

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 21, 2012

Diane M. Fremgen
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. 2011AP397

Cir. Ct. No. 2009CV1745

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

JAMES R. PAULSEN,

PLAINTIFF-APPELLANT,

V.

SPELLMAN'S MARINA, LLC,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County:
SCOTT C. WOLDT, Judge. *Affirmed.*

Before Brown, C.J., Reilly, J., and Neal Nettesheim, Reserve Judge.

¶1 PER CURIAM. James Paulsen appeals from a circuit court order dismissing on summary judgment his claims against Spellman's Marina, LLC arising from his purchase of an allegedly defective Alumacraft power boat. We agree with the circuit court that the summary judgment record does not establish

Paulsen's claims that the boat was defective or that Spellman's breached the purchase contract or warranties or made misrepresentations. Therefore, we affirm the order dismissing Paulsen's claims.

¶2 Paulsen purchased an Alumacraft power boat, canvas canopy and aft and side curtains from Spellman's. The canopy and curtains were manufactured by DuFort Industries and were an add-on to the boat. Paulsen sued Spellman's because passengers became wet when Paulsen operated the boat with the canopy and curtains deployed.¹ Both parties sought summary judgment. The circuit court granted summary judgment to Spellman's and dismissed Paulsen's claims. Paulsen appeals.

¶3 We review decisions on summary judgment by applying the same methodology as the circuit court. *M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 496-97.

¶4 We are not required to address an appellate argument in the manner in which a party has framed the issues. *See State v. Waste Mgmt. of Wis., Inc.*, 81

¹ Paulsen asserted various claims against Spellman's: misrepresentation under WIS. STAT. § 100.18 (2009-10), breach of contract, breach of express warranty under WIS. STAT. § 402.313, breach of implied warranties of merchantability and fitness for a particular purpose under WIS. STAT. §§ 402.314 and 402.315, and revocation of acceptance. Paulsen alleged other claims, but he does not raise those on appeal.

Alumacraft became a third-party defendant as a result of Spellman's third-party complaint. However, Paulsen never asserted any claims against Alumacraft after Alumacraft joined the litigation.

Wis. 2d 555, 564, 261 N.W.2d 147 (1978). We conduct our review as follows. We first review the summary judgment record to determine whether there were factual issues regarding the cause of the water spray into the boat. We conclude that the facts were undisputed that the water spray occurred because Paulsen used the canvas canopy and side curtains in a manner that interfered with air flow through the boat. Because these add-ons caused the water spray, the boat was not defective, and the circuit court properly dismissed Paulsen's breach of contract claim.

¶5 To avoid summary judgment, Paulsen had to show an issue of material fact relating to misrepresentations and warranties about the canopy and side curtains. The record does not show that Spellman's made any misrepresentations or warranties about these add-ons. Therefore, the circuit court properly dismissed Paulsen's claims on summary judgment.

¶6 The summary judgment record reveals the following about Paulsen's complaint about the boat. It is undisputed that Paulsen experienced heavy water spray into the boat from the stern when he operated the boat with the canvas canopy and side curtains deployed. In his deposition, Paulsen testified that he did not use the canopy the first time he operated the boat, and no spray occurred. The second time he operated the boat, Paulsen used the canopy, and the spray problem

occurred.² Spellman's proposed a stern curtain and various retrofits to address the spray problem, all of which Paulsen rejected.

¶7 Spellman's submitted multiple affidavits to explain the physics behind the water spray problem. The affidavit of Claude DuFort, a designer of the canvas add-ons used by Alumacraft, described Paulsen's water spray problem as the well-known "station wagon effect." DuFort stated that a warning regarding the station wagon effect accompanies DuFort's tops and covers. DuFort averred that the purpose of the cover and side curtains is to shield passengers from sun and rain. DuFort stated:

While the top set and side curtains can be fully deployed and used under full power, it is known throughout the boating industry, as noted in my attached report, that a low pressure zone or back draft will occur a/k/a the station wagon effect, which will draw water back into the boat. It is recommended to avoid operation of a boat in this manner or to open the zippers on the top cover and/or open the windshield and/or take other steps to reduce the low pressure zone not only to reduce any back spray and any

² In his reply brief, Paulsen cites deposition testimony that he claims establishes that spray occurs even if the boat is properly vented. The deposition excerpt upon which Paulsen relies does not support Paulsen's claim because the testimony was unclear:

Q: There was no issue of a spray when the boat was operated with the boat covers down, correct, or not deployed, is that accurate:

A: There was a mist in the back, coming off the back.

Q: So even when the canopy was fully closed, there was a mist in the back?

A: Yeah. You could have got wet by sitting in the back two seats. There was a mist coming back around, correct.

Paulsen's testimony that passengers got wet was in response to a question about what happened when the canopy was fully closed. As the summary judgment record demonstrates, running the boat with the canopy fully deployed caused spray.

back draft of carbon monoxide. If boaters wish to avoid the spray, it is recommended to purchase and install a stem curtain.

DuFort opined that Paulsen's Alumacraft boat was not defective.

¶8 The affidavit of physicist Dennis Henry explained that the Bernoulli Principle caused water spray at the back of Paulsen's boat when the canopy and side curtains were deployed. In addition to causing spray to enter the back of the boat, running the boat with the canopy and side curtains deployed would allow carbon monoxide (CO) exhaust to enter the boat. Henry opined that "the primary variable controlling the degree of [water spray at the rear of the boat] for a given configuration of the boat and top set is the speed of operation of the boat. The secondary variable is the maintenance of recommended openings of front window and zippered cover for safe operation with respect to CO hazards." Henry opined that the boat and the DuFort top set were not defective.

¶9 In his affidavit, James Irwin, an Alumacraft Executive Vice President, stated that the Alumacraft Owner's Manual notifies owners that "the sources of carbon monoxide includes the operating of the boat with the canvas tops and side curtains in place without ventilation and further informs them to reduce the accumulation of carbon monoxide to properly ventilate the boat's interior by operating the deck hatches, windows and/or canvas to allow for air flow through the boat [sic]." Attached to Irwin's affidavit was the relevant page from the Owner's Manual setting out these warnings and operation parameters.

¶10 The affidavits of Alumacraft's Jerry Byron and Brad Voit also addressed the purpose of the canopy and curtains, the station wagon effect, and the importance of maintaining air flow through the boat to avoid spray and carbon monoxide build up. Voit, an Alumacraft employee who investigated Paulsen's

spray complaint, rode in the boat during his investigation and confirmed Paulsen's experience with the boat. Voit stated that for his first ride in the boat, the top set and side curtains were not deployed, and no water or spray entered the boat. However, running the boat with the top and curtains deployed caused water to enter from the stern due to the station wagon effect. Voit opined that the boat operator must configure the boat to avoid the station wagon effect; the boat is not defective in design or manufacture. Voit opined that when operating at high speed with the canvas top and curtains fully deployed, the zippers should be open and the bow cover and side curtains should be removed to minimize the station wagon effect.

¶11 In opposition to Spellman's summary judgment showing about the cause of the spray problem, Paulsen argued that DuFort could not be correct because Paulsen got wet and reasonable inferences could be drawn from Spellman's affidavits that the boat was defective. Paulsen cited his long history of boat ownership and his experience with this boat. We do not agree that Spellman's affidavits allow reasonable inferences in favor of Paulsen's claims. The affidavits all identify the use of the add-on canopy and curtains as the source of the water spray. In addition, Paulsen testified at his deposition that water spray did not occur when he operated the boat without the canopy. We conclude that Paulsen did not counter Spellman's summary judgment showing that the water spray arose from the add-ons to the boat.

¶12 Paulsen argues that the carbon monoxide warnings were not relevant to the station wagon effect he experienced. Spellman's affidavits explained that the same principle of physics that can cause an accumulation of carbon monoxide can also cause water spray.

¶13 Having concluded that the summary judgment record explains why water spray entered the boat, we turn to Paulsen's claims about misrepresentations and warranties. The flaw in Paulsen's misrepresentation and warranty claims against Spellman's is that the relevant warranties must relate to the DuFort canvas top and side curtains, not to the boat itself, because the add-ons were the undisputed source of the water spray. The record does not establish that any warranties were made by any entity about the canvas canopy and curtains. In addition, the record establishes that Spellman's did not make any misrepresentation or warranties about whether passengers would remain dry while riding in the boat. Paulsen conceded as much in his deposition.

¶14 In his affidavit in support of his summary judgment motion, Paulsen averred that in selecting the Alumacraft boat, he relied heavily on information in the Alumacraft brochure Spellman's provided because Spellman's did not have a boat in stock that Paulsen could inspect before making his purchase decision. Paulsen alleged that the Alumacraft brochures stated that the hull "keep[s] you dry, comfortable and happy," "larger spray rails ... keep water spray out of the boat,"³ and "the Alumacraft Ride is drier, quieter, smoother and more responsive." Spellman's owner, Tim Doberstein, told Paulsen that Alumacraft boats were among the finest on the market, and based on all these representations, Paulsen assumed that the passengers would stay dry during normal boating operations. However, in his deposition, Paulsen admitted that Doberstein never told him anything about how wet or dry the passengers would be.

³ We recall the statements of Paulsen and Brad Voit that water spray did not enter the boat when the canopy and curtains were not deployed.

¶15 In his affidavit in support of Spellman’s summary judgment motion, Doberstein denied that he made any warranties, representations or guarantees in connection with Paulsen’s purchase other than stating that Alumacraft was a fine boat. Doberstein denied making any statements or representations to Paulsen regarding water entering the boat if he operated the boat with the canvas top deployed, and Paulsen never raised any issue about the canvas top before he completed his purchase. In a second affidavit, Doberstein denied that Spellman’s made any promises or warranties regarding the boat and motor combination. Doberstein had no knowledge that Paulsen intended to operate the boat in a manner contrary to the Owner’s Manual instructions for avoiding carbon monoxide build up.

¶16 We have already held that the summary judgment record establishes that the manner in which Paulsen used the canopy and curtains caused the water spray problem. The record does not contain any evidence regarding warranties about the canopy and the curtains or that Spellman’s made any representations about these add-ons.⁴ Paulsen’s misrepresentation and warranty claims were properly dismissed on summary judgment.

¶17 Paulsen next claims that Spellman’s breached the purchase contract because it sold him a boat and motor that could not be operated under reasonable conditions without generating a soaking water spray. Paulsen claims that Spellman’s breached the implied warranty of merchantability by selling a defective boat and motor combination that was not fit for the purposes to which Paulsen intended to put the boat (recreational boating, fishing and client entertainment). The summary

⁴ Alumacraft’s “dry, comfortable and happy” statement does not relate to a boat with a canopy, as the canopy is an add-on to the boat.

judgment record establishes that the problem arose from the manner in which Paulsen operated the boat with the canopy and curtains deployed. The boat and motor were not the problem.

¶18 Finally, Paulsen argues that summary judgment should have been denied on his claim that he was entitled to revoke his acceptance of the boat because the goods were nonconforming and Spellman's could not cure the nonconformity. The summary judgment record does not support Paulsen's claim of a nonconformity. In the absence of a nonconformity, Paulsen could not revoke his acceptance. WIS. STAT. § 402.608.⁵

¶19 We affirm the dismissal of Paulsen's claims on summary judgment.

By the Court.—Order affirmed.

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

⁵ To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).

