COURT OF APPEALS
DECISION
DATED AND FILED

May 28, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2398 **Cir. Ct. No. 02-SC-433**

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

RUSTAM GALLERY ORIENTAL RUGS,

PLAINTIFF-RESPONDENT,

V.

CHRISTINE LINDEMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MCCORMACK, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] In this appeal from a small claims judgment, Christine Lindemann protests the circuit court's acceptance into evidence of an invoice that she asserts she had never seen before and during the trial she was not

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(a) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

given a reasonable amount of time to examine. We affirm because the receipt of evidence is within the discretion of the circuit court and the evidence is sufficient to support the circuit court's conclusions.

¶2 Rustam Zulfakar, the owner of Rustam Gallery Oriental Rugs (Rustam), started a small claims action against Lindemann to recover $3073, the cost of cleaning, repairing and recoloring four oriental rugs. Lindemann filed a reply disputing the reasonableness of Rustam's charges. The parties were ordered to appear for a pretrial conference before the court commissioner and were required to bring all physical evidence they intended to introduce at trial, such as receipts, invoices and a list of witnesses. During the trial, Rustam submitted an invoice dated "10-25-01." In response to an inquiry from the circuit court, Lindemann declared that she had never seen a copy of the invoice. Consequently, the circuit court ordered a ten-minute recess to give Lindemann time to review the invoice. When the court reconvened, it accepted the invoice into evidence.

¶3 At the conclusion of testimony, the circuit court held that the parties had never reached an agreement concerning what work Lindemann wanted Rustam to perform and what price Rustam would charge for the work. The court commented that without such an agreement, it could not find that there was a contract between the parties and, as such, the court was left to determine a dollar amount representative of the benefit Lindemann gained from the cleaning, repairing and recoloring of the rugs by Rustam. The court concluded that the fair value of Rustam's labor and materials was $1750 and ordered judgment against Lindemann in that amount.

¶4 In her appeal, Lindemann argues that the "10-25-01" invoice was improperly and inappropriately admitted. She contends that the invoice had been

altered by Rustam and that she did not have the opportunity to "refute or to question the validity of this evidence or what it claimed to represent." She states that she never saw the invoice prior to the trial and asserts that she was prejudiced by not being given the chance to challenge the invoice.

¶5 The court of appeals does not retry the entire case. Rather, we examine the record from the circuit court to determine if the court made any error in the admission of evidence and if the error was prejudicial to the complaining party. We conduct this examination under a set of principles called the standard of review. When there is a challenge to the admission of evidence, our standard of review provides that the admissibility of evidence is directed to the sound discretion of the circuit court. We will not reverse the circuit court's decision to allow the admission of evidence if there is a reasonable basis for the decision and it was made in accordance with accepted legal standards and in accordance with the facts of record.[2]

¶6 As we understand Lindemann's argument, she claims to have been surprised by Rustam's submission of the "10-25-01" invoice because it had not been provided to her earlier as required by the pretrial order. "Surprise" is not a specific ground for excluding evidence.[3] Testimony or exhibits, which result in surprise, may be excluded if the surprise would require a continuance causing undue delay or if surprise is coupled with the danger of prejudice and confusion of issues.[4] It is a general principle that dealing with "surprise" evidence is within the

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[2] ***State v. Olson***, 217 Wis. 2d 730, 737, 579 N.W.2d 802 (Ct. App. 1998).

[3] ***Gieseke v. DOT***, 145 Wis. 2d 206, 213, 426 N.W.2d 79 (Ct. App. 1988).

[4] ***Gieseke***, 145 Wis. 2d at 213.

discretion of the circuit court. The court has two options when confronted with "surprise" evidence: it can either exclude the evidence or it can grant the surprised party a continuance to review the evidence. A continuance is preferred to the exclusion of evidence.[5]

¶7 When deciding which option to select, the court should consider whether the "surprise" is unduly prejudicial to the "surprised" party, whether it would confuse the issues, and whether a lengthy delay is necessary to permit the "surprised" party to deal with the evidence. In this case, there is nothing in the record to support a conclusion that the "10-25-01" invoice was unduly prejudicial to Lindemann. Unduly prejudicial evidence is that which threatens the fundamental goals of accuracy and fairness by misleading or inflaming the judge or influencing the judge to decide the case on an unfair basis.[6] The "10-25-01" invoice did not confuse the issue because the sole issue was the value of Rustam's labor and materials expended in cleaning, repairing and recoloring Lindemann's oriental rugs and the invoice was related to that issue. Finally, we are satisfied that a short adjournment—here, the circuit court granted a ten-minute adjournment—was all that was necessary; also, Lindemann does not tell us how she would have specifically benefited from a longer adjournment. Accordingly, we conclude that the circuit court did not err in admitting the "10-25-01" invoice.

¶8 We sense that Lindemann is complaining that the "10-25-01" invoice should not have been admitted into evidence because Rustam did not

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[5] *See* ***Fredrickson v. Louisville Ladder Co.***, 52 Wis. 2d 776, 784, 191 N.W.2d 193 (1971).

[6] ***State v. DeSantis***, 155 Wis. 2d 774, 791-92, 456 N.W.2d 600 (1990).

submit a copy of the invoice at the pretrial conference as required in the pretrial order. Under similar circumstances, courts consider whether the party denied discovery was surprised by the undisclosed matter and would be prejudiced by admission of the evidence.[7] Courts typically attempt to ameliorate any hardship caused by nondisclosure by granting an opportunity to prepare a response to the evidence.[8] In the absence of egregious or bad faith failure to comply with a pretrial order, circuit courts try to deal with noncompliance in a practical fashion intended to eliminate or minimize surprise or hardship caused by the noncompliance. As we have previously explained, the "10-25-01" invoice was not unduly prejudicial to Lindemann. We conclude that the circuit court's efforts to minimize any hardship to Lindemann were a practical attempt to eliminate what, if any, hardship the invoice presented.

¶9 We also infer that Lindemann is challenging the circuit court's conclusion that the evidence presented by Rustam was not sufficient to support its judgment that the labor and materials expended on cleaning, restoring and recoloring the oriental rugs totaled $1750. When there is a challenge to the sufficiency of the evidence, our standard of review is established by statute; the factual findings of the circuit court will not be upset on appeal unless those findings are clearly erroneous.[9] Before we can reverse the factual findings of the circuit court, we must search the entire record and conclude that the only relevant evidence is evidence in support of Lindemann's position.[10] In addition, when

[7] ***Jenzake v. City of Brookfield***, 108 Wis. 2d 537, 543, 322 N.W.2d 516 (Ct. App. 1982).

[8] *See* ***Jenzake***, 108 Wis. 2d at 543-44.

[9] WIS. STAT. § 805.17(2).

[10] ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983).

more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.[11]

¶10 We have read the transcript of the trial and agree with the circuit court. Although Lindemann and Rustam discussed cleaning, repairing and recoloring the rugs, they failed to reach an agreement on the most basic terms of the contract. Therefore, Rustam was not entitled to recover the cost of labor and materials he claimed on any of the exhibits submitted to the circuit court. However, the lack of an agreement between the parties does not prevent Rustam from seeking compensation for his labor and materials expended on cleaning, repairing and recoloring the rugs. The Wisconsin Supreme Court has recognized that the principle that "where one renders valuable services for another payment is expected" is "well-grounded in human experience."[12] The supreme court noted that "if one merely accepts services from another which are valuable to [him or her] … the presumption of fact arises that a compensation equivalent is to pass between the parties."[13] In other words, in Wisconsin, recovery is allowed for services performed by Rustam on the basis of a contract implied in law to have Lindemann pay what the services were reasonably worth.

¶11 The evidence is undisputed that Lindemann left four oriental rugs with Rustam. Rustam cleaned, repaired and recolored the rugs and over a period of time made several attempts to call Lindemann to pick up the rugs and pay for the labor and materials. After awhile, an individual came to Rustam's gallery and

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[11] ***Noll***, 115 Wis. 2d at 643-44.

[12] ***Brooks v. Steffes***, 95 Wis. 2d 490, 500, 290 N.W.2d 697 (1980).

[13] ***Brooks***, 95 Wis. 2d at 500.

picked up the rugs on behalf of Lindemann but told Rustam that he was not there to pay for the work done on the rugs but only to deliver them to Lindemann. Rustam made further demands upon Lindemann for payment and she refused to pay Rustam and has retained the rugs that Rustam cleaned, repaired and recolored.

¶12 As the circuit court found, these facts are the classic facts of a contract implied in law—Rustam performed a valuable service in cleaning, repairing and recoloring the rugs and Lindemann has accepted this benefit. We agree with the circuit court that Lindemann is responsible for the reasonable value of Rustam's labor and materials and affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.