COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2997 **Cir. Ct. No. 2002CV3566**

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

NANCY STOUGH AND BOBBY STOUGH,

PLAINTIFFS-RESPONDENTS,

V.

NEWMAR CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DAVID T. FLANAGAN, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront, Deininger, JJ.

¶1 VERGERONT J. The Newmar Corporation, a manufacturer of recreational vehicles (RVs), appeals the circuit court's decision that it violated Wisconsin's Lemon Law and the resulting judgment against it in the amount of $330,881.90, plus double costs and attorney fees. The court found Newmar

violated WIS. STAT. § 218.0171(2)[1] when it refused to repurchase an RV from Nancy and Bobby Stough. Newmar makes five arguments on appeal: (1) the circuit court erroneously exercised its discretion in not imposing a sanction for spoliation of evidence; (2) the circuit court erroneously exercised its discretion when it barred the testimony of two of Newmar's witnesses; (3) the Stoughs presented insufficient evidence at trial to prove a warranty nonconformity that substantially impaired the use, value, or safety of the RV as required by § 218.0171(1)(f); (4) the circuit court erred in its construction and application of days "out of service" under § 218.0171(1)(h)2.; and (5) the circuit court erroneously exercised its discretion by allowing the Stoughs to introduce evidence after the court's decision and order.

¶2 We conclude: (1) the circuit court properly exercised its discretion in rejecting Newmar's request for sanctions based on spoliation of evidence; (2) the circuit court properly exercised its discretion in limiting testimony as it did; (3) the evidence regarding the slide-out water intrusion problem was sufficient to prove a warranty nonconformity under WIS. STAT. § 218.0171(1)(f); (4) as to that nonconformity, the court correctly construed and applied days "out of service" under § 218.0171(1)(h)2.; and (5) the circuit court did not erroneously exercise its discretion by admitting additional evidence after its decision and order. We therefore affirm.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

BACKGROUND

I. Statutory Background

¶3 WISCONSIN STAT. § 218.0171, known as Wisconsin's Lemon Law, is a remedial statute enacted to protect buyers of new motor vehicles who experience certain types of problems with their vehicles. *See* ***Garcia v. Mazda Motor of America, Inc***., 2004 WI 93, ¶1, 273 Wis. 2d 612, 682 N.W.2d 365. The statute provides recourse in certain circumstances to consumers who purchase new motor vehicles with "nonconformities," which are defined as:

> a condition or defect which substantially impairs the use, value or safety of a motor vehicle, and is covered by an express warranty applicable to the motor vehicle or to a component of the motor vehicle, but does not include a condition or defect which is the result of abuse, neglect or unauthorized modification or alteration of the motor vehicle by a consumer.

Section 218.0171(1)(f).

¶4 If a nonconformity persists after a manufacturer makes a "reasonable attempt to repair" it, the manufacturer must accept the return of the motor vehicle and, at the consumer's election, either "replace the motor vehicle with a comparable new motor vehicle and refund any collateral costs" or "refund to the consumer … the full purchase price plus any sales tax, finance charge, amount paid by the consumer at the point of sale and collateral costs, less a reasonable allowance for use.…" WIS. STAT. § 218.0171(2)(b).

¶5 "Reasonable attempt to repair" is defined in WIS. STAT. § 218.0171(1)(h) as:

> any of the following occurring within the term of an express warranty applicable to a new motor vehicle or

> within one year after first delivery of the motor vehicle to a consumer, whichever is sooner:
>
> 1. The same nonconformity with the warranty is subject to repair by the manufacturer, motor vehicle lessor or any of the manufacturer's authorized motor vehicle dealers at least 4 times and the nonconformity continues.
>
> 2. The motor vehicle is out of service for an aggregate of at least 30 days because of warranty nonconformities.

II. Factual and Procedural Background

¶6 In March 2002, the Stoughs purchased a Newmar Mountain Aire Class A RV from Horn's RV, an authorized Newmar dealership, for $96,991.27. At the time of purchase, the Stoughs received a limited warranty from Newmar for "manufacturing defect[s]" occurring "within thirty-six (36) months from the date of purchase, or 36,000 miles, whichever occurs first." Within the next eight months, the Stoughs encountered a number of problems with the RV and took it in for repairs several times. On November 19, 2002, the Stoughs served Newmar with a demand to repurchase the RV under WIS. STAT. § 218.0171(2)(b). Newmar did not repurchase the vehicle. The Stoughs filed this action[2] alleging a violation of § 218.0171 and seeking an order to repurchase, damages, and costs and attorney fees under § 218.0171(7).[3]

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[2] The Stoughs filed the first complaint in this action on November 13, 2002. Attached to that complaint is a demand to repurchase the Stoughs' RV; that complaint alleges the Stoughs served this demand on Newmar on October 7, 2002. On January 21, 2003, the Stoughs filed an amended complaint, to which a repurchase demand dated November 19, 2002, is attached. The amended complaint alleges this was served on November 19, 2002, apparently because Newmar asserted it did not receive a copy of the first demand to repurchase. It is undisputed that this second demand was served on Newmar on November 19, 2002.

[3] WISCONSIN STAT. § 218.0171(7) provides:

(continued)

¶7 At the trial to the court the Stoughs presented the following evidence. They first took the RV to be repaired in May 2002. At that time the problems were: water entered the vehicle when the slide-out was retracted after it rained;[4] the exhaust pipe had come loose; a rear clearance light had gone out; the grill made a noise when the RV was driven at a certain speed on the highway; and a digital panel designed to gauge the fullness of tanks holding drinking water, grey water, and sewage malfunctioned. The water intrusion from the slide-out retraction was the primary reason they brought the vehicle in. This problem was not repaired in May 2002, and the Stoughs took the RV to authorized Newmar dealers for this problem and others again in July, September, and November 2002 and February 2003. However, they testified, the slide-out water intrusion problem persisted.

¶8 In December 2003, after this action was filed, the Stoughs took their RV to Custom RV, a repair center not authorized by Newmar, for repair of the slide-out water intrusion problem. The Stoughs testified that Custom RV repaired the problem in January 2004, and the slide-out no longer let water in when retracted after rain. The Stoughs paid for this repair themselves.

> In addition to pursuing any other remedy, a consumer may bring an action to recover for any damages caused by a violation of this section. The court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss, together with costs, disbursements and reasonable attorney fees, and any equitable relief the court determines appropriate.

[4] A slide-out is a compartment on an RV that expands when the RV is in a parked position to make more living space in the RV; it must be retracted when the RV is in motion. The Stoughs' RV had two slide-outs, and it was the larger one, situated toward the front of the vehicle behind the driver, that had the problem.

¶9 Newmar presented testimony to show that there was nothing wrong with the slide-out retraction and that the other problems identified by the Stoughs were promptly repaired. Newmar's primary defense was that there were no nonconformities within the meaning of WIS. STAT. § 218.0171(1)(f).

¶10 In a detailed written opinion, the circuit court determined that, with the exception of the grill noise, each of the problems brought in for repair in May, July, September, and November 2002 and February 2003 was a non-conformity as defined in WIS. STAT. § 218.0171(1)(f). The court found the vehicle was in the repair shop for a total of forty-two days by December 19, 2002.[5] The court concluded that, because the Stoughs had no use of their vehicle while it was being serviced, the RV had been "out of service" for more than thirty days within the meaning of § 218.0171(1)(h)2. Therefore, Newmar had been obligated to repurchase the RV by December 19, 2002—thirty days after the demand for repurchase.

¶11 The circuit court also determined that the unrepaired slide-out water intrusion problem alone caused the RV to be incapable of "rendering service as warranted due to a warranty non-conformity" for 227 days—calculated from May 6, 2002, when the Stoughs first made Newmar aware of the problem, to

[5] It appears that the circuit court should have used November 19, 2002,—the date on which the Stoughs served Newmar with the demand to repurchase—as the endpoint for calculating the days out of service rather than December 19, 2002, the deadline for repurchase. However, neither party mentions this. In any event, if this is an error, it makes no difference in the court's finding on the number of days the RV was in the repair shop, because it was not in the repair shop between November 19 and December 19, 2002.

December 19, 2002.[6] The court concluded that under ***Vultaggio v. General Motors Corp***., 145 Wis. 2d 874, 429 N.W.2d 93 (Ct. App. 1988), this was an alternative basis for determining that the RV was out of service for more than thirty days within the meaning of WIS. STAT. § 218.0171(1)(h)2, even though the Stoughs possessed and could drive the vehicle during that time. Accordingly, the court concluded that, based solely on the slide-out water intrusion problem, Newmar was obligated to repurchase the RV by December 19, 2002.

¶12 The court concluded Newmar's failure to repurchase the vehicle by December 19, 2002, as required by WIS. STAT. § 218.0171(2)(b)2.b., entitled the Stoughs to double damages and to actual reasonable costs and attorney fees. *See* § 218.0171(7).

ANALYSIS

¶13 On appeal, Newmar argues: (1) the circuit court erroneously exercised its discretion in not imposing a sanction for spoliation of evidence; (2) the circuit court erroneously exercised its discretion when it barred the testimony of two of Newmar's witnesses; (3) the Stoughs presented insufficient evidence to prove a warranty nonconformity that substantially impaired the use, value, or safety of the RV under WIS. STAT. § 218.0171(1)(f); (4) the circuit court erred in its construction and application of days "out of service" under § 218.0171(1)(h)2; and (5) the circuit court erroneously exercised its discretion by

[6] As already noted, it appears the court should have used November 19, 2002, rather than December 19, 2002, as the endpoint for calculating the days out of service, but neither party mentions this. *See supra* n.5. Had the court done so, it would have arrived at 197 days out of service under this theory rather than 227 days. However, if this is an error, it does not affect the circuit court's analysis, or ours, on whether the RV was out of service for more than thirty days within the meaning of WIS. STAT. § 218.0171(1)(h)2.

allowing the Stoughs to introduce evidence after the court's decision and order. For the reasons explained below, we reject each of these arguments.

I. Spoliation of Evidence

¶14 Newmar argues that the repairs to the slide-out by Custom RV precluded Newmar from effectively proving at trial that the RV did not have a slide-out water intrusion problem. This was intentional on the Stoughs' part, Newmar asserts, because they had the vehicle repaired before trial without properly documenting the problem or the repair and without giving Newmar's counsel the opportunity to object to the repair or to be present at the repair. Therefore, argues Newmar, the circuit court erroneously exercised its discretion in not imposing the sanction of prohibiting the Stoughs from recovering.

¶15 A circuit court's decision whether to impose sanctions for the spoliation or destruction of evidence is a discretionary decision. ***Garfoot v. Fireman's Fund Ins. Co***., 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999). We affirm a circuit court's discretionary decision as long as the court examined the relevant facts, applied the proper legal standard, and reached a reasonable conclusion using a rational process. ***Id.*** Dismissal based on spoliation of evidence requires a finding of egregious conduct, which is defined as "a conscious attempt to affect the outcome of litigation or a flagrant knowing disregard of the judicial process." ***Id.*** at 724. The sanction of barring recovery is the equivalent of dismissal in this context and requires the same finding. *See* ***City of Stoughton v. Thomasson Lumber Co***., 2004 WI App 6, ¶39, 269 Wis. 2d 339, 675 N.W.2d 487. The circuit court acts as a fact finder in deciding the motive of the party against whom the spoliation claim is made; and that court, not this court,

decides what inferences to draw from the evidence when there is more than one reasonable inference. ***Garfoot***, 228 Wis. 2d at 724-25.

¶16 Newmar raised its spoliation claim in pretrial briefing. At trial the court heard the evidence regarding the circumstances under which the Stoughs had the slide-out repaired, and the parties presented argument on the spoliation claim in their post-trial briefs. In its written decision, the court made a finding that there was "no arguable basis" to support Newmar's claim that "the decision by the plaintiffs to undertake repair of the slide-out water intrusion problem after the six hundred sixty seven day period of Newmar's failure to repair was a spoliation of evidence of their claim." We understand this to be a finding that the Stoughs' purpose in having that repair made was to fix the problem and was not for any reason that would justify a sanction. We conclude the evidence supports this finding.

¶17 Newmar's witnesses testified that they inspected the Stoughs' RV twice before the Stoughs had the slide-out repaired in December 2003-January 2004, and once after: in August 2003, October 2003, and June 2004. All three inspections were done at the Stoughs' residence. Photographs taken during those inspections were admitted into evidence.

¶18 The Stoughs testified that they notified Newmar via fax and mail that they intended to take the RV to Custom RV on December 1, 2003, for the slide-out to be repaired. This letter, dated November 24, 2003, was admitted into evidence. The letter requested that Newmar pay for the repair under warranty and estimated the cost would be $2500. Newmar's fax reply, dated November 26, 2003, was also admitted into evidence. Its reply requested a "detailed summary of precisely what Custom RV, Inc. views the problem to be," and requested that the

scheduled deposition of the owner of Custom RV be postponed until after the repair. In this reply, Newmar made no request to postpone the slide-out repair, to allow Newmar to inspect the RV again before the repair, or to allow Newmar to be present at the repair. Newmar's brief on appeal does not point to evidence in the record showing that Newmar made any of these requests after being informed that the repair was going to take place.

¶19 Thus, the evidence shows that Newmar had already inspected and photographed the slide-out and did not object when informed that the Stoughs were planning on taking it elsewhere for repair. A reasonable inference from Newmar's request that the deposition of Custom RV's owner take place after the repair and the lack of any objection to this repair or its timing is that Newmar did not object to the repair going ahead as the Stoughs planned. The evidence and reasonable inferences from it support a finding that, in seeking to repair the slide-out, the Stoughs did not consciously attempt to interfere with Newmar's ability to present its defense.

¶20 Contrary to Newmar's assertion, the Stoughs' actions in having the slide-out repaired are not analogous to the plaintiffs' actions in ***Garfoot v. Fireman's Fund Insurance Co***., 228 Wis. 2d 707, 599 N.W.2d 411 (Ct. App. 1999), ***Sentry Insurance v. Rural Insurance Co. of North America***, 196 Wis. 2d 907, 539 N.W.2d 911 (Ct. App. 1995), or ***Milwaukee Constructors II v. Milwaukee Metropolitan Sewerage District***, 177 Wis. 2d 523, 502 N.W.2d 881 (Ct. App. 1993). The plaintiffs in these cases destroyed evidence without giving the defendants an opportunity to inspect it. ***Garfoot***, 228 Wis. 2d at 712-13 (plaintiff's agent disconnected joints in the gas piping system alleged to be the source of a leak that caused an explosion before the defendants had inspected it, making it impossible to prove with certainty whether the joints had leaked);

Sentry, 196 Wis. 2d at 911-12 (plaintiffs destructively tested and then allowed to be discarded in a landfill the refrigerator they alleged caused the fire that gave rise to the claim); ***Milwaukee Constructors II***, 177 Wis. 2d at 528-31 (plaintiffs destroyed several hundred boxes of documents that the defendants had not seen but had determined were potentially relevant to the action).[7]

¶21 Because the record supports the circuit court's determination that there is no basis for imposing a sanction on the Stoughs for spoliation of evidence, we conclude the court properly exercised its discretion.

II. Exclusion of Newmar's Witnesses

¶22 Newmar argues the circuit court erroneously exercised its discretion in barring the testimony of Tom Horn of Horn RV and Ed Collier of Collier RV, the authorized dealers to which the Stoughs brought their RV for repairs. As a result, Newmar asserts, it was prejudiced because it was precluded from presenting testimony on the number of days the vehicle was out of service.

¶23 The record shows the following. The scheduling order required that Newmar identify its expert witnesses by November 3, 2003, but did not require Newmar to identify fact witnesses. The order stated that "any … expert witness … not identified by [that date] shall not be permitted to testify at the trial of this case, except for good cause shown prior to the commencement of trial." Although the scheduling order was amended a number of times, that date was not changed

[7] In ***Milwaukee Constructors II v. Milwaukee Metropolitan Sewerage District***, 177 Wis. 2d 523, 502 N.W.2d 881 (Ct. App. 1993), we concluded the circuit court erroneously sanctioned the plaintiffs with dismissal because there was no evidence the plaintiffs acted in bad faith, although we indicated a lesser sanction might be appropriate. ***Id***. at 534-38.

and each amendment contained the same language about the consequences of not identifying expert witnesses as ordered. Newmar's initial expert witness list is not in the record. On August 17, 2004, Newmar filed an "Amended Witness List" identifying five witnesses, one of whom was Harry Allen of Collier RV; Allen would "testify as to warranty issues in place of Dave Klaus, if Mr. Klaus is unavailable."[8] In its brief filed ten days before the trial scheduled for February 21, 2005, Newmar stated that Horn and Allen would testify "as fact [] witness[es] as to all of the invoices and service from [Horn's and Collier's]."

¶24 On the same day that Newmar filed its trial brief, the Stoughs filed a motion in limine to bar Newmar from offering any evidence regarding days out of service based on Newmar's failure to supplement an answer to an interrogatory asking how many days it believed the RV "was out of service … during the first year."[9] Newmar opposed the motion, arguing that it did not have an obligation to supplement its response for several reasons: the court earlier denied the Stoughs'

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[8] Dave Klaus is not otherwise identified as a witness in Newmar's amended witness list, and, as noted above, Newmar's initial witness list is not part of the record.

[9] WISCONSIN STAT. § 804.01(5)(b) provides:

> **(5)** SUPPLEMENTATION OF RESPONSES. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
>
> ….
>
> (b) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which 1. the party knows that the response was incorrect when made, or 2. the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

motion to compel an answer;[10] the Stoughs had adequate notice of what evidence Newmar intended to produce and therefore were not prejudiced; and the Stoughs had not objected to Horn and Allen testifying as fact witnesses regarding the invoices provided to the Stoughs on the dates when their RV was serviced.

¶25 The court had not yet ruled on the Stoughs' motion in limine when, three days before trial, Newmar informed the circuit court that "it ha[d] come to [Newmar's] attention that Harry Allen [was] no longer with Collier RV" and it wished to substitute Collier, the dealership's owner. The Stoughs' counsel objected, arguing that when Allen's name first appeared on Newmar's amended witness list, he called Newmar's counsel, and Newmar's counsel represented that Allen's testimony would be limited to authenticating service records. The Stoughs' counsel asserted that, on that basis, he did not object to Allen's testimony, and so did not make a motion to limit Allen's testimony. However, the Stoughs' counsel asserted, the Stoughs now did object to Allen's testimony on days out of service based on Newmar's failure to supplement its response to the

[10] The interrogatory and Newmar's response in italics are:

> [1.] In your answer, you contend that the 2002 Mountain Aire at issue here was not out of service (as that term is used in Wisconsin's Lemon Law) for 41 days. Given that contention, please answer the following questions:
>
> A. How many days do you believe the 2002 Mountain Aire was out of service during the first year?
>
> A. … *Unknown. discovery ongoing. Warranty records indicate total of 6.1 hours on four separate days.*

The Stoughs moved to compel Newmar to answer this interrogatory, and the parties' briefs on the motion focus on whether the term "out of service" has a settled meaning under the statute. The circuit court denied the motion, stating it was "a close question," and ruling that it was "a contention interrogatory and complete response would require access to information in the possession of the plaintiffs…."

interrogatory. In addition, with respect to Collier specifically, the Stoughs argued that, because they never interacted with Collier during the course of having the RV serviced at Collier RV, Collier did not have personal knowledge with respect to when they were told to bring in and pick-up the RV, and therefore his testimony would be either cumulative hearsay or evidence Newmar withheld during discovery.

¶26 Newmar responded that Collier would testify only as to the invoices and services provided by the business that he owned and operated, and his testimony would not surprise the Stoughs because all of the invoices Collier would be testifying to had been provided the Stoughs at the time they received the services from Collier RV. Newmar also asserted that any prejudice to the Stoughs could be cured by providing an adjournment for the Stoughs to depose Collier.

¶27 The morning of trial the court took up both the Stoughs' motion in limine and Newmar's request to call Collier as a witness, stating that the two were related. In response to the court's questions on what evidence Newmar intended to offer on days out of service, Newmar's counsel responded that the evidence would show that there were thirty-two days on which repair work was performed, but, because Newmar's position was that none of the items repaired were nonconformities within the meaning of the statute, there were essentially "zero" days the vehicle was out of service within the meaning of the statute.

¶28 The court then asked Newmar's counsel a number of questions about what Collier was going to testify to, in an effort, the court explained, to determine whether he should be permitted to testify after being identified at this late date. Initially, Newmar's counsel responded that Horn and Collier were not being offered as expert witnesses, but were "just going to go through the invoices" and

testify as to what was done and not done when the RV was brought in. In response to further questioning by the court about "this witness," which we understand to mean Collier, Newmar's counsel explained that the testimony would be that "none of the things that they found were a substantial impairment of the use or safety of the vehicle." The Stoughs' counsel objected that this was expert testimony and Newmar's counsel had said that "he," apparently meaning either Allen or Collier, would not be giving expert testimony.

¶29 The court's ruling was that "[t]he witness may authenticate the records. Nothing beyond that." The court explained:

> the basis for the ruling with regard to this last-minute witness is the duty to supplement the response to interrogatory 1A …under Section 804.01(5)(b). So far as I can tell, there's been no supplementation. I think it would have been required under that subsection. In addition, we have got a witness that is being offered at the very last minute in violation of the disclosure requirements of the scheduling order. For those two reasons, I will permit the witness to testify but only as to authenticating business records.

¶30 A circuit court has broad discretion in deciding how to respond to untimely motions to amend scheduling orders on witness identification. ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶29, 265 Wis. 2d 703, 666 N.W.2d 38. This broad discretion is essential to the court's ability to manage its calendar. ***Id.***

¶31 We conclude the circuit court properly exercised its discretion in limiting Collier's testimony to authenticating business records rather than allowing him to testify as an expert. In arriving at this conclusion, the court implicitly accepted the Stoughs' counsel's statement that he had not objected to Newmar's adding Allen as an expert after the deadline had passed because of Newmar's

counsel's representation that Allen would only be authenticating service records. Based on Newmar's counsel's statements to the court on Collier's proposed testimony, it was reasonable for the court to conclude that Collier's proposed testimony was far broader than that which Newmar's counsel had earlier represented Allen would testify to, and that Newmar was seeking not simply to substitute one fact witness for another to give the same testimony, but was seeking to present a witness to give an expert opinion without having timely identified him as an expert. Newmar's explanation that it had just learned that Allen was no longer at Collier RV does not show good cause for doing this.

¶32 Newmar argued in the circuit court, as it does on appeal, that Collier's testimony on the service records would not prejudice the Stoughs because the Stoughs had all of the invoices in their possession and Collier was just going to "go through the invoices." This argument, and Newmar's reference in their appellate brief to Horn and Collier as "fact witnesses," ignores its counsel's statement to the court that Collier (and, apparently, Horn) was going to testify that "none of the things that they found were a substantial impairment of the use or safety of the vehicle"; it also ignores counsel's statement that Newmar's position was that, because of the lack of substantial impairment, there were "zero" days out of service. The fact that the Stoughs possessed the invoices would not have revealed to them what the testimony would be on whether the items constituted substantial impairment or how many days Newmar considered the vehicle to be out of service. Even if Newmar had no duty to supplement its response to the interrogatory, an issue which we need not resolve, the response it gave and the lack of supplementation are a reasonable basis for concluding that the Stoughs had no way of knowing what Collier's testimony would be on days out of service.

¶33 With respect to Horn, it appears that Newmar views the court's ruling as preventing Horn from testifying. However, we read the court's ruling to address only Collier—it refers in all its comments to "the witness" and "the last minute witness." If Horn was truly a fact witness, then he did not need to be identified, he was not a "last minute witness," and we see nothing in the court's ruling that would have prevented Horn from testifying as a fact witness. If, on the other hand, Horn, like Collier, was going to testify on what was and was not a substantial impairment, then the same reasoning that supports the court's decision with respect to Collier would support a decision to exclude Horn's testimony as an expert. In any case, if Newmar was uncertain whether the court's ruling precluded Horn from testifying, it was incumbent upon Newmar to ask for a clarification. *See* ***Arents v. ANR Pipeline Co***., 2005 WI App 61, ¶31, 281 Wis. 2d 173, 696 N.W.2d 194 (party waived its objection to the circuit court's exclusion of its of witnesses by failing to obtain a conclusive ruling excluding these witnesses).

¶34 We recognize that the Stoughs' motion in limine, if granted, would have precluded Horn from testifying as to days out of service. However, we do not see a separate ruling from the court on this motion. As we read the record, the court viewed the Stoughs' motion in limine and Newmar's motion to present Collier as a witness as related, and it believed it resolved both motions by its ruling. It was reasonable for the court to view the motions as related, especially after Newmar's counsel explained that its position was that there were "zero" days out of service because none of the problems found substantially impaired the use or safety of the vehicle, and this is what Collier would testify. If Newmar wanted a separate ruling on the Stoughs' motion in limine to clarify whether Horn could testify and, if so, the scope of his testimony, then it was incumbent on Newmar to obtain that ruling. ***Arents***, 281 Wis. 2d 173, ¶31.

III. Sufficiency of Evidence of "Nonconformity"

¶35 Newmar argues that there is insufficient evidence to support the circuit court's decision that the Stoughs' RV had a "nonconformity" as defined by WIS. STAT. § 218.0171(1)(f) because there was insufficient evidence that the slide-out water intrusion problem was a "defect which substantially impairs the use, value, or safety of a motor vehicle, and is covered by an express warranty…." Section 218.0171(1)(f).[11]

¶36 The determination of whether there is a substantial impairment within the meaning of WIS. STAT. § 218.0171(1)(f) involves making factual findings that are intertwined with a legal question: whether the facts fulfill the legal standard of substantial impairment. ***Chmill v. Friendly Ford-Mercury of Janesville, Inc.***, 144 Wis. 2d 796, 803, 424 N.W.2d 747 (Ct. App. 1988). We affirm the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** The circuit court as fact finder is to resolve conflicts in testimony, determine the credibility of witnesses, and draw inferences based on the evidence presented. ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. On appeal we search the record to support the circuit court's factual findings and inferences; and we do not overturn its credibility determinations unless they are based on evidence that is "inherently or

[11] Newmar also argues that the circuit court erred in concluding that, apart from the slide-out water intrusion problem, there were a number of other nonconformities and, when these other nonconformities are considered together, the "out of service" requirement of WIS. STAT. § 218.0171(1)(h) was met. Because we affirm the circuit court's decision that the slide-out water intrusion problem alone was a nonconformity within the meaning of § 218.0171(1)(f) and there was a reasonable attempt to repair that nonconformity within the meaning of § 218.0171(1)(h)2., we do not address the court's alternative basis for liability.

patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts." ***Id.***

¶37 With respect to the circuit court's legal conclusion on "substantial impairment," we give weight, though not controlling weight, to that conclusion. ***Chmill***, 144 Wis. 2d at 803 (citations omitted). We do this because "the determination whether something is 'substantial' requires a value judgment heavily dependent upon interpretation and analysis of underlying facts." ***Id.***

¶38 The circuit court made the following determinations:

> 72. The [c]ourt concludes that plaintiffs' description of the slide-out water intrusion problem was a fully accurate and truthful account of what occurred prior to the repairs performed by Mr. Carstensen [of Custom RV]. The description offered by the plaintiffs was plausible, credible, corroborated by the expert opinion of Mr. Skalitzky and further corroborated by the observations and actions of Mr. Carstensen. The plaintiffs have established the accuracy of their description well beyond the preponderance of the credible evidence.
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> 73. The [c]ourt further concludes, based upon a clear preponderance of the evidence, that the water intrusion experienced by the plaintiffs was not a normal or acceptable level of RV performance….
>
> 74. The court further concludes, based upon a review of all relevant evidence, the defense suggestion that the water intrusion was less severe than claimed was not supported by credible evidence.
>
> 75. The slide-out water intrusion experienced by the plaintiffs was caused by defects in their RV covered by their warranty from Newmar.
>
> 76. The water problems caused by accumulation and infiltration of water on the main slide out significantly impaired the value of the RV, rendering it unacceptable for sale until it was repaired, which cost of … $2,029.20.

¶39 Newmar's argument that there was insufficient evidence to support these findings focuses on the testimony of its own witnesses. However, this is not the correct standard for our review. The circuit court expressly found that the Stoughs and their witnesses were more credible than Newmar's witnesses on the existence and severity of the slide-out water intrusion problem. We accept this credibility determination because there is nothing implausible or incredible about the testimony of the Stoughs and their witnesses on this point. *See* ***Global Steel***, 253 Wis. 2d 588, ¶10.

¶40 At trial, Bobby and Nancy Stough both testified in detail about the slide-out water intrusion problem. For example, Bobby Stough testified when it first occurred the Stoughs were camping in Florida where it had been raining when he retracted the slide-out in preparation to drive away. He testified that, after the slide-out was retracted, "I put [the RV] in gear to move slowly toward the area to stop to check for traffic before pulling out, and I get almost half a gallon of water down my neck." The water got on the "seat, floor, dash, windshield, splattered everywhere." The records from authorized Newmar dealers on the occasions the Stoughs brought their RV in for repair of this problem contain descriptions of the problem by the Stoughs that are consistent with their trial testimony.

¶41 In addition, the Stoughs presented the testimony of Scott Skalitzky, the owner of Custom RV, which repaired the slide-out, and George Carstensen, the employee there who repaired the slide-out. Carstensen's testimony was that when the Stoughs bought their RV in for repair in December 2003, approximately

one-half gallon of water was accumulated on the slide-out roof.[12] He and Skalitzky described the defect in the slide-out that in their opinion caused water to enter the RV when the slide-out was retracted, and Carstensen described how he repaired the slide-out. The testimony on the method of repair supported the Stoughs' testimony on the amount of water that accumulated in their vehicle and the court expressly so found. Skalitzky testified that the slide-out water intrusion problem described by the Stoughs was not acceptable in the RV industry.[13]

¶42 The circuit court explained in detail why it found the above testimony credible and why it found the conflicting testimony of each of Newmar's witnesses lacking in credibility. Accepting the circuit court's credibility determinations, we conclude there was ample evidence to support the circuit court's factual findings on the existence, cause, and extent of the water intrusion problem.

¶43 Newmar also argues that there was no evidence introduced that the slide-out water intrusion problem was covered by an express warranty as required

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[12] There was testimony that the Stoughs' son had been staying in the RV with the slide-out expanded during Thanksgiving prior to the Stoughs' bringing the RV in to Custom RV, and that water froze on the top of the slide-out and then melted in Custom RV's heated garage.

[13] Newmar attacks the qualifications of Skalitzky and Carstensen, arguing they are not qualified to testify about the slide-out water intrusion problem and repair because they were trained in heaters and air-conditioners.

The circuit court has broad discretion deciding whether to allow a witness to offer testimony as an expert under WIS. STAT. § 907.02, and we review the circuit court's discretionary decisions for erroneous exercise of discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Newmar does not develop an argument that the circuit court erroneously exercised its discretion in allowing them to testify. In any event, our review of the record persuades us that the testimony of these two witnesses shows they had sufficient knowledge, skill, and experience in repairing RVs, *see* § 907.02, to support the circuit court's decision that Carstensen and Skalitzky were qualified to offer expert testimony on the RV slide-out repair.

by WIS. STAT. § 218.0171(1)(f). The circuit court found that the dealer invoices and Newmar's warranty records show that, with the exception of work on a stabilizer jack, all the work performed on the Stoughs' RV during the first year after delivery "was treated as warranty work, at the time, by both Newmar and its dealers." Those exhibits support this finding and show that authorized Newmar dealers never charged the Stoughs for any of their attempts to repair this problem. In addition, Newmar's own witnesses testified that if the slide-out water intrusion problem existed as described by the Stoughs, it would be covered under warranty.

¶44 We turn now to the court's legal conclusion that the slide-out water intrusion problem was a nonconformity under WIS. STAT. § 218.0171(1)(f), which requires that it "substantially impair the use, value or safety of the vehicle." Newmar argues that the court's conclusion was an error because the vehicle could still be driven. However, it is well established that a vehicle that can be driven may still have a nonconformity that triggers liability. In ***Chmill***, 144 Wis. 2d at 803-05, we held that a car with a pulling problem had a nonconformity despite the owners' having driven the car 78,000 miles with this problem. We concluded that the Uniform Commercial Code standard, which allows a buyer to revoke acceptance of a commercial unit whose "'nonconformity substantially impairs its value to [the buyer],'" *see* UCC § 2-608(1), *and* WIS. STAT. § 402.608(1), was "far different" than the standard in § 218.0171(1)(f) (then numbered WIS. STAT. § 218.015(1)(f) (1983-84)), which defines nonconformity "in terms of use and safety as well as value." ***Chmill***, 144 Wis. 2d at 803-04. We therefore rejected the manufacturer's argument that cases decided under the UCC standard holding that vehicles satisfied that standard when they substantially fulfilled the "primary purpose [of] simple transportation" were applicable. ***Id.*** We stated that the fact "that a vehicle has served its primary purpose of providing 'simple transportation'

does not satisfy the use, value and safety standard of sec. 218.015(1)(f)." ***Id.*** *See also* ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶¶23-25, 261 Wis. 2d 769, 661 N.W.2d 476, and ***Dobbratz Trucking & Excavating, Inc. v. Paccar, Inc.***, 2002 WI App 138, ¶¶13-14, 256 Wis. 2d 205, 647 N.W.2d 315, both relying on ***Chmill***.

¶45 Giving weight to the circuit court's legal conclusion here, we conclude that, based on the evidence accepted by the circuit court, the slide-out water intrusion problem substantially impaired the value of the RV.[14] Nancy Stough testified, based on her experience of having owned four RVs, that "[a]bsolutely nobody would buy it [with the water intrusion problem]"; Skalitzky testified the amount of water in the Stoughs' RV slide-out prior to the repair was unacceptable in the RV industry; and Everard Osman, a salesman at RV World, testified that based on the Stoughs' counsel's description of the slide-out water intrusion problem, that he would not be able to sell the Stoughs' RV until the water intrusion problem was fixed. One of Newmar's witness testified that

[14] The court also made the following determination regarding substantial impairment of use of the vehicle:

> 77. There is sufficient credible evidence to establish that the Stoughs' use of their motor home was substantially impaired by the individual warranty items that left them unable to fully use the plumbing in their RV due to faulty gauges, unsure whether the stabilizing jacks were working properly, unsure whether the slide out would retract. Moreover, when it did retract after a rain, they had to soak up the water and mop up the spillage. All of these items detracted significantly from the Stoughs' ability to fully use the RV as a reliable weatherproof mobile recreational residence, as intended and as guaranteed by warranty.

However, because the court did not expressly determine that the slide-out water intrusion problem in itself substantially impaired the use of the RV, we address only its determination regarding value.

"nobody wants their unit to leak" in response to the question "don't you find buyers adverse to water leakage into the unit?" In addition, there was evidence that this RV has oak hardwood cabinets, a microwave, two televisions, and central air conditioning. It is reasonable to infer from this evidence that this RV is not supposed to let in substantial amounts of water after rain, as the court found occurred here, and that this condition substantially impairs its value.

¶46 Because the circuit court's findings of fact are not clearly erroneous and support its legal conclusion that the slide-out problem substantially impaired the value of the RV, we affirm the circuit court's determination that the slide-out problem was a nonconformity within the meaning of WIS. STAT. § 218.0171(1)(f).[15]

IV. Reasonable Attempt to Repair—Days "Out of Service"

¶47 Newmar argues the circuit court improperly interpreted and applied WIS. STAT. § 218.0171(1)(h)2. regarding reasonable attempt to repair when it concluded that the RV had been "out of service for an aggregate of at least 30 days because of warranty nonconformities." Section 218.0171(1)(h)2. According to

[15] Newmar periodically refers to the fact that people do not rely on RVs in their daily lives in the same way they rely on cars and suggests that WIS. STAT. § 218.0171 should not apply to RVs. However, Newmar does not develop an argument that an RV is not a "motor vehicle" within the meaning of § 218.0171(1)(d), which defines "motor vehicle" as "any motor driven vehicle required to be registered under ch. 341 or exempt from registration under s. 341.05(2) … [but] does not mean a moped, semitrailer or trailer designed for use in combination with a truck or truck tractor." WISCONSIN STAT. § 341.25(1)(i) and (j) require registration of recreational vehicles and motor homes, respectively. Because Newmar does not address the relevant statutes using principles of statutory construction, we do not further discuss this topic. To the extent that Newmar's argument is that RV's *should not be* covered under the statute, that must be addressed to the legislature.

Newmar, the circuit court's reliance on ***Vultaggio***, 145 Wis. 2d 874, in construing and applying the statute was based on a misreading of that case.

¶48 This meaning of a statute and its application to the facts as found by the circuit court presents a question of law, which we review de novo. *See* ***Garcia,*** 273 Wis. 2d 612, ¶7.

¶49 In ***Vultaggio***, 145 Wis. 2d at 885-86, the parties disputed the meaning of "out of service" in WIS. STAT. § 218.0171(1)(h)2 (then numbered WIS. STAT. § 218.015(1)(h)2. (1983-84)).[16] The manufacturer contended "out of service" meant the vehicle was unavailable for the consumer's use because of the performance of repairs, in other words, the vehicle needed to be in the repair shop in order to be "out of service." 145 Wis. 2d at 885. We examined the legislative history of the statute and noted the legislature had deleted the words "repair of" from the final draft of § 218.015(1)(h)2. as follows:

> The motor vehicle is out of service for an aggregate of at least 30 days because *of repair* of warranty nonconformities…. [Emphasis added.]

Vultaggio, 145 Wis. 2d at 885-86, citing 1983 AB 16 and 1983 Wis. Act 48. Considering this legislative history along with the "remedial" nature of the statute and the problem the statute was designed to address, we concluded "out of service" was "not limited to only those periods in which the vehicle is unavailable to the consumer," but instead included "those periods when the vehicle is not capable of rendering service as warranted due to a warranty nonconformity, even though the vehicle may be in the possession of the consumer and may still be

[16] 1987 Wis. Act 105, § 2 amended WIS. STAT. § 218.015(1)(h) (1983-84) by adding "motor vehicle lessor" to subd. 1., and 1999 Act 31, § 287 renumbered the statute to its current location; neither of these amendments affects our analysis..

driven …." ***Vultaggio***, 145 Wis. 2d at 886. We held that the consumer must report a nonconformity to the manufacturer and make the vehicle available for repair; however, "[a]s long as there exists notice and opportunity, the thirty-day clock runs" under WIS. STAT. § 218.015(1)(h)2. (1983-84). ***Vultaggio***, 145 Wis. 2d at 887.

¶50 Here the circuit court found the Stoughs presented Newmar with the RV for repair of the slide-out water intrusion problem on May 6, 2002, but Newmar did not repair the problem, and it remained unrepaired until Custom RV successfully repaired it in January 2004. These findings are supported by the evidence, and we have already sustained the circuit court's determination that the slide-out water intrusion problem was a non-conformity within the meaning of WIS. STAT. § 218.0171(1)(f). Therefore, at the time the Stoughs served Newmar with a demand to repurchase on November 19, 2002, 197 days had transpired from May 6, 2002, during which the RV had not rendered services as warranted because of a warranty nonconformity. The vehicle had therefore been out of service for 197 days on account of a warranty nonconformity based on our interpretation of that phrase in ***Vultaggio***.

¶51 Newmar attempts to distinguish ***Vultaggio*** based on factual differences. First, Newmar argues that a truck was involved in ***Vultaggio,*** not an RV. However, Newmar does not explain why this factual distinction is relevant to the construction of WIS. STAT. § 218.0171(1)(h)2. *See supra* n.15. Newmar also contrasts the seriousness of the problem in ***Vultaggio*** with its view of the water intrusion problem here, but this argument in essence challenges factual findings of the circuit court that we have already upheld. Similarly, Newmar's assertion in its reply brief that ***Vultaggio*** does not apply because there is no warranty

nonconformity in this case is based on its disagreement with the factual findings and legal conclusion we have already affirmed.

¶52 We conclude the circuit court correctly applied ***Vultaggio*** in deciding that the Stoughs' RV was out of service for over thirty days within the meaning of WIS. STAT. § 218.0171(1)(h)2. because of the slide-out water intrusion problem. Since we have affirmed the circuit court's findings and conclusion that this was a warranty nonconformity, all the requirements for a reasonable attempt to repair under para. (h)2. are met.

V. Evidence on the Stoughs' Interest Payments

¶53 Newmar argues the circuit court improperly allowed the Stoughs, after the court filed its decision and order, to introduce new evidence regarding continually accruing interest on the loan they took out to finance their purchase of the RV. This was improper, according to Newmar, because under ***Stivarius v. DiVall***, 121 Wis. 2d 145, 157, 358 N.W.2d 530 (1984), the court should have reopened the case and allowed additional testimony on all issues.

¶54 The procedural facts relating to this issue are as follows. Bobby Stough testified at trial that he and Nancy Stough financed the entire purchase of the RV with a loan from Cambridge State Bank with an interest rate of 7.9%, and at the time of trial they were still making monthly payments on the loan, which included continually accruing interest payments. The court admitted into evidence a copy of that loan agreement, a letter dated January 18, 2005, from the senior vice-president of the bank stating that interest paid on that loan to date was

$20,824.59, and a letter from Nancy Stough to counsel stating the Stoughs were paying $594.99 interest on the loan per month.[17]

¶55 The circuit court's decision and order entered on July 8, 2005, concluded that Newmar was obligated to pay the Stoughs, as part of the repurchase, $20,824.59 in "finance charges," which the court found the Stoughs had proved at trial. That decision and order also stated that the Stoughs were entitled to "actual reasonable costs" including reasonable attorney fees under WIS. STAT. §§ 218.0171 and 100.20(5), and directed the Stoughs to submit a claim for those to the court as well as submitting a judgment. On July 12, 2005, along with documents supporting claims for costs, attorney fees, and interest on the judgment under WIS. STAT. § 807.01(4),[18] the Stoughs' submitted two alternate damage summaries, one based on judgment being entered after July 18, 2005, and the second based on judgment entered after August 18, 2005. The proposed judgments differed in the amount entered for finance charges, and also in the amount for interest on the judgment due under § 807.01(4). In support of the former, the Stoughs submitted a letter from Cambridge State Bank stating the Stoughs would have paid $24,703.65 in interest on the RV loan as of July 18,

[17] The circuit court's decision and both Newmar and the Stoughs on appeal state that the interest rate on the loan was 9.7%, although the loan document clearly states, and Bobby Stough testified at trial, that the loan had an interest rate of 7.9%. In any case, the court used the evidence of the monthly payment of $594.99 to calculate the interest, not the interest rate.

[18] WISCONSIN STAT. § 807.01(4), Settlement offers, provides:

> **(4)** If there is an offer of settlement by a party under this section which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid. Interest under this section is in lieu of interest computed under ss. 814.04(4) and 815.05(8).

2005, and $25,306.76 as of August 18, 2005. The Stoughs requested the court adjust the final judgment award depending on what day the case was finally resolved to reflect the Stoughs' ongoing interest payments and the corresponding changes to interest on the judgment under § 807.01(4).

¶56 On August 10, 2005, Newmar submitted a proposed judgment showing damages including the finance charge, as stated in the July 8 decision and order. The accompanying letter addressed various issues in response to the Stoughs' filing, but was silent on their request to increase the amount of the finance charge based on the date judgment was entered.

¶57 While resolution of other issues relating to the judgment was pending, the Stoughs filed a motion to supplement the record with an affidavit from a loan officer at Cambridge State Bank calculating the interest on the loan as $25,907.52 as of September 18, 2005, and asking that the judgment reflect this current amount. Subsequently, the court entered a judgment using the damage amount proposed by the Stoughs, which included the increased finance charges. When Newmar asked the court for an explanation of the increased damages, the court ordered the Stoughs to explain this. The Stoughs responded by explaining that their damages had increased on account of the ongoing monthly interest payments. Newmar objected, arguing the court should not consider the evidence regarding the additional interest "as that evidence was available at the time of trial but not submitted by the plaintiffs." Newmar also argued that the court had never ruled on the Stoughs' motion to supplement the record.

¶58 Recognizing that it had never ruled on the Stoughs' motion to supplement the record, the court ordered that its judgment be suspended to give Newmar an opportunity to respond to the Stoughs' motion to supplement the

record. In its response, Newmar objected to supplementation of the record, arguing the evidence the Stoughs sought to introduce had been available at trial and was not produced during discovery, and arguing that the court would not be acting equitably if it allowed the Stoughs to introduce evidence after trial when the court had limited the testimony of Collier and Horn at trial.

¶59 The circuit court rejected Newmar's argument. The court concluded the evidence at trial—including the Stoughs' loan agreement, the Stoughs' testimony and other documents reflecting ongoing interest payments, and the letter from the bank calculating interest payments made to January 18, 2005—established that the Stoughs had an ongoing obligation to make interest payments on the RV loan in the amount of $594.99 per month. The court concluded the Stoughs' supplemental materials were corroborative evidence of their ongoing obligation to make interest payments and the court admitted these materials. The court also concluded the trial evidence was sufficient to support an amended judgment that reflected ongoing interest payments, and, the court stated, its decision was based on the evidence produced at trial. The court noted that the recent calculations provided by the bank were slightly higher than the bank's and Nancy Stough's calculations at trial ($635.37 versus $594.99). Concluding this difference was de minimis, the court used the amount of $594.99 established at trial.

¶60 Although on appeal Newmar characterizes the basis for the circuit court's final determination of interest as "new evidence," this overlooks the court's express finding that the evidence on the amount of monthly interest the Stoughs were paying was admitted at trial. The record supports this finding. In essence, the court modified its initial decision on the amount of interest to take into account the months that had passed since the trial testimony until judgment

was entered. The court did so only after giving Newmar an opportunity to be heard on this issue. Newmar did not in the circuit court, and does not on appeal, explain why the court is precluded from using in the final judgment the most current figure, when the basis for calculating that figure was evidence admitted at trial.

¶61 Neither ***Stivarius***, 121 Wis. 2d at 157,[19] nor WIS. STAT. § 805.17(2),[20] on which Newmar relies, addresses a situation such as this, and Newmar does not develop an argument explaining why either is relevant to what the circuit court did here.

¶62 Newmar also argues that it was inequitable for the court to modify the amount of interest because it did not permit Horn and Collier to testify. We see no connection between these two rulings. Moreover, we have already

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[19] In ***Stivarius v. DiVall***, 121 Wis. 2d 145, 358 N.W.2d 530 (1984), the supreme court used its discretionary power of reversal to reverse and remand a circuit court decision denying the defendant attorney fees based on a frivolous action because the defendant did not present evidence of the reasonableness of the fees. The defendant mistakenly believed the evidence he had previously submitted on this point was still before the court, after a remand, and rested. The circuit court refused to reopen and permit the defendant to present this evidence. In reversing and remanding, the supreme court directed that on remand, in the interests of fairness to the plaintiff, evidence could be presented by both parties on frivolousness and the allocation of fees as well as on the reasonableness of the amount. ***Id.*** at 154-59.

[20] WISCONSIN STAT. § 805.17(2) provides in part:

> **(2)** EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the ultimate facts and state separately its conclusions of law thereon. The court shall either file its findings and conclusions prior to or concurrent with rendering judgment, state them orally on the record following the close of evidence or set them forth in an opinion or memorandum of decision filed by the court.

concluded the circuit court properly exercised its discretion in its ruling on Newmar's witnesses.

¶63 In short, Newmar's arguments that the court improperly increased the amount of the interest payments are either undeveloped or not persuasive. Accordingly, we conclude Newmar is not entitled to a reversal of the court's orders on this point or to the amount of interest in the final judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.