

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 2, 2008

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. 2007AP1669

Cir. Ct. No. 2005CV167

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

SUZY MORTAG,

PLAINTIFF-APPELLANT,

v.

**EDWARD SOROOSH, D/B/A PINWOOD BUILDERS, PINWOOD, INC.
AND ALIAS INSURANCE COMPANY No. 1,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Vilas County:
NEAL A. NIELSEN, III, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Suzy Mortag appeals a judgment arising out of a dispute over a home improvement project. Mortag contends the circuit court erred by denying her motion for judgment notwithstanding the verdict. Mortag insists

Edward Soroosh, d/b/a Pinewood Builders, and Pinewood, Inc. (collectively, “Soroosh”), committed an unfair trade practice as a matter of law, thereby entitling her to double damages and attorney fees. We disagree and affirm the judgment.

¶2 Mortag and Soroosh entered into a “Rehabilitation Contract” whereby the Ashland County Housing Authority financed three basic areas of work on Mortag’s home: a new roof, new siding, and interior work. Ultimately, in conjunction with requests for payment to the housing authority, both Soroosh and Mortag signed certifications stating:

I hereby certify that the date reported above is correct, rehabilitation work has been performed in a satisfactory manner and in full compliance with the contract, and the amount requested is justified by the work which has been completed.

¶3 The housing authority inspector testified that when he inspected the project, “The quality of the work wasn’t the best I have seen ... but it was passable.” The housing authority subsequently paid Soroosh the full contract price.

¶4 Mortag alleged that shortly after the final payment, the roof started leaking. Mortag also complained about the siding and other problems. Mortag subsequently commenced an action against Soroosh, alleging breach of contract and violations of WIS. ADMIN. CODE ch. ATCP 110, the Home Improvement

Practices Code.¹ The matter went to a jury trial. At trial, Mortag requested \$42,745.06 in breach of contract damages, and the jury awarded \$7,823.²

¶5 Also at issue at trial were Mortag's allegations of unfair trade practices under WIS. ADMIN. CODE ch. ATCP 110. Several separate questions on the special verdict asked whether Soroosh violated ch. ATCP 110. As relevant to this appeal, Mortag alleged Soroosh was paid for drywall work he did not intend to provide or which he knew would not be provided according to the terms of the contract, thereby violating § ATCP 110.02(7)(b).³ The jury concluded that Soroosh did not violate the code.

¶6 Mortag brought a motion for judgment notwithstanding the verdict, contending that the verdict was internally inconsistent. Mortag asked the circuit court to rule that Soroosh violated WIS. ADMIN. CODE § ATCP 110.02(7)(b) as a matter of law with regard to the interior work, thereby entitling her to double damages and reasonable attorney fees under WIS. STAT. § 100.20(5). The circuit court denied the motion.⁴ This appeal followed.

¹ References to the Wisconsin Administrative Code are to the October 2004 version. References to the Wisconsin Statutes are to the 2005-06 version.

² Neither party appeals this portion of the jury verdict.

³ Mortag also contended at trial that Soroosh violated WIS. ADMIN. CODE § ATCP 110.02(11), by making misrepresentations to obtain payment. Although Mortag argued this issue to the circuit court at the hearing on the motion for judgment notwithstanding the verdict, she does not argue this issue on appeal. Indeed, Mortag states in her reply brief, "The specific provision of Wisconsin Admin. Code ATCP Chapter 110 at issue in this appeal is ATCP 110.02(7)(b)...." The misrepresentation issue is therefore deemed abandoned. *Reiman Assocs., Inc. v. R/A Adver., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

⁴ The circuit court on its own motion granted additur, and increased the jury's breach of contract damage award by \$700. Neither party challenges this action on appeal and we therefore do not reach it.

¶7 WISCONSIN ADMIN. CODE § ATCP 110.02(7)(b) provides:

ATCP 110.02 Prohibited Trade Practices. No seller shall engage in the following unfair methods of competition or unfair trade practices:

....

(7)

(b) Solicit or accept any payment for home improvement materials or services which the seller does not *intend* to provide according to the terms of the home improvement contract, or which the seller *has reason to believe* will not be provided according to the terms of the contract. (Emphasis added.)

¶8 Mortag contends that Soroosh admitted at trial the elements of WIS. ADMIN. CODE § ATCP 110.02(7)(b).⁵ First, Soroosh entered into a home improvement contract under which he was to perform interior work, among other things. Second, Soroosh testified he requested and accepted payment for interior work that he knew Rick’s Drywall in fact provided, and for which he knew Mortag paid Rick’s Drywall separately. In addition, Mortag contends that “in closing argument, Edward Soroosh’s counsel admitted that Edward Soroosh owed Suzy Mortag \$800 based on all of this.”

¶9 However, Mortag concedes that WIS. ADMIN. CODE § ATCP § 110.02(7)(b) specifically refers to intent. Mortag nevertheless claims that intent “is not an element of liability under § ATCP 110.02,” citing our decision in *Stuart*

⁵ In her reply brief, Mortag contends, without citation to the record, that “in making its ruling denying Suzy Mortag’s motion for judgment notwithstanding the verdict, the trial court essentially acknowledged that all the elements of a violation of ATCP Chapter 110 were present.” We are not persuaded.

v. Weisflog's Showroom Gallery, Inc., 2006 WI App 184, ¶29, 296 Wis. 2d 249, 722 N.W.2d 766. Mortag's reliance on *Stuart* is misplaced for several reasons.

¶10 First, Mortag misquotes our decision in *Stuart*.⁶ More importantly, our decision in *Stuart* was reversed by our supreme court in *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, 753 N.W.2d 448 ("*Stuart II*"). Finally, as Mortag acknowledges, *Stuart* involved the interpretation of WIS. ADMIN. CODE § ATCP 110.02(11), dealing with misrepresentations, which is not an issue in the present appeal.

¶11 Mortag nevertheless insists, "If a wrongful intent to deceive is not required to find a violation of the general misrepresentation section of WIS. ADMIN. CODE § ATCP 110.02, it seems certain that such a wrongful intent to deceive is also not required to find that Edward Soroosh violated ATCP § 110.02(7)(b)." We reject Mortag's argument that *Stuart* requires a finding as a matter of law that Soroosh violated § ATCP 110.02(7)(b).

¶12 Mortag fails to provide a sufficient basis to conclude that Soroosh violated WIS. ADMIN. CODE § ATCP 110.02(7)(b) as a matter of law. Here, it is undisputed the special verdict questions were proper as to form. We conclude the court appropriately determined there was enough evidence to give the questions to the jury. Soroosh testified that Rick's Drywall was brought in to do interior work

⁶ Mortag misquotes our decision. She quotes our decision at paragraph 29 and states as follows: "But, according to the Court of Appeals in *Stuart II*, this sort of 'state of mind' intent 'is not an element of liability under § ATCP 110.02.'" Our decision does not contain that quotation at paragraph 29. See *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2006 WI App 184, ¶29, 296 Wis. 2d 249, 722 N.W.2d 766. In addition, Mortag discusses the "Wisconsin Supreme Court" ruling in *Stuart II* but cites to our decision in that case. As Mortag recognized in her brief, *Stuart II* was on review by our supreme court at the time her briefs were submitted in the present appeal.

and “it developed into where they were going to do the whole thing.” Soroosh testified he paid Rick’s Drywall for paint and intended to pay Rick’s Drywall the remainder owed for the interior “when he was through.” Soroosh testified the interior work was never finished by Rick’s Drywall. Whether Soroosh accepted payment for services he did not intend to provide, or had reason to believe would not be provided, according to the terms of the contract was a question that was properly answered by the jury as fact-finder.⁷

¶13 Because we conclude that Mortag was not entitled to judgment notwithstanding the verdict as a matter of law, we need not reach the issues of double costs and reasonable attorney fees under WIS. STAT. § 100.20(5). *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁷ At any rate, Mortag does not address the evidence presented at trial concerning Soroosh’s intent. We need only address issues specifically raised on appeal. *Waushara County v. Graf*, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992).

