COURT OF APPEALS
DECISION
DATED AND FILED

September 4, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP435 **Cir. Ct. No. 2011CV1008**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

BANK OF KAUKAUNA,

PLAINTIFF-RESPONDENT,

V.

JAMES M. ROBERTS AND DALE A. ROBERTS,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. James and Dale Roberts appeal a summary judgment dismissing their defenses and counterclaims to Bank of Kaukauna's action to enforce personal guaranties. The Robertses argue the circuit court erroneously determined the parol evidence rule defeated their arguments. We

agree with the circuit court's alternative rationale—which the Robertses fail to refute—that any reliance on the Bank's representations was unreasonable as a matter of law. Accordingly, we affirm.

BACKGROUND

¶2 The Robertses, who were minority shareholders of a business, executed a loan guaranty with the Bank in May 2009. James and Dale each signed the document, which made them jointly and severally liable in the amount of $300,000, plus collection costs. When the business faltered in March 2011, a forbearance agreement was reached that deferred for six months payments owed to the Bank.

¶3 As part of the forbearance agreement, the Robertses were required to execute new guaranties. This time, however, they signed separate documents. Each document stated: "This guaranty replaces the guaranty agreement between Lender and Guarantor dated May 8, 2009. The amount of liability under this guaranty is limited to $300,000.00, plus costs of collection." The business subsequently defaulted, and the Bank sought to enforce each of the 2011 guaranties.

¶4 After the Robertses failed to pay, the Bank commenced this action to enforce the guaranties. The Robertses defended and counterclaimed, asserting there was either fraudulent misrepresentation or a mistake of fact. They each submitted affidavits, averring:

> It was my understanding and I was specifically told by representatives of the [Bank] that the grand total of the May 8, 2009 guaranty was $300,000. In other words, the most that could be paid under that guaranty, by both myself and … the co-guarantor, was a cumulative total of $300,000. …

> At the time I discussed the [new] guaranty and other elements of the forbearance agreement with representatives of the [Bank], it was represented to me by bank officials that the guaranty they were asking me to sign was only an update of the May 8, 2009 guaranty and did not increase the overall amount of the guaranty.
>
> I signed the March 31, 2011 guaranty based upon the express representations of the [Bank] that the maximum combined exposure under the new guaranty was no more than what existed under the May 8, 2009 guaranty.
>
> I would not have signed the March 31, 2011 guaranty … (thereby increasing my financial exposure from $300,000 to [$600,000]) but for the bank's representation that the exposure I, along with my co-guarantor … already had, was in the amount of $600,000.

¶5 The circuit court rejected the Robertses' defenses and counterclaims, and granted the Bank summary judgment. The court reasoned the Robertses' arguments were defeated by the parol evidence rule and integration clauses. However, the court also observed that the Robertses had ample time to review the guaranties and confer with their attorney before executing them.

¶6 The Robertses moved for reconsideration, which was denied. In its decision denying that motion, the court elaborated on its reasoning, explaining:

> This Court does affirm its finding … that this indeed is a parol evidence and integration clause case and that those issues are clear …. I will reiterate at this time that with respect to a misrepresentation case, even if this were a misrepresentation case, the elements of a fraud claim [include] that the injured party relied on the misrepresentation. The reliance must be justifiable. Negligent reliance is not justifiable, and that's a long-held Wisconsin law under ***Ritchie v. Clappier***, 109 Wis. 2d 399, [326 N.W.2d 131 (Ct. App. 1982)].
>
> … So we have a question of law here today about justifiable reliance regardless of whether it's taken for the purposes of argument today that there was a falsity ….
>
> So in the instant case here, even though the defendants may present evidence regarding the alleged misrepresentation by

> the bank's representative, they have not shown justifiable reliance on such statement. On this record there is no dispute that prior to signing the guaranties Dale Roberts asked Mr. Esterling if the new guaranties were in the same amount as the original and he responded in the affirmative.
>
> However, for the same reasons as those relied on by this Court in granting the summary judgment, that is, the defendants are experienced businessmen who received the guaranties more than a week before they were executed and reviewed them with their attorney; their attorney advised them verbally and in writing that they were each signing a separate $3,000 [sic] guaranty and that their attorney advised the Bank that the defendants had no problem with each signing the [$]3,000 [sic] guaranty—there is no justifiable reliance on Mr. Esterling's representation.

The Robertses now appeal.

DISCUSSION

¶7 Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[1] Whether the circuit court properly granted summary judgment is a question of law subject to de novo review. ***Hocking v. City of Dodgeville***, 2009 WI 70, ¶7, 318 Wis. 2d 681, 768 N.W.2d 552.

¶8 The Robertses' joint appellate brief challenges only the circuit court's holding that the parol evidence rule foreclosed their arguments. They fail to mention, much less refute, the court's alternative rationale that, as a matter of law, there was no reasonable reliance on the Bank's representations concerning the amount of the guaranties. We could affirm on that basis alone. *See* ***Schlieper v.***

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

DNR, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (ignoring ground upon which circuit court ruled constitutes concession of the holding's validity).

¶9 In any event, we agree with the Bank that any reliance by the Robertses was unreasonable as a matter of law. Where, as here, the relevant facts are undisputed, whether the party claiming fraud was justified in relying on a misrepresentation is a question of law. *See* ***Ritchie***, 109 Wis. 2d at 406 (citing ***Williams v. Rank & Son Buick, Inc.***, 44 Wis. 2d 239, 246-47, 170 N.W.2d 807 (1969)). The general rule in Wisconsin is that the recipient of a fraudulent misrepresentation is justified in relying on it, unless the falsity is actually known or is obvious to ordinary observation. ***Hennig v. Ahearn***, 230 Wis. 2d 149, 170, 601 N.W.2d 14 (Ct. App. 1999) (citing ***Williams***, 44 Wis. 2d at 245-47). "'Whether the falsity of a statement could have been discovered through ordinary care is to be determined in light of the intelligence and experience of the misled individual. Also to be considered is the relationship between the parties.'" ***Ritchie***, 109 Wis. 2d at 405-06 (quoting ***Williams***, 44 Wis. 2d at 246). Further, "all the circumstances" surrounding the transaction are relevant to the question of whether the misled party's reliance was reasonable. ***Hennig***, 230 Wis. 2d at 170-71 (quoting ***Bank of Sun Prairie v. Esser***, 155 Wis. 2d 724, 734, 456 N.W.2d 585 (1990)).

¶10 In ***Ritchie***—the case relied on by both the circuit court and the Bank—the court concluded the plaintiff who failed to read a contract was negligent as a matter of law and therefore not justified in his reliance upon an alleged misrepresentation. ***Ritchie***, 109 Wis. 2d at 400, 404, 406. The plaintiff claimed he believed the defendant's representation that the document was merely an agreement regarding a rental security deposit. ***Id.*** at 402. In reaching its conclusion that reliance was unjustified, the court relied upon a number of factors,

including that the plaintiff was a college graduate, a licensed real estate salesperson involved in approximately twenty closings, that the document in question was on a standard form titled "QUIT CLAIM DEED," and that the plaintiff had had that document in hand for ten to fifteen minutes before signing it. ***Id.*** at 406.

¶11 We agree with the Bank that the facts in this case are even more compelling. The Robertses are successful businesspersons. According to financial statements that they provided to the Bank, they own and operate a successful and profitable dental supply company. They both have extensive experience in limited partnerships. According to those financial statements, James had over $8,000,000 equity in partnerships and Dale over $30,000,000. The Robertses received drafts of the 2011 guaranties nine days before signing them. They also reviewed them with attorney Woodward, who explicitly informed the Bank that the Robertses *had no issue guarantying $300,000 each* and requested other modifications to the draft guaranties before his clients signed them. That request, set forth in an e-mail, was also forwarded to both of the Robertses. Further, the Robertses' each averred in their affidavits filed in opposition to summary judgment that the Bank told them the original guaranty was for a total of $300,000.

¶12 Even if the Robertses initially believed the Bank's representation that the total guaranty amount was unchanged, by the time they signed the new guaranties, they knew, or should have known, otherwise. Thus, any reliance on the representation was unreasonable as a matter of law. The falsity was either actually known or obvious to ordinary observation. *See* ***Hennig***, 230 Wis. 2d at 170.

¶13 Moreover, after ignoring the court's rationale in their initial brief, the Robertses fail to adequately reply to the Bank's argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). In fact, the Robertses' reply brief inexplicably fails to mention, much less address, ***Ritchie***. Instead, they cite two cases holding that, in those particular cases, the question of reasonable reliance was one of fact for the jury. The Robertses additionally argue, "Clearly, had the Roberts[es] been advised that the liability limit under the original guaranty was $300,000.00, they would have discovered the doubling of liability when they reviewed the draft replacement guaranties and would not have executed them."[2] This assertion is, essentially, a concession. The Robertses each averred that they *were* told by the Bank that the total amount of the original guaranty was $300,000.[3]

¶14 The Robertses alternatively argue there was a mutual mistake of fact because the parties believed the initial and replacement guaranties would be in the same amounts. A mutual mistake is "one reciprocal and common to both parties, where each alike labors under a misconception in respect to the terms of the written instrument." ***Continental Cas. Co. v. Wisconsin Patients Comp. Fund***,

[2] We note that neither of the Robertses was individually responsible for more than $300,000 under either the first or second guaranty. Because the Robertses were jointly and severally liable under the original guaranty, the Bank could have enforced the entire amount of the guaranty against either one of them. Thus, contrary to the claim in their respective affidavits and suggestions throughout their joint briefs, neither James's nor Dale's individual "financial exposure" doubled under the second guaranty.

[3] The Robertses assert, without citing to the record, that they were never provided with a copy of the original guaranty. While their affidavits stated they did not receive a copy "at closing," they did not aver they had not received a copy at any time before or after closing, nor did either aver they had forgotten the amount of the original guaranty.

164 Wis. 2d 110, 117, 473 N.W.2d 584 (Ct. App. 1991). This argument fails for the same reason the misrepresentation claim fails; the Robertses undisputedly knew the terms of both the original and replacement guaranties.[4] Any reasonable person, and especially sophisticated businesspersons, should be expected to understand that a single $300,000 guaranty is not the same as two separate $300,000 guaranties.

By the Court.—Judgment affirmed.

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

[4] The Robertses also address a unilateral mistake of fact defense and a duty of surety defense. Those arguments would fail for the same reason.