

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 24, 2010

A. John Voelker
Acting 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. 2010AP1293

Cir. Ct. No. 2009SC2346

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

MARIE L. GODFREY,

PLAINTIFF-APPELLANT,

V.

STEINER HEATING & COOLING,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

¶1 BROWN, C.J.¹ Marie Godfrey appeals from an order granting Steiner Heating & Cooling² \$2300 for the purchase and installation of a heater in

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

fulfillment of a contract agreement with Godfrey. Godfrey, arguing pro se, claimed that she should be able to keep the new heater without paying for it because Steiner tricked her into purchasing an expensive heater, in violation of WIS. STAT. §100.18(1), when a less expensive alternative solution existed. Steiner denied Godfrey's accusations and argued that it should recover \$2300 for the heater and installation. The trial court ordered judgment in favor of Steiner. We affirm.

FACTS

¶2 In or around spring of 2009,³ Godfrey contacted Steiner to fix her malfunctioning air conditioner. Jeff Steiner⁴ testified that he was the technician sent over to service the air conditioner. Jeff tried several ways to fix the problem, including installing a new thermostat, but none were successful because the furnace fan—needed to run the air conditioner—would not operate. Upon further investigation, Jeff discovered that due to a problem with the circuit board, the fan worked in furnace mode but not in air conditioning mode.

¶3 Jeff further testified that Godfrey wanted the air conditioner fixed as soon as possible. She told him that she suffered from illnesses exacerbated by the

² Steiner Heating & Cooling is referred to by slightly different names (all including “Steiner” and “Heating”) throughout the record. When faced with such a discrepancy, we normally follow our docket sheet, which is what we have done here.

³ There is some confusion in the testimony as to precisely when the relevant events took place. Godfrey attached an invoice to her complaint indicating that a new furnace was sold to her on June 26, 2009. The exact date is not relevant to the issues presented by the parties or our holding.

⁴ To avoid confusion Steiner Heating & Cooling will be known throughout as “Steiner” and Defendant-Respondent witness Jeff Steiner will be known as “Jeff.”

heat and had an elderly grandmother living with her. Jeff explained to Godfrey that he was unfamiliar with the furnace, which had no name on it, and that he did not have the needed circuit board to service it. Jeff recommended calling another area contractor to help get the unit running. Jeff testified, though Godfrey disputes, that Godfrey suggested the possibility of a new furnace. Jeff agreed with her, explaining that her current furnace may be as much as twenty years old.

¶4 After reviewing several furnaces Godfrey chose the one priced at \$2300 including parts and labor, in part because it qualified for a 30% federal tax credit. Jeff installed and tested the unit and both the air conditioning and heating functioned well. After receiving the bill for the furnace, Jeff testified that Godfrey may have called Steiner a couple of times to fix minor problems related to the new furnace. Jeff did not personally attend to those calls.

¶5 Godfrey disputes several aspects of Jeff's testimony. Godfrey testified that a Steiner representative, though not Jeff, came to her house and recommended a new furnace because the wiring of the other furnace was completed incorrectly. She stated that the representative had told her that Schwibinger, the previous owner of Godfrey's house and furnace, had likely done the wiring himself to cut costs.⁵ Godfrey testified that after the representative explained to her that Freon would not fix the air conditioner, she told him, "Go ahead and order the new furnace."

⁵ Marie Godfrey purchased her house from John Schwibinger. Schwibinger had moved the house from one location to another and contracted with Steiner to reinstall the existing furnace in the new location.

¶6 Both parties agree that Steiner offered to replace the new furnace with the original furnace in an effort to satisfy Godfrey and avoid litigation. Godfrey refused Steiner’s offer because she did not believe the furnace in Steiner’s possession was her furnace. She testified, “Had I been able to trust them to begin with, I gladly would have resolved this. I had no problem with the furnace that was in my house.”

¶7 At trial, Jeff identified five photos, taken in Steiner’s office, of what he claims is the furnace he removed from Godfrey’s home. He also testified that Schwibinger identified the unit in the pictures as his former furnace which Schwibinger later confirmed in testimony. Godfrey countered that the furnace shown in pictures by Steiner was not her original furnace. “[T]he furnace that left my house was a clean, handsome, not banged up, energy efficient, amazing, smooth-running furnace. The furnace that they are showing you that was my furnace is all banged up and beaten.”

¶8 At the end of testimony the trial court awarded \$2300 to Steiner. Speaking to Godfrey the court said, “Based on the evidence I think you—they did make an offer on the new furnace. I think you did need it. I think they did install it. It works. I think they know what they are doing, and I think you should pay them for their product and their labor.” The court concluded by saying that while sincere in her beliefs, Godfrey was wrong about being tricked and wrong about her misidentification of the Steiner brothers. Godfrey appeals.

DISCUSSION

¶9 In reviewing a trial court’s order granting relief to Steiner, we uphold the court’s findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). Whether a set of facts constitutes a violation WIS. STAT. § 100.18(1)

is a question of law we review de novo. *See State v. Piddington*, 2001 WI 24, ¶13, 241 Wis. 2d 754, 623 N.W.2d 528 (the application of a set of facts to a particular statute is generally a question of law that we review de novo).

¶10 To prevail on a claim alleging a violation of WIS. STAT. § 100.18(1), the plaintiff must prove three elements: 1) that the defendant made a representation to “the public” with the intent to induce an obligation; 2) that the representation was untrue, deceptive or misleading; and 3) that the representation caused the plaintiff a pecuniary loss. *K&S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 2007 WI 70, ¶19, 301 Wis. 2d 109, 732 N.W.2d 792. The allegedly untrue, deceptive, or misleading statement need not be part of an ad directed at a large number of people; the fact that it is made to a plaintiff as part of a sales promotion is sufficient to afford protection under § 100.18(1). *See K&S Tool*, 301 Wis. 2d 109, ¶25.

¶11 The trial court’s findings of fact show that Godfrey has failed to establish a claim that Steiner acted in violation of WIS. STAT. § 100.18(1) because she was unable to show that that Steiner made a representation that was untrue, deceptive, or misleading. *See K&S Tool*, 301 Wis. 2d 109, ¶19. The trial court believed that Steiner was truthful in its interactions with Godfrey. It stated that Godfrey’s original furnace “didn’t work to operate the air conditioning unit. It needed to be replaced in the opinion of Mr. Steiner.... He gave [Godfrey] a quote, [she] accepted it, he installed it, and it works.” Those factual findings are supported by the record through Jeff’s testimony, so we will not disturb them. *See Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979) (“the trial judge is the ultimate arbiter of the credibility of the witnesses.”). Because Godfrey fails under one required element of her claim, we need not and will not address the others.

By the Court.—Judgment affirmed.

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

