COURT OF APPEALS DECISION DATED AND FILED

June 28, 2007

David R. Schanker
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. 2006AP2803

Cir. Ct. No. 2003CV12

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

JOHN SKOTZKE CONCRETE CONSTRUCTION, INC.,

PLAINTIFF,

V.

TERRI L. KOWALCZYK, MICHAEL R. BLANK AND TIMOTHY M. BLANK,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

V.

PATRIOT HOMES, INC., D/B/A LINCOLN PARK HOMES AND RENARD HOMES, LLC.,

THIRD-PARTY DEFENDANTS-RESPONDENTS,

ROGER GRIFFIN, F/D/B/A GRIFFIN EXCAVATING,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed*.

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. This appeal concerns claims arising out of an allegedly defective and negligently installed manufactured home.[1] The circuit court granted summary judgment in favor of the manufacturer and the supplier of the home, and the purchasers appeal. The circuit court determined that, based on the undisputed facts, the purchasers did not suffer any damages and that the Magnuson-Moss Warranty Act, 15 U.S.C.S. § 2301 et seq.[2] does not cover the manufactured home. We affirm the circuit court's judgment, although on somewhat different grounds.

BACKGROUND

¶2 In approximately May 2001, Terri Kowalczyk, Michael Blank, and Timothy Blank (collectively the purchasers) contracted with Renard Homes, LLC, for the purchase of a manufactured home to be manufactured by Patriot Homes,

[1] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1067 (4th ed. 2000) defines manufactured home as "a prefabricated house that is put together in standardized sections." Because the parties do not provide details regarding the type or specifications of the manufactured home at issue in this case, we assume this general dictionary definition suffices for the purposes of this opinion.

[2] All references to the United States Code are to the 2000 version unless otherwise noted.

Inc.[3] This action was initiated by John Skotzke Concrete Construction, Inc., seeking monetary damages from the purchasers for failure to pay for labor and materials associated with pouring concrete footings and walls for the manufactured home. The purchasers in turn filed a third-party complaint against Patriot Homes and Renard Homes.[4] The amended third-party complaint alleged that, within several months of delivery of their manufactured home, they discovered numerous defects and the defects were not properly repaired under the manufacturer's warranty. They sought damages for negligence, breach of warranty, and violations of the Magnuson-Moss Act.

¶3 Patriot Homes and Renard Homes moved for summary judgment on various grounds, including that the purchasers could not show that they had sustained any recoverable damages and that the complaint did not state a claim under the Magnuson-Moss Act. In support of their motions they submitted the deposition testimony of an appraiser, Dennis Cronce, who was retained by the purchasers to inspect and value the property in December 2005. He valued the property at $123,500 as of December 15, 2005. His written appraisal stated there were no "apparent physical deficiencies or conditions that would affect the

[3] The record is not clear on the date of purchase. The affidavits of Kowalczyk and Michael Blank aver that the manufactured home was purchased in May of 2001. We see no factual submission in the record converting this date. On appeal Patriot Homes and Renard Homes both state in their briefs that the manufactured home was purchased in October of 2000 and delivered in May of 2001; but there is no record citation. We therefore use May 2001 as the date of purchase. As for Renard Homes' role, this party admitted in its answer to the third-party complaint that it contracted with the purchasers for the sale of the manufactured home, but denied that allegation in its the answer to the amended third-party complaint. However, on appeal Renard Homes states in its "Statement of Facts" that the purchasers "signed a contract with Renard Homes, LLC for the purchase of a manufactured home to be manufactured by Patriot Homes, Inc." We therefore treat this as an undisputed fact for purposes of this appeal.

[4] The third-party complaint also named Roger Griffin as a defendant, but he is not involved on this appeal.

soundness or structural integrity of the improvements [the manufactured home] or the livability of the property" and he testified that he would have noted on the appraisal form any adverse conditions or any repairs needed in order to obtain the appraised value. He concluded the condition of the home was average in terms of what he would expect for a manufactured home of this age, and he arrived at the appraised value based on the recent sale prices of comparable properties that were also in average condition.

¶4 In opposition to the motion, the purchasers submitted the deposition testimony of Michael Blank, who described defects in the manufactured home and estimates he had obtained for repairs; the deposition testimony of a plasterer who described defects in the home and provided an estimate in December 2004 of $12,300 to install new sheet rock and replaster; and Michael Blank's affidavit accompanied by two other estimates for repairs.

¶5 The circuit court granted summary judgment in favor of Patriot Homes and Renard Homes. It agreed with them that the correct measure of damages was the lesser of the cost of repairs and the diminished value of the manufactured home, and concluded that the undisputed facts showed the value of the home had not been diminished. The circuit court also concluded that the Magnuson-Moss Act did not apply because the manufactured home was not a consumer good.

DISCUSSION

¶6 On appeal, the purchasers contend that the court applied an erroneous measure of damages and that they *did* present evidence of damages. They also contend that the manufactured home is a consumer product and not real estate and the sale is therefore covered by the Magnuson-Moss Act.

¶7 We review de novo a circuit court's grant of summary judgment, employing the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WIS. STAT. § 802.08(2) (2005-06).[5]

I. Damages on the negligence and breach of warranty claims.

¶8 The determination of the proper measure of damages presents a question of law, and our review of this issue is therefore de novo. ***Jacquet Lumber Co., Inc. v. Kolbe & Kolbe Millwork Co., Inc.***, 164 Wis. 2d 689, 703, 476 N.W.2d 305 (Ct. App. 1991).

¶9 On a negligence claim the measure of damages for a structure is the cost of repair or the diminution in the value of the structure, whichever is smaller. ***Engel v. Dunn Co.***, 273 Wis. 218, 222, 77 N.W.2d 408 (1956). Under this rule the evidence the purchasers submitted regarding the costs of repair is the measure

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[5] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

of their damages only if those costs are less than any diminution of value of the manufactured home. However, the purchasers presented no evidence of how the defects Michael Blank described in his testimony affected the value of the manufactured home. The only evidence on value was the appraisal conducted in December 2005 by the purchasers' own appraiser that showed the home was in average condition for its age. The only reasonable inference from this evidence is that the value of the home was not diminished by any negligence of Patriot Homes or Renard Homes.[6]

¶10 The purchasers argue on appeal that the circuit court should have used the measure of damages in WIS. STAT. § 402.714(2). We observe, first, that the purchasers took the opposite position in the circuit court. In the circuit court, Patriot Homes, not the purchasers, asserted that § 402.714(2) provided the correct measure of damages for a breach of warranty claim; the purchasers disputed this on the ground that the UCC applies only to commercial transactions and this was not a commercial transaction. On appeal, in response to the purchaser's argument that § 402.714(2) provides the correct measure of damages, Renard Homes asserts that it does not, because the UCC applies only to goods and this transaction was a sale of real estate, not goods.

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[6] The purchasers assert in their appellate brief that "it was represented to [the purchasers] that their home would be worth $166,000. The actual value of the property turned out to be substantially less than that." They provide no record cite. They include in the appendix an unsigned and unsworn "Affidavit of Michael Blank" (not the signed and sworn one we refer to *supra* at paragraph 4) that states that there was an appraisal performed on December 12, 2001, for the purpose of obtaining a mortgage and that appraisal is attached to the affidavit and shows a fair market value of $166,000. However, no appraisal is attached and we cannot locate either this purported affidavit or this appraisal in the record. We therefore disregard this purported affidavit and the argument based on it.

¶11 We will assume for purposes of argument that WIS. STAT. § 402.714(2) is the applicable measure of damages for the breach of warranty claim in this case. Under this statute damages are the difference between (1) the value of the product as warranted at the time and place of acceptance, and (2) the actual value of the product with defects at the time and place of acceptance.[7] *See* ***Mayberry v. Volkswagen of America, Inc.***, 2005 WI 13, ¶39, 278 Wis. 2d 39, 692 N.W.2d 226. There is no evidence in the record of either of these values.[8]

¶12 The purchasers also argue on appeal that they seek "consequential damages as a result of the loss of use and enjoyment of their property as well as $12,000 pursuant to sec. 402.715 Stats.,[9] in consequential damages to their

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[7] WISCONSIN STAT. § 402.714(2) provides:

> **(2)** The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

[8] *See supra* at paragraph 9 and footnote 6. In addition, we observe that in its responsive brief, Patriot Homes states that the purchasers purchased the manufactured home for $66,454.25. However, it provides no record cite and we can locate no such evidence in the record.

[9] WISCONSIN STAT. § 402.715 provides:

> **(1)** Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
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> **(2)** Consequential damages resulting from the seller's breach include:

(continued)

personal property as a result of various breaches of warranty." (Footnote added.) This argument is not adequately developed in their appellate brief and it was not adequately presented in the circuit court. In their circuit court brief this was the only reference to consequential damages and it occurred in the midst of a paragraph discussing the defects in the home: "The third party suffered consequential damages of over $12,000. He has also received repair estimates to remedy the defects. [Ex. B, Affidavit of Michael R. Blank]." Blank's referenced affidavit states:

> There have also been substantial consequential damage caused by Patriot Homes, Inc.'s breach of contract and warranty including water damaged structural items and water damaged personal property; personal property damage is approximately $12,000.00.

There is no further detail in the record on what this personal property was, how it was damaged, or the extent of the damage. Also, there is nothing we can see to support the assertion on appeal of the "loss of the use and enjoyment of their property." We do not generally consider arguments that are insufficiently presented or developed and we decline to do so here. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).

> (a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
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> (b) Injury to person or property proximately resulting from any breach of warranty.

¶13 Because there was no evidence of damages for the negligence claims or the breach of warranty claims under the applicable measures of damages, we conclude the circuit correctly granted summary judgment on those claims.[10]

II. Magnuson-Moss Act

¶14 The Magnuson-Moss Act imposes requirements for warranties made in the sale of certain types of products. The parties debate whether the manufactured home is a consumer product and therefore subject to the act, as the purchasers contend, or real estate and therefore not subject to the act, as Patriot Homes and Renard Homes contend.[11] However, Patriot Homes makes an alternative argument—that, if there is no evidence of damages, the purchasers cannot recover under the act.[12]

¶15 The law appears to support Patriot Homes' position. The Magnuson-Moss Act applies to "a consumer who is damaged." 15 U.S.C. § 2310(d). "[S]tate law governs the appropriate measure of damages for breach of warranty under the Magnuson-Moss Act." ***Mayberry,*** 278 Wis. 2d 39, ¶16. We

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[10] The parties do not distinguish between the common law breach of warranty claim and the claim for breach of implied warranty under WIS. STAT. § 402.314. However, we observe that the measure of damages for a common law breach of warranty is "the difference between the actual value of the property and the value if as warranted." ***Mulvaney v. Tri State Truck & Auto Body, Inc***., 70 Wis. 2d 760, 769, 235 N.W.2d 460 (1975). This appears to be indistinguishable from the measure in WIS. STAT. § 402.714(2) for purposes of this appeal.

[11] Renard Homes also makes the argument that the purchasers' claim under the Magnuson-Moss Act was pleaded only against Patriot Homes and therefore the amended third-party complaint does not state a claim against it, Renard Homes, for a violation of the act. It is not necessary to address this argument.

[12] Patriot Homes made the same argument in the circuit court, but the circuit court did not address it. However, we may affirm on grounds that differ from those relied on by the circuit court. ***Koestler v. Pollard,*** 162 Wis. 2d 797, 809 n.8, 471 N.W.2d 7 (1991).

have already concluded that the purchasers have presented no evidence of damages for the state law breach of warranty claim. The purchasers do not address this argument in their reply brief and therefore do not refute the proposition that, if they have no damages under their state law claim, they have no claim under the Magnuson-Moss Act. We take this failure to reply to this point as a concession that it is correct. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 297 N.W.2d 493 (Ct. App. 1979) (that which is not refuted is deemed conceded). On this basis, we affirm the circuit court's ruling that Patriot Homes and Renard Homes are entitled to summary judgment on the Magnuson-Moss Act claim.

CONCLUSION

¶16 The circuit court correctly granted summary judgment in favor of Patriot Homes and Renard Homes because the purchasers presented no evidence that they were damaged under the measure of damages applicable to their claims. Accordingly we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.