ATCP 134.08(3), which prohibits rental agreements from, "[r]equir[ing] payment, by the tenant, of attorney's fees or costs incurred by the landlord in any legal action or dispute arising under the rental agreement").

¶7 Contracts that are "unfair" trade or business practices under WIS. ADMIN. CODE § ATCP 110.05(2) may or may not be enforced by the violating party, depending on whether the offending practice goes to the heart of the public purpose underlying the general order. *See* ***Baierl***, 2001 WI 107, ¶¶21–39, 245 Wis. 2d at 643–651, 629 N.W.2d at 282–286. Although that usually entails, as in ***Baierl***, an analysis of the general order's history, the parties have not submitted any evidence of the Department's intent in requiring that businesses who sell home-improvement products or services comply with the various requirements set out in § ATCP 110.05(2). Accordingly, we analyze American Total Security's admitted failure to specify the quality of windows in the November 11, 2003, sales agreement against the record as it exists. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court may decline to review issues inadequately presented).

¶8 As we have seen, WIS. ADMIN. CODE § ATCP 110.05(2) requires that all home-improvement sales contracts contain, *inter alia*, "[a] description of the work to be done and the principal products and materials to be used or installed in performance of the contract." The specifications in the November 11, 2003, contract satisfy this requirement. Section ATCP 110.05(2) also provides that "[t]he description shall include, where applicable, the name, make, size, capacity, model and model year of principal products or fixtures to be installed,

and the type, grade, quality, size or quantity of principal building or construction materials to be used." As we have seen from Marble's testimony, the specifications in the November 11, 2003, sales agreement were also, *in toto*, applicable to both the "high-end" Imperial Soft Lite window and the "low-end" Barrington Soft Lite window. Thus, Schultz had no assurance, from the face of the November 11, 2003, sales agreement that American Total Security was binding itself to provide the high-end window rather than the low-end window.

¶9 Further, and with cumulative significance, WIS. ADMIN. CODE § ATCP 110.05(2) also mandates: "Where specific representations are made that certain types of products or materials will be used, or the buyer has specified that certain types of products or materials are to be used, a description of such products or materials shall be clearly set forth in the contract." This sentence has two imbricated requirements: (1) if "specific representations are made that certain types of products or materials will be used," the contract must "clearly set forth" "a description of such products or materials," and (2) if the "buyer has specified that certain types of products or materials are to be used," the contract must also "clearly set forth" "a description of such products or materials."

¶10 In our view, and absent any legislative history to the contrary (and, as noted, we have been presented none), the Department's three-fold insistence that home-improvement buyers be able to ascertain from the face of the agreements they sign "the name … model … and the type, grade, quality, size or quantity of principal building or construction materials to be used," as well as be assured *in the contract* that home-improvement sellers will comply with both the sellers' oral promises and the buyers' "specified" requests that "certain types of products or materials are to be used," indicates that the clauses are at the core of the Department's legislative charter to discourage unfair business practices. *See*

Baierl, 2001 WI 107, ¶¶19, 21, 245 Wis. 2d at 642–643, 629 N.W.2d at 282 (intent of the general order violated determines whether the contract is enforceable by the violating party).

¶11 In ***Baierl***, a landlord was prevented from enforcing a lease that contained a shifting-attorney's-fees clause prohibited by a Department general order even though: (1) the tenants breached the lease, and, also, (2) the clause was peripheral to the lease's tenancy-terms and conditions. ***Id.***, 2001 WI 107, ¶40, 245 Wis. 2d at 651, 629 N.W.2d at 286. As ***Baierl*** explained, not preventing the landlord from enforcing the lease would dilute the efficacy of the general order prohibiting the clause threatening to make tenants responsible for landlords' legal expenses in enforcing leases:

> On the other hand, we also acknowledge that the McTaggarts failed to live up to the terms of their bargain. Nevertheless, the controlling factor is the intent of the Department. That intent does not exclusively address tenants such as the McTaggarts who abandon their contractual obligations. Rather, that intent speaks to the tenants from whom the courts potentially will never hear—tenants who, in the determination of the Department, will forgo their legal rights when faced with a provision that states that they are responsible for their landlord's litigation costs. It is for those tenants that the intent of § ATCP 134.08(3) must be effectuated.

Id., 2001 WI 107, ¶39, 245 Wis. 2d at 651, 629 N.W.2d at 286. By similar token here, the Department has decreed that home-improvement buyers should not have to depend on the good faith of the sellers with whom they deal; we perceive that to be the core intent of the sales-agreement requirements with which American Total

Security did not comply. Accordingly, we hold that it may not enforce the November 11, 2003, contract.[5]

¶12 Preventing American Total Security from enforcing the November 11, 2003, sales agreement does not end the matter. As we have seen, the trial court directed that Schultz pay American Total Security and that American Total Security deliver the windows to Schultz, and both parties have complied. The Record is silent, however, as to whether Schultz has had the windows installed, or whether the windows are in good condition. Returning the parties to the *status quo ante* may not be viable or just. Thus, the issue of whether American Total Security may recover from Schultz on either a *quantum meruit* theory, or some other basis, still needs to be determined. *See* ***Zbichorski v. Thomas***, 10 Wis. 2d 625, 628, 103 N.W.2d 536, 537 (1960); ***Ramsey v. Ellis***, 168 Wis. 2d 779, 784–785, 484 N.W.2d 331, 333–334 (1992) (discussing distinctions between unjust enrichment and *quantum meruit*). These are matters that must be decided in the first instance by the trial court. The trial court should also determine whether Schultz has suffered a "pecuniary loss" because of American Total Security's violation of the Department's general order, and, if so, the damages, costs, and reasonable attorney's fees she should recover pursuant to WIS. STAT. § 100.20(5) ("Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss,

[5] As we have seen, Schultz never signed the proposed amended agreement American Total Security sent to her in early 2004. Also, in light of our resolution of Schultz's appeal, we do not address her other arguments seeking reversal of the trial court's order. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

together with costs, including a reasonable attorney's fee."). *See* ***Snyder v. Badgerland Mobile Homes, Inc.***, 2003 WI App 49, ¶19, 260 Wis. 2d 770, 784–785, 659 N.W.2d 887, 894–895. Accordingly, we reverse the trial court's order, remand for further proceedings, and deny American Total Security's motion for frivolous appeal costs.

By the Court.—Judgment reversed and cause remanded with directions.[6]

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

[6] *See* footnote 1.