COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1042 **Cir. Ct. No. 2004CV4632**

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

COURTNEY NISSENBAUM,

PLAINTIFF-APPELLANT,

V.

POLLY J. DANIELS, N/K/A POLLY J. WILKERSON, KEVIN RIGG AND KRISTIN JOHNSTON,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed; request for double costs granted.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 FINE, J. Courtney Nissenbaum appeals from judgments dismissing her breach-of-contract and misrepresentation claims against Polly J. Daniels, n/k/a

Polly J. Wilkerson, Kevin Rigg, and Kristin Johnston. Nissenbaum claims that the trial court erroneously exercised its discretion when it precluded her expert witness from testifying. We disagree and affirm.

¶2 Nissenbaum also claims that the trial court erroneously exercised its discretion when it denied her motion to add a lay witnesses to the witness list. Our resolution of the expert-witness claim is dispositive, and, accordingly, we do not discuss the substance of the lay-witness-list issue. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

¶3 Rigg's main brief asks that we award him double costs from Nissenbaum under WIS. STAT. RULES 809.19(2)(a) and 809.83(2). We grant the request.

I.

¶4 Nissenbaum bought a house from Daniels in the spring of 2004. Rigg was the listing real-estate agent. Johnston was Nissenbaum's real-estate agent. Johnston gave Nissenbaum a Real Estate Condition Report in which Daniels represented that she was not "aware of defects in the structure of the property." Johnston also drafted the Offer to Purchase, which included an inspection contingency and gave Daniels a right to cure any defects.

¶5 Bob Beisbier, a home inspector, looked at the house in March of 2004 and noted that the floor joists were cracked, rotted, and overspanned. Beisbier marked the rotten joists with blue tape and recommended that Nissenbuam have a structural engineer inspect all of the floor joists to determine whether the house was safe.

¶6 After the home inspection, Johnston faxed to Rigg a Notice of Defect and an Amendment to the Offer to Purchase. The Amendment waived the inspection contingency in exchange for an evaluation of the floor joists by a "certified engineer" and the completion of any recommended repairs at Daniels's expense.

¶7 Daniels did not sign the Amendment. Instead, she elected to fix the floor joists under the right-to-cure provision in the Offer to Purchase. Daniels's Notice invoking her right to cure provided that the repairs would be done pursuant to a March 15, 2004, proposal submitted to Rigg by Mark Schultz of Mark's Repairs and Remodeling, LLC. In the proposal, Schultz stated that he would "install [a] microlaminated beam and sister all 2 x 6 floor joists."

¶8 Schultz made the repairs, and Nissenbaum closed on the house in April of 2004. After the closing, Nissenbaum walked through the house with Beisbier. Beisbier told Nissenbaum that only part of the structure had been repaired. Beisbier then called Schultz and learned that Schultz was not a structural engineer.

¶9 Nissenbaum sued Daniels for, as material, breach of contract and breach of warranty, alleging that Daniels represented that she had no notice or knowledge of any structural defects in the property, when, in fact, she knew about them, including the sagging floor joists. Nissenbaum also sued Rigg and Johnston for, as material, intentional misrepresentation, alleging that they misrepresented: (1) that the "[d]amage [was] evaluated by a structural engineer," and (2) that

Daniels would "replace [the] damage[d] and sagging floor joists."[1] Nissenbaum sought money damages, or alternatively, rescission and restitution.

¶10 In October of 2004, Nissenbaum indicated in response to Rigg's interrogatories that she intended to call Schultz as an expert witness at trial. Nissenbaum also submitted a July 19, 2004, proposal from Schultz. In the proposal, Schultz asserted that the house "would have to be lifted off of the foundation and the rotted beams would need to be replaced along with adding floor joists to increase the strength of the main floor." Schultz also "estimated" that the repairs would include the following costs: (1) $3,000-$5,000 for electrical; (2) $2,000-$3,000 for heating, ventilation, and air conditioning; (3) $5,000-$10,000 for plumbing; (4) $500-$750 for a glass block window; (5) $3,000-$7,000 for materials, supplies, and permits; and (6) $30,000-$40,000 to pay contractors.

¶11 Nissenbaum filed her witness list on March 7, 2005, and Schultz was deposed in June of 2005. Schultz testified at his deposition that he had served in the Air Force for four years, where he was a structural repair-technician on fighter aircraft. He also testified that he worked for his grandfather's refrigeration and air conditioning business, and for an asbestos-removal contractor. Schultz testified that he had "years of personal experience" doing remodeling projects for friends

[1] Nissenbaum initially sued Daniels, Rigg, and Johnston for: (1) breach of contract and breach of warranty; (2) intentional misrepresentation; (3) misrepresentation in violation of WIS. STAT. § 895.80 (renumbered as WIS. STAT. § 895.446 effective April 5, 2006), which provides a civil remedy for the violation of WIS. STAT. § 943.20(1)(d) (theft-by-fraud); (4) misrepresentation in violation of WIS. STAT. § 100.18 (false advertising); (5) strict-responsibility misrepresentation; (6) negligent misrepresentation; and (7) negligence. At the final pretrial conference, Nissenbaum's claims were narrowed to: (1) a breach-of-contract and breach-of-warranty claim against Daniels, and (2) an intentional-misrepresentation claim against Rigg and Johnston.

and family, and that he had started his own business, Mark's Repairs and Remodeling, in 2001. According to Schultz, he "predominant[ly]" did "home repairs, remodeling, kitchens, bathrooms, buil[t] decks, replace[d] windows and doors, [and did] some roofing." Schultz testified that he had not done a "project … where a whole entire house was lifted," "[r]arely" got involved in structural work, and had worked with structural engineers "[o]n rare occasions."

¶12 Schultz testified that he had a home-improvement remodeling contractor's license from the City of Milwaukee. Schultz admitted that he was not licensed in any of the "construction trades," such as "general contracting, or plumbing or electrical." He also acknowledged that he had not taken classes or been trained in "plumbing, electrical, or any other licensed trade." Schultz testified that he was not a "professional registered engineer or licensed architect," and would defer to a structural engineer's opinion as to what was necessary to make Nissenbuam's house "safe and [give it] structural integrity" because he was "not a structural repair contractor at all."

¶13 Schultz testified that he drafted the July 19, 2004, proposal after reviewing inspection reports and looking at the house with a Tim Sty or a Tim Stys.[2] According to Schultz, Sty or Stys was a "structural contractor" whom he found in the telephone book. Schultz did not think that Sty or Stys was an engineer, however, and could not remember the name or location of Sty's or Stys's business. Schultz also testified that the contractor costs in his proposal were "basically" labor costs, including that of Sty or Stys, but could not, however, remember how much the fellow's hourly rate was. Schultz further testified that

[2] The Record uses both spellings.

"the cost of labor for this project can be broken down to rough estimates only and these costs are not set in stone."

¶14 On October 11, 2005, Nissenbaum sought to add Todd Daniels, Polly Daniels's ex-husband, to the witness list.[3] Nissenbaum claimed she had just learned that Todd Daniels knew that Polly Daniels was aware of serious structural defects in the house and intended to sell the house without fixing them. Nissenbaum did not seek to add any additional experts to the list.

¶15 On October 18, 2005, Rigg filed a motion *in limine* to prevent Schultz from testifying as an expert witness about the necessity or cost of structural repairs, claiming that Schultz was not qualified under WIS. STAT. RULE 907.02.[4]

¶16 The trial court denied Nissenbaum's motion to amend the witness list, concluding that the deadline for discovery had passed, and Nissenbaum had not shown excusable neglect. *See* WIS. STAT. RULE 801.15(2)(a) (party seeking to enlarge time after deadline has expired must show excusable neglect). The trial court also granted Rigg's motion *in limine* to exclude Schultz's testimony,

[3] Nissenbaum also sought to add Michelle Daniels, Todd Daniels's wife, to the witness list. Nissenbaum does not, however, argue on appeal that the trial court erred in denying her motion to add Michelle Daniels to the witness list. Accordingly, any claim of error on that matter has been abandoned. ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285, 292 (Ct. App. 1998) (issue raised in the trial court but not on appeal deemed abandoned).

[4] WISCONSIN STAT. RULE 907.02 provides:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

concluding that Schultz was "not qualified as a structural expert." The trial court explained:

> We start with a concept [that] Wisconsin has a liberal rule.
>
> We don't do hearings to determine expertise, but we do have a requirement under 907.02 that an expert is someone who by knowledge, skill, experience, training or education may testify in a form of an opinion that has specialized knowledge.
>
> And the question is: Does Mr. Schultz have sufficient specialized knowledge to be offered as an expert on structural repairs?
>
> There is no objection to his testimony as a repair person to what he did in this property. The question is: Can he give an opinion about structural repairs that he is recommending need to be done in order to properly repair this house?
>
> I read through his testimony provided in the motion. I looked at his estimate. He has here the electrical costs, 3,000 to 5,000; [heating, ventilation, and air conditioning], 2,000 to 3,000; plumbing, 5[,000] to 10,000; glass block, 500 to 750; materials, supplies and permits, 3,000 to 7,000; and then contractor cost, 30,000 to 40,000.
>
> I was struck by the testimony that he gave about that. He really wasn't very clear as to what that was comprised of.
>
> Then you get to how did he come to that if he's never done this before, he's never done this kind of structural work? He picked a name out of the phone book, called, spoke to somebody at that number and asked to be given information on how to make structural repairs.
>
> This person never saw the house, never came to the house; plus, we have no notes that were taken by Mr. Schultz as to what the person said.
>
> There is an argument that this all goes to weight, not admissibility; but I think there is a gate[-]keeping function for the courts. There has to be some determination that a witness is competent.

> I have severe questions as to his competency to testify as to the structural repairs to this property. I just don't think Schultz has demonstrated that. I did note his own statement as to his assessment of his own expertise.
>
> Then he relies on this unknown person. Yes, we often have witnesses that rely. The example is given of a vocational expert; but usually that is a situation where they rely on tables, documents, reports, other things that you can go and look at or rely on their notes that you can look at and make a determination.
>
> Here we have an unknown person who apparently gave information. We have no information as to that person's qualifications to give the estimates that were being pro-offered [*sic*].
>
> So I think that, he's qualified to testify as to the repairs he made but is not qualified as a structural expert.

Nissenbaum's lawyer then told the trial court that without Schultz's testimony on the cost of repairs, "I have no other proof of damages," and "on [this] basis, I cannot prove my case and I think the Court would be justified in dismissing this case now." Nissenbaum's lawyer did not seek to amend Nissenbaum's witness list to add another expert witness, or seek leave for time to find a qualified expert.

¶17 Given Nissenbaum's lawyer's representation that he could not proceed without an expert, the trial court dismissed Nissenbaum's complaint with prejudice under WIS. STAT. RULES 802.10(5)(b) and 801.01(2).

II.

A. *Expert Testimony.*

¶18 The determination of whether a witness is qualified to give a particular opinion as an expert is a discretionary determination for the trial court. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 86, 629 N.W.2d 698, 705–706. A trial court properly exercises its discretion when it examines the

relevant facts, applies a proper legal standard, and, using a demonstrated rational process, reaches a reasonable conclusion. ***Id.***, 2001 WI 113, ¶45, 246 Wis. 2d at 96, 629 N.W.2d at 710.

¶19 Under WIS. STAT. RULE 907.02, a witness may give an opinion within his or her area of expertise as long as the witness is "qualified as an expert by knowledge, skill, experience, training, or education" on the issue. While "[i]t is not necessary … that an expert have personally performed the activities at issue in order for him or her to give an opinion thereon," ***Hennig v. Ahearn***, 230 Wis. 2d 149, 181, 601 N.W.2d 14, 29 (Ct. App. 1999), a witness must exhibit "'such a degree of knowledge, gained from experiments, observation, standard books or other reliable source, as to make it appear that his opinion is of some value,'" ***Tanner v. Shoupe***, 228 Wis. 2d 357, 374, 596 N.W.2d 805, 815 (Ct. App. 1999) (quoted source omitted); *see also* ***State v. Hollingsworth***, 160 Wis. 2d 883, 896, 467 N.W.2d 555, 560 (Ct. App. 1991) ("RULE 907.02 'permits witnesses with any form of specialized knowledge, however obtained, to assist the trier of fact.'") (quoted source and emphasis omitted).

¶20 Nissenbaum contends that the trial court erroneously exercised its discretion because it: (1) applied the wrong legal standard when it excluded Schultz's testimony because Schultz had never performed the repairs he recommended, and (2) denied the motion under the mistaken belief that Sty or Stys never saw the house. Nissenbaum claims that Schultz was qualified to give expert testimony on the necessity and cost of structural repairs because Schultz: has been remodeling houses since 2001; had a home-improvement remodeling contractor's license from the City of Milwaukee; had "years of personal experience" doing remodeling projects; worked for an air conditioning business

and an asbestos-removal contractor; made structural repairs on fighter aircraft; and had previously repaired Nissenbaum's home. We disagree.

¶21 We affirm because the trial court applied the proper legal standard, and did not erroneously exercise its discretion. The trial court noted that it had looked at Schultz's July 19, 2004, proposal and read Schultz's deposition testimony, which provided, as material, that:

- Schultz was not a "professional registered engineer or licensed architect" and had not taken any classes in architecture or engineering.
- Schultz was not licensed in any of the "construction trades," and had not taken classes or been trained in plumbing, electrical, or other licensed trade.
- Schultz mostly repaired and remodeled kitchens and bathrooms, built decks, replaced windows and doors, and did some roofing.
- Schultz had never done a "project … where a whole entire house was lifted."
- Schultz "[r]arely" got involved in structural work, and had worked with structural engineers "on rare occasions."
- Schultz was "not a structural repair contractor at all."

There is nothing in this Record to suggest that Schultz had any expertise on the necessity or costs of structural repairs. Indeed, Schultz admitted that he had limited experience with residential (as opposed to aircraft) structural work and had no training or education in that area. He also admitted that he never did the structural repair work he recommended, and, significantly, acknowledged that he was "not a structural contractor at all." *See* ***Green v. Smith & Nephew AHP, Inc.***,

2000 WI App 192, ¶22, 238 Wis. 2d 477, 498–499, 617 N.W.2d 881, 891 (witness can disavow expertise by his or her own testimony), *aff'd*, 2001 WI 109, 245 Wis. 2d 772, 629 N.W.2d 727.

¶22 Although Nissenbaum contends that Schultz could rely on Sty or Stys (who was *not* named as an expert witness), under WIS. STAT. RULE 907.03, which permits an expert witness to rely on inadmissible data if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," Schultz was not qualified to testify as an expert, and this is a prerequisite under RULE 907.03. *See* ***Green***, 2000 WI App 192, ¶23, 238 Wis. 2d at 499, 617 N.W.2d at 891. The trial court properly exercised its discretion.

B. *Witness List.*

¶23 Nissenbaum contends that the trial court erroneously exercised its discretion when it denied her motion to amend the witness list to name an additional lay witness to support her misrepresentation claim. As we have seen, however, Nissenbaum's lawyer conceded at the final pretrial conference that he could not prove Nissenbaum's case without Schultz's testimony. Accordingly, this issue is moot. *See* ***Gross***, 227 Wis. at 300, 277 N.W. at 665.

C. *Costs.*

¶24 Rigg seeks double costs from Nissenbaum, claiming that the appendix to her main brief on appeal violates the rules of appellate procedure because it does not contain: (1) the order for judgment or the judgment Nissenbaum is appealing, or (2) the complete transcripts of Schultz's deposition testimony or the final pretrial conference and motion hearing. Nissenbaum's

lawyer certified, however, that he complied with WIS. STAT. RULE 809.19(2)(a) (contents of appendix). The certification was false. Accordingly, we award to Rigg double costs. *See* WIS. STAT. RULE 809.83(2) (penalties for non-compliance with rules of appellate procedure).

By the Court.—Judgments affirmed; double costs granted.

Publication in the official reports is not recommended.