

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 8, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2657

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

TERMINAL-ANDRAE, INC.,

Plaintiff-Respondent,

v.

**MILWAUKEE BOILER
MANUFACTURING COMPANY, INC.,**

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: ARLENE D. CONNORS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Milwaukee Boiler Manufacturing Company, Inc., appeals from a judgment awarding Terminal-Andrae, Inc., \$189,019.41 as damages arising out of a contract dispute. We affirm.

Milwaukee Boiler builds large tunnel digging machines and was hired by the Peter Kiewit-Shea Company to build tunnel diggers for a subway tunnel project in Baltimore, Maryland. Milwaukee Boiler contracted Terminal-Andrae to build electrical systems for the tunneling machines. The machines were built and tested in Milwaukee and then were dismantled for shipping purposes. Apparently there were problems with reassembly at the work site and problems with the part of the electrical system, the power saving equipment (also referred to as "soft start" or "flowstar"), not fitting in the tunnels the machines were digging. According to the testimony from trial, Kiewit/Shea decided to remove the "flowstars" and then continued using the machines.

Milwaukee Boiler made \$392,690 in partial payments to Terminal-Andrae under a contract price for the two electrical systems of \$646,344. Terminal-Andrae sued Milwaukee Boiler for the remaining balance due under the contract. Milwaukee Boiler counterclaimed, alleging, *inter alia*, breach of the implied warranty of fitness for a particular purpose. See § 402.315, STATS.

The dispute went to a jury trial. The jury found that Terminal-Andrae had substantially performed its contract and awarded Terminal-Andrae \$253,653.89 as damages for the unpaid balance Milwaukee Boiler owed under the contract. The jury also found, however, that the systems were "unfit for the purpose required" and determined that "the diminished value of the electrical system by reason of such defect" was \$64,634.48. The trial court reduced Terminal-Andrae's award by this amount. The trial court denied Milwaukee Boiler's motions after verdict and Milwaukee Boiler appeals.

Milwaukee Boiler's brief raises numerous unfocused and undeveloped claims. The first argument is that the trial court "made an error of law in granting judgment to [Terminal-Andrae] because the jury's verdict was that the seller's product was unfit for its particular purpose." Although it appears that Milwaukee Boiler might be attempting to argue insufficiency of the evidence or inconsistent/perverse verdicts, none of its arguments is clearly or adequately briefed. See *State v. Pettit*, 171 Wis.2d 627, 646-647, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court not to serve as advocate in developing appellant's arguments and judge in deciding them). However, Milwaukee Boiler seems to be arguing that once the jury determined that the systems were unfit for a particular purpose, its remedy was return of the full purchase price

minus the unpaid balance, and that no jury determination on the diminished value was necessary. We conclude that the jury's determinations were supported by sufficient credible evidence.

Whether Terminal-Andrae substantially performed its contract and the "diminished value" determination are factual issues to be determined by the jury, subject to the following legal standards on appeal:

The standard of review of a jury verdict is that it will not be upset if there is any credible evidence to support it. The evidence will be viewed in the light most favorable to the verdict. This is especially true where ... the verdict has the approval of the trial court. The credibility of the witnesses and the weight given to their testimony are left to the judgment of the jury, and where more than one reasonable inference can be drawn from the evidence, this court must accept the inference drawn by the jury. On appeal the obligation of this court is to search for credible evidence that will sustain the verdict, not for evidence to sustain a verdict the jury could have but did not reach.

Meurer v. ITT Gen. Controls, 90 Wis.2d 438, 450-451, 280 N.W.2d 156, 162 (1979) (citations omitted).

Here, the jury heard testimony relative to problems with the flowstars part of the electrical systems, but that Kiewit-Shea continued to use the tunnel digging equipment after removing the flowstars. Sufficient credible evidence existed upon which the jury could find that Terminal-Andrae had substantially performed under the contract despite the problems with the flowstars failing to completely conform to the requirements for the particular purpose.

Milwaukee Boiler also argues that the trial court "misinterpreted" the jury's answer to the special verdict question on diminished value. The

special verdict question read: “What was the diminished value of the electrical system by reason of such defect?” As noted, the jury answered \$64,634.89. The trial court interpreted the jury's determination to mean that the electrical systems had decreased in value by \$64,634.89, *i.e.*, by 10%. Milwaukee Boiler, however, contends that the jury's answer literally means that \$64,634.89 is the full remaining value of the equipment after subtracting the value by which it was diminished.¹ Milwaukee Boiler's argument is specious.

The “diminished value” rule for substantial but incomplete performance is the *difference* between the value of the goods as warranted and the actual value of the goods. *Plante v. Jacobs*, 10 Wis.2d 567, 572, 103 N.W.2d 296, 298-299 (1960). The jury determined that the diminished value was \$64,634.89. That this amount is the *difference* between the contract value and the actual value of the equipment is logically consistent with the other jury findings. The evidence at trial regarding the electrical systems focused on the part of the electrical system referred to as “flowstars,” which were removed so that the tunneling machines could continue working. The jury found that Terminal-Andrae substantially performed under the contract. A jury finding that substantial performance occurred but that the goods were only worth one-tenth of their contract price would have been incongruous. Milwaukee Boiler provides no support for its argument that \$64,634.89 represents the entire net value of the contract, or that the trial court's interpretation of the jury's answer was inconsistent with the evidence.

Additionally, counsel is required to state with particularity any objection to a jury instruction or a special verdict and to make a record of that objection. Section 805.13(3), STATS. (failure to object at instruction conference waives any alleged error in proposed instructions or verdict); *Air Wisconsin, Inc. v. North Cent. Airlines, Inc.*, 98 Wis.2d 301, 311-314, 296 N.W.2d 749, 753-755 (1980) (objections to alleged errors in jury instructions or verdict not

¹ In its response brief Terminal-Andrae states that it “does not agree with any finding that there was any defect in its performance on the contract. However, it has not appealed and has accepted the jury's verdict that there may have been some theoretical diminished-value arising out of the end user's decision to remove the energy saving devices.”

preserved for appeal if not made on the record). Here, counsel for Milwaukee Boiler did neither.²

In conclusion, we reject Milwaukee Boiler's arguments and affirm the judgment in favor of Terminal-Andrae.

By the Court. – Judgment affirmed.

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

² Further, at the hearing on Milwaukee Boiler's motions after verdict, counsel for Milwaukee Boiler claimed that he had not known that the standard instruction on diminished value had not been given. His ignorance, however, is not sufficient to have preserved the issue. Additionally, at the same motion hearing, after the trial court read both the standard and given instructions on diminished value, counsel for Milwaukee Boiler stated: “I am hearing two different instructions, both of which could have been given in this case.... My disagreement is not with either instruction.” His statement could also be read to amount to an express waiver of any objection to either the jury instruction or the special verdict question on diminished value.