

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 7, 2004**

Cornelia G. Clark  
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. 03-1441**

Cir. Ct. No. 01-CV-106

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

---

**DIANE NEWBY AND ROBERT P. BURGESS,**

**PLAINTIFFS-RESPONDENTS-CROSS-  
APPELLANTS,**

**V.**

**MANUFACTURED HOUSING ENTERPRISES, INC., A  
FOREIGN CORPORATION,**

**DEFENDANT-APPELLANT-CROSS-  
RESPONDENT.**

---

CROSS-APPEAL from a judgment of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Diane Newby cross-appeals from a judgment that denied her an award of actual attorney fees.<sup>1</sup> Newby argues that she is entitled to an award of actual attorney fees because she prevailed on her breach of warranty claim under the Magnuson-Moss Act. Because the record supports the trial court’s discretionary determination that an award of actual attorney fees would be inappropriate, we affirm the judgment.

## BACKGROUND

¶2 In 1998, Newby purchased a defective manufactured home from Manufactured Housing Enterprises, Inc. In 2001, she filed this action, alleging a variety of claims against Manufactured Housing, which were eventually voluntarily dismissed except for her breach of warranty claim. With respect to the breach of warranty claim, her complaint alleged:

### COUNT I UCC—BREACH OF WARRANTY

... The sale of manufactured homes in Wisconsin is governed by UCC § 402.101, et. seq.

Under state and federal statutes (e.g., the Magnuson-Moss Warranty Act, 15 U.S.C § 2301, et. seq.) new manufactured homes are warranted against manufacturing defects in material and workmanship for a period of 1 year after installation.

¶3 Her parenthetical note is the only reference to the Magnuson-Moss Warranty Act. She demanded judgment and asked for “replacement or repurchase of the Manufactured Home, plus an award of damages, costs, and such other relief

---

<sup>1</sup> Manufactured Housing Enterprises, Inc.’s appeal was voluntarily dismissed.

as the Court deems appropriate.” Her breach of warranty claim did not request attorney fees.<sup>2</sup>

¶4 On the second day of the jury trial, the lack of evidence concerning monetary damages was discussed outside the presence of the jury.<sup>3</sup> The court discussed remedies:

THE COURT: Well, she doesn't have a damage case. She is going to have a replacement case. She has to have some case.

....

THE COURT: We have got to have something here. What am I spending two days on if we are not going to have [a] bottom line?

....

THE COURT: ... I mean don't waste two days here. We got a jury here. I am going to let them do something. I mean, I don't know what you expect me to all of a sudden say there [are] no damages, that's the end, we go home.

¶5 After discussion, Newby's counsel replied, “Some of these issues will have to be addressed in the jury instructions. And we have not had a chance to go over those with the court. But I think that if replacement is a remedy they ought to be allowed to choose that as a remedy.” The court ruled, “If your case is resting on replacement that is how we are going to proceed.” Newby's counsel agreed. Newby's counsel stated that the whole issue was “[b]reach of warranty and whether they breached it and whether [there are] damages.” In response to a

---

<sup>2</sup> The complaint included other claims entitled Strict Liability—Defective Product, Negligence—Defective Product, UCC—Revocation of Acceptance, and Fraud. Following these separate claims, Newby requested “attorney fees” or “reasonable attorney fees.” The eleven-page complaint never requests “actual attorney fees.”

<sup>3</sup> Newby's failure to present evidence of damages was based on the court's decision to exclude an expert witness who was not identified in compliance with a scheduling order.

question from defense counsel, the court clarified: “And I will allow [Newby] to proceed under that theory and do what she needs to do to present evidence so that she can ask the jury to give her a replacement of the home. And that’s what I understand that she is doing.”

¶6 Following additional testimony, Newby stated she would rest her case. More discussion regarding her theory of the case ensued. Defense counsel pointed out that replacement of the home “is not allowed under the UCC” and “she pled a specific statute and the statute outlines the damages.” The court inquired of Newby’s counsel: “Do you want at least for our record, amend the pleading to whatever she needs to amend, cover whatever we need to get a replacement?” to which Newby’s counsel replied, “Absolutely.”

¶7 Defense counsel inquired, “But if she is amending her pleading, I want to know what theory she thinks that she can recover that on.” Newby’s counsel replied:

Breach of warranty. Now, there’s some addition—that additional remedy that may be available under the Meganson Moss Act. [sic]. UCC applies to home, which UCC applies to consumers. There’s a case Litzcans versus Steinberg Homes [sic] where the court does not—Whether Meganson and Moss [sic] applied to these kind [sic] of cases but Meganson & Moss [sic] applies to consumer goods even if they eventually attached to realty. And if we are treating it as a consumer good, as we do under the UCC, I would argue that Meganson Moss [sic] applies and that gives the plaintiff additional remedies, as well.

¶8 The trial court expressed its frustration that “[t]hese issues should have been addressed a day ago, a week ago, a month ago, or a year ago. ... And what do you want me to do because you waited until the 11<sup>th</sup> hour and you bring up this dispute.” Newby’s counsel responded, “Judge, just to clarify the record, as well under Count One UCC breach of warranty, we ask for repair or—I am

sorry—replacement or repurchase.” The court ruled that Newby had proceeded the last couple of days on that theory and that “the plaintiff has elected the remedy.”

¶9 Following trial, the jury answered the special verdict in favor of Newby. It found that the manufactured home had defects and was unfit for human habitation. It further found that Newby provided timely notice of the defects and that the manufacturer’s corrective action did not restore the home to its warranted condition. In addition, the jury found that Newby was entitled to a refund. It also found that Newby was entitled to replacement.

¶10 Postverdict motions followed. A dispute arose regarding the appropriate items to be taxed as costs. At the hearing on the dispute, Newby raised the issue of an award of actual attorney fees. Her counsel stated that “the statute that the plaintiff recovered under, the Magnuson-Moss Warranty Act, clearly contemplate[s] an award of attorney fees, actual costs. And I didn’t even go there, but it does contemplate an award of attorney fees to enforce warranties.”<sup>4</sup>

¶11 The trial court denied actual attorney fees, explaining:

The real difficulty the court has with this situation is that I don’t believe the record was ever made correctly that plaintiff was proceeding under some Magnuson-Moss Warranty Act. And we had the UCC involved in this situation. And, it was really ... a sort of after-the-fact, oh by the way, we are eligible for our actual costs here essentially at the end of the trial. Never at any point from the start, at least from this court’s recollection, did plaintiff

---

<sup>4</sup> Newby’s motion for actual attorney fees has not been made a part of the record before us on appeal. See *State v. McAttee*, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 (“It is the appellant’s responsibility to ensure completion of the appellate record and ‘when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court’s ruling.’” (citation omitted)).

indicate, judge, we are proceeding under the Magnuson-Moss Warranty Act, we're proceeding with the understanding if we are to prevail, we will obtain actual costs. ... It was kind of at the end of the case, oh, by the way, now that we've won, we get our actual fees.

¶12 The court explained that it had a hard time with the “simple fairness” of now telling defense counsel that “this is how we're going to proceed ... because perhaps that would have provided little incentive for some kind of a settlement if a party is going to know that they are going to get actual attorneys fees and actual costs.” The court stated that it “never had an opportunity to look at that act to see what elements we needed to include in our special verdict .... I didn't see this case being tried under Magnuson-Moss warrant[y] act, it was being tried under more general UCC theories.”

¶13 The court pointed out that “it was a real difficult case for the court because as I indicated, counsel really, in my opinion, didn't have it prepared to the position that it needed for trial. We had all sorts of problems with this case. ... The only time Magnuson-Moss came up was towards the end of the case, as I recall.” The court observed that while the complaint contained “all sorts of alternative causes of action,” it was unclear what Newby's theory was until midway through the trial, following problems with damage experts. The court entered judgment on the verdict and ruled that Newby was entitled, in the alternative, to a refund of the purchase price or a replacement of the unit, along with costs under WIS. STAT. § 814.04.

## DISCUSSION

¶14 Newby argues that she is entitled to recover actual attorney fees under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(2). This section provides:

If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he *may* be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court *in its discretion* shall determine that such an award of attorneys' fees would be inappropriate. (Emphasis added.)

¶15 Newby agrees that it is within a trial court's discretion to award attorney fees. She contends, however, that the trial court's rationale for denying attorney fees was unreasonable. Appellate review of an award of attorney fees is confined to whether the trial court erroneously exercised its discretion. *Carl v. Spickler Enters., Ltd.*, 165 Wis. 2d 611, 627, 478 N.W.2d 48 (Ct. App. 1991). "Because the Act calls for application of state law except where it prescribes a regulating rule, we apply Wisconsin law to determine whether the trial court abused its discretion." *Id.* (citation omitted).

¶16 A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). "Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." *Id.* It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning. *Id.*

¶17 Newby complains that the court imposed a “false notice requirement” as a “condition precedent to the recovery of actual attorney fees.” Newby argues that the trial court relied upon an incorrect fact, which was that Newby did not indicate she was proceeding under the Magnuson-Moss Warranty Act. Newby further claims that her parenthetical reference in her complaint was ample notice that she was proceeding under the Act. She contends that she is not required to give “special notice” concerning the possibility of actual attorney fees. She points out that at the postverdict motion hearing, the trial court stated that it was clear that Newby was seeking a replacement home.

¶18 We are unpersuaded. Here, the trial court was entitled to conclude that an award of attorney fees would be inappropriate. The court correctly observed that Newby did not assert any right to actual attorney fees until after the trial. Her breach of warranty claim in her complaint did not seek attorney fees. Also, it parenthetically alluded to the Magnuson-Moss Warranty Act; it did not assert a claim for actual attorney fees under the Act.

¶19 The record abounds with the confusion surrounding Newby’s selection of a remedy. Midway through trial, Newby sought to amend her pleadings, but never mentioned a claim for actual attorney fees under the Act. A party cannot rely on the liberal construction of pleadings rule to supply a missing or forgotten claim. *See Wilson v. Continental Ins. Cos.*, 87 Wis. 2d 310, 319, 274 N.W.2d 679 (1979). The court was entitled to conclude that the single parenthetical allusion to the law contained in the eleven-page complaint and an isolated reference midway through trial was insufficient to alert the court and opposing counsel of her actual attorney fee claim.



¶20 Newby provides no legal authority for her proposition that it was error for the trial court to consider “simple fairness” as a factor in reaching its discretionary decision. We conclude the trial court was entitled to consider that Newby did not identify her theory of recovery until midway through trial, and that lack of notice to defense counsel that actual attorney fees were sought under the Act prevented a fair evaluation of the case. Because the record shows that the court reached a decision that a reasonable judge or court could arrive at through the consideration of the relevant law, the facts and a process of logical reasoning, it is not overturned on appeal.

¶21 Newby argues that the trial court approved jury instructions based on the Magnuson-Moss Warranty Act, making it the law of the case. Newby, however, fails to identify anything in the record that would have alerted the court that the jury instructions were derived from the Act and she was entitled therefore to actual attorney fees. Newby’s record reference supporting this argument is devoid of any mention of the Act.

¶22 Newby’s arguments fail to address the basis of the trial court’s decision, which was the unfairness of the lack of any notice that Newby would seek actual attorney fees under the Act until after the trial. The record supports the trial court’s determination that Newby did not state that she sought actual attorney fees under the Act until after trial. As her counsel stated at the postverdict motion hearing, “I didn’t even go there.” Newby’s arguments fail to reveal an erroneous exercise of discretion.

*By the Court.*—Judgment affirmed.

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

