

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 6, 2005

Cornelia G. Clark
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. 2004AP3074

Cir. Ct. No. 2001CV412

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

KENNETH LINDSTROM AND KATHY LINDSTROM,

PLAINTIFFS-APPELLANTS,

V.

PATRIOT HOMES, INC.,

DEFENDANT,

PINEWOOD HOMES, L.L.C.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Polk County:
ROBERT RASMUSSEN, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Kenneth and Kathy Lindstrom appeal an order that directed a verdict for one question of a special verdict. The Lindstroms contend the circuit court erred by failing to submit to the jury the question of the amount they owed Pinewood Homes under a contract. We disagree and affirm.

Background

¶2 The Lindstroms agreed to purchase a manufactured home from Pinewood.¹ Upon delivery of the home, the Lindstroms discovered multiple defects in its construction and assembly. When the home was not repaired to the Lindstroms' satisfaction, they failed to pay the remaining \$20,000 of the contractual purchase price.

¶3 The Lindstroms filed suit for breach of contract and other various claims for the defects. Pinewood counterclaimed for breach of contract for the unpaid balance. At the jury trial, the court employed a special verdict form, consisting of multiple questions. The jury answered that Pinewood breached its contract with the Lindstroms and that the Lindstroms properly mitigated their damages. Question 14 asked, "What amount is still owed by the plaintiffs to Pinewood Homes on the original purchase contract?" Because the remaining amount owed under the contract was undisputed, the court answered "\$20,000" itself before submitting the questions to the jury. The jury awarded the Lindstroms \$16,785 in damages, which the court offset against the \$20,000 they owed Pinewood under the contract.

¹ Patriot Homes is also named in this appeal; however, following the verdict the Lindstroms entered into a settlement with Patriot. Thus, this appeal relates only to Pinewood.

Standard of Review

¶4 When reviewing a circuit court’s decision to direct a verdict, we apply the same standard as the circuit court, but also give substantial deference to the circuit court’s better ability to assess the evidence. See *James v. Heintz*, 165 Wis. 2d 572, 577, 579, 478 N.W.2d 31 (Ct. App. 1991). The standard is whether, viewing the evidence most favorably to the party against whom the verdict is sought to be directed, there is any evidence to sustain a claim. See *Carl v. Spickler Enters., Ltd.*, 165 Wis. 2d 611, 624, 478 N.W.2d 48 (Ct. App. 1991). A verdict should be directed only when the evidence gives rise to no dispute as to material issues, or when the evidence is so clear and convincing as to reasonably permit unbiased and impartial minds to come to but one conclusion. See *Voith v. Buser*, 83 Wis. 2d 540, 550, 266 N.W.2d 304 (1978).

Discussion

¶5 The Lindstroms contend the trial court erred by directing the verdict with regard to question 14. Specifically, the Lindstroms contend that the court should have given a jury instruction regarding the requirement that Pinewood must substantially perform to collect fully under the contract. We disagree.

¶6 This case is properly analyzed as a goods contract under the Uniform Commercial Code. The U.C.C. defines goods as, “all things (including specially manufactured goods) which are movable at the time of identification to the

contract for sale.” WIS. STAT. § 402.105(1)(c).² Because the manufactured home at issue was moveable at the time of this contract, it is a good under the U.C.C.

¶7 The applicable U.C.C. provision makes it clear that the circuit court properly offset the damages the Lindstroms received against the undisputed amount they still owed under the contract. The U.C.C. states, “The buyer on notifying the seller of the buyer’s intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.” WIS. STAT. § 402.717. Here, the court properly offset the damages awarded against the amount owed. *See Twin Disc, Inc. v. Big Bud Tractor, Inc.*, 772 F.2d 1329 (7th Cir. 1985) (the court applied § 402.717 in this same manner). The reasoning behind this is obvious. It is generally inappropriate to allow a party a windfall due to the breach by the other party. Further, the Lindstroms have been compensated for Pinewood’s breach through the damages they were awarded.

¶8 The cases the Lindstroms cite, which focus on the doctrine of substantial performance, are inapplicable for multiple reasons. First, as we have demonstrated, this case is governed by the U.C.C. because the manufactured home is a good. Also, even if the U.C.C. does not apply, the principle remains the same. The cases the Lindstroms cite recognize that it is inappropriate to allow a party a windfall due to the breach of the other party. For example, in *Kreyer v. Driscoll*, 39 Wis. 2d 540, 159 N.W.2d 680 (1968), a contractor failed to properly complete construction on a house, and thus, the court held that he did not substantially

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

perform under the construction contract. However, the court recognized that the contractor still could collect for the work already completed on a theory of quantum meruit or restitution. *Id.* at 547. Thus, the customer was not permitted a windfall due to the contractor's breach. Applying the same principle, Pinewood can collect the undisputed amount owed under the contract, less the damages awarded the Lindstroms.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

