

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 3, 2013**

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. 2012AP65  
STATE OF WISCONSIN**

Cir. Ct. No. 2009CV812

**IN COURT OF APPEALS  
DISTRICT II**

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**KENNETH HOLZ,**

**PLAINTIFF-APPELLANT,**

**v.**

**SEAN C. LENTZ,**

**DEFENDANT,**

**FIRST WEBER REALTY,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Fond du Lac County: GARY R. SHARPE, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Kenneth Holz appeals from a circuit court judgment, following a jury trial, dismissing his complaint against First Weber

Realty. Holz contends that the circuit court erred in granting First Weber's motions for dismissal and judgment notwithstanding the verdict. We reject Holz's argument and affirm the judgment.

¶2 In 2008, Kenneth Holz purchased a residence from Sean Lentz. During that transaction, Lentz was licensed by First Weber as a salesperson. Lentz had utilized First Weber's services to list his residence for sale.

¶3 After purchasing the residence from Lentz, Holz discovered defects in the basement, which were not disclosed in the property's real estate condition report signed by Lentz. Holz subsequently sued Lentz, asserting breach of contract and various claims of misrepresentation. Lentz defaulted on the complaint, and Holz took judgment against him.

¶4 After Lentz's default judgment, Holz filed an amended complaint, adding First Weber as a defendant. The amended complaint explained that First Weber was added because Lentz was an employee/agent and, consequently, all of his actions were attributable to First Weber.

¶5 First Weber responded with a motion for summary judgment, arguing that, even if the allegations of the amended complaint were true, First Weber could not be held vicariously liable for the misconduct of Lentz. The circuit court denied the motion, and the matter proceeded to trial.

¶6 At trial, the jury returned a verdict against First Weber for each of Holz's misrepresentation claims. First Weber then moved to dismiss Holz's claims and for judgment notwithstanding the verdict, renewing its argument that there was no legal basis to hold it vicariously liable for the misconduct of Lentz. This time the circuit court granted First Weber's motion.

¶7 In its written decision, the circuit court determined that WIS. STAT. § 452.12(3) (2009-10),<sup>1</sup> not the common law of respondent superior, applies in assessing Holz’s claims. In support of this determination, the court cited § 452.139(1), which provides:

The duties of a broker specified in this chapter or in rules promulgated under this chapter shall supersede duties or obligations under common law to the extent that those common law duties or obligations are inconsistent with the duties specified in this chapter or in rules promulgated under this chapter.

¶8 After concluding that WIS. STAT. § 452.12(3) applies, the circuit court held that for First Weber to be liable, Lentz’s misrepresentations had to be part of a “brokerage service” provided for another person on behalf of First Weber. The court determined that no brokerage services had been provided to another person, as Lentz had acted on his own behalf. The court further determined that the misrepresentations in the property’s real estate condition report were made by Lentz in his capacity as the seller and not as a salesperson for First Weber. Accordingly, the court agreed with First Weber that it could not be liable for Lentz’s misconduct and granted its motions for dismissal and judgment notwithstanding the verdict. This appeal follows.

¶9 To resolve the primary issue presented in this case, we must interpret and apply WIS. STAT. § 452.12(3). The interpretation and application of a statute are questions of law subject to de novo review. *See State v. Jensen*, 2010 WI 38, ¶8, 324 Wis. 2d 586, 782 N.W.2d 415. The circuit court’s decision to grant

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version.

judgment notwithstanding the verdict is also subject to de novo review. *See Logterman v. Dawson*, 190 Wis. 2d 90, 101, 526 N.W.2d 768 (Ct. App. 1994).

¶10 On appeal, Holz contends that the circuit court erred in granting First Weber’s motions for dismissal and judgment notwithstanding the verdict. He maintains that First Weber was liable for the misconduct of Lentz. He also submits that the circuit court erred in considering First Weber’s motions because it held a hearing on them more than sixty days after the verdict, contrary to WIS. STAT. § 805.16(2).

¶11 As noted above, Holz’s amended complaint added First Weber as a defendant on the theory that Lentz was an employee/agent and, consequently, all of his actions were attributable to it.<sup>2</sup> Of course, vicarious liability does not arise automatically from agency. There must be some affirmative expression in the law for it to arise.

¶12 With respect to the real estate industry, such expression appears in WIS. STAT. § 452.12(3), which states:

BROKER’S LIABILITY FOR ACTS OF EMPLOYEES.  
Each broker shall supervise, and is responsible for, the brokerage services provided on behalf of the broker by any broker, salesperson, or time-share salesperson who is an employee of the broker.

This statute supersedes any inconsistent common law duties or obligations. *See* § 452.139(1). The definition of “brokerage service” indicates that such a service must be made for “another person.” *See* § 452.01(2) and (3e).

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<sup>2</sup> Holz appears to change this theory on appeal, arguing that First Weber was directly liable for breaching a duty to disclose material adverse facts to him. Because this claim was not pled or pursued in the circuit court, we do not address it further.

¶13 Reviewing the above statute, we agree with the circuit court that First Weber cannot be found vicariously liable for the misconduct of Lentz. That is because Lentz's misrepresentations in the real estate condition report<sup>3</sup> were not made in the course of a brokerage service provided for another person on behalf of First Weber; rather, they were made by Lentz, individually, on behalf of himself. Consequently, the requirements for establishing liability under WIS. STAT. § 452.12(3) are not satisfied.

¶14 Finally, we decline to grant Holz relief on the ground that the circuit court erred in considering First Weber's motions after verdict. Although it is true that the court did not conduct a hearing on First Weber's motions until more than sixty days after verdict was rendered, contrary to WIS. STAT. § 805.16(2), Holz did not object or otherwise raise this issue in the circuit court. *See State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (issues not preserved generally will not be considered on appeal). Moreover, Holz does not offer or develop any argument as to what the consequence should be in light of the fact that the circuit court decided the motions within the time specified by § 805.16(3). *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (an appellate court may decline to address issues that are inadequately briefed). As a result, we will not discuss this issue further.

¶15 For the reasons stated, we affirm the judgment of the circuit court.

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<sup>3</sup> We also agree with the circuit court that the misrepresentations in the property's real estate condition report were made by Lentz in his capacity as the seller and not as a salesperson for First Weber. This conclusion is consistent with Holz's pleadings, his testimony at trial, and the law governing such reports. *See* WIS. STAT. Ch. 709 (governing disclosures by owners of real estate).

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE  
809.23(1)(b)5 (2011-12).

