

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 11, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-0345

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BRADLEY BOLDEN AND JEANENE BOLDEN,

PLAINTIFFS-APPELLANTS,

v.

GORDON KOTTKE AND BARBARA KOTTKE,

DEFENDANTS,

KEEFE REAL ESTATE, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Green County:
JAMES R. BEER, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Bradley and Jeanene Bolden appeal from the judgment on their claim against Keefe Real Estate, Inc. The Boldens prevailed on

a claim that Keefe misrepresented the facts in a real estate transaction. Their recovery was reduced, however, because the jury found them contributorily negligent. On appeal, they contend that the trial court should have instructed the jury on Keefe's strict responsibility for the misrepresentation, thereby allowing them full recovery. *See Reda v. Sincaban*, 145 Wis.2d 266, 272, 426 N.W.2d 100, 103 (Ct. App. 1988) (contributory negligence is not a defense to a strict responsibility misrepresentation claim). We conclude that the Boldens waived this issue, and have presented no persuasive reasons to review it despite that waiver. We therefore affirm.

To preserve this type of civil trial error for appeal, the appellant must first move the trial court for a new trial based on that error. *Hartford Ins. Co. v. Wales*, 138 Wis.2d 508, 515, 406 N.W.2d 426, 429 (1987). Here, the Boldens concede that they did not move for a new trial based on the alleged jury instruction error, and, as a result, they do not have a right to have that error reviewed on appeal. However, they ask that we nevertheless exercise our discretion to address the issue in the interest of justice.

We decline to review the issue despite the Boldens' waiver. Section 752.35, STATS., provides that we may reverse a judgment and order a new trial, regardless of whether the proper motion or objection appears in the record, if it appears that the real controversy has not been fully tried, or it is probable that justice has miscarried. The use of this section is left to our discretion. *Hartford*, 138 Wis.2d at 517-18, 406 N.W.2d at 430. We choose not to use it in this case because the Boldens have not provided sufficient grounds to conclude that the real controversy was left untried, or that justice has miscarried.

By the Court.—Judgment affirmed.

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

