

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 30, 2015

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. 2014AP2803

Cir. Ct. No. 2014SC1051

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ALAN ZINN,

PLAINTIFF,

KAREN KLOTH,

PLAINTIFF-APPELLANT,

V.

GERALD SPRINKLE AND NANCY SPRINKLE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Eau Claire County:
MICHAEL A. SCHUMACHER, Judge. *Affirmed.*

¶1 THOMAS CANE, Reserve Judge.¹ Karen Kloth, pro se, appeals an order dismissing her strict responsibility misrepresentation case. We affirm.

BACKGROUND

¶2 Kloth and Alan Zinn purchased an older home from Gerald and Nancy Sprinkle (“the Sprinkles”). Shortly after the purchase, a substantial amount of water leaked into the home’s basement, and the dining room ceiling leaked a tar-like substance.

¶3 Zinn and Kloth initiated a small claims action against the Sprinkles, alleging the Sprinkles had misrepresented the condition of the home prior to the sale to Zinn and Kloth. A small claims trial was conducted, and the court commissioner found the Sprinkles had provided sufficient notice to Zinn and Kloth of the water problems. The commissioner dismissed the complaint.

¶4 The circuit court conducted a de novo trial. Zinn and Kloth alleged the water issues were not disclosed appropriately and that the Sprinkles had falsely represented the condition of the residence in the Real Estate Condition Report that was completed prior to the sale. Kloth identified a portion of the Real Estate Condition Report concerning known defects, where the Sprinkles had explained they “experienced water seepage [in] 2013 after heavy snow melt and continuous [rain] first time in 10 years. Will be painting floor with waterproof paint.” Zinn and Kloth alleged this statement was untrue, as they claimed the Sprinkles must have experienced water in the basement for a consistent period of time over the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

past ten years. In addition, Zinn and Kloth alleged the Sprinkles failed to acknowledge awareness of structural defects in the condition report, despite ceiling damage in the dining room. The court accepted various exhibits from the parties, as well as testimony from two witnesses on behalf of Zinn and Kloth.

¶5 The circuit court properly identified the five elements that had to be proven to establish strict responsibility misrepresentation: (1) the defendant made a representation of fact; (2) such representation of fact was untrue; (3) the representation of fact was made based upon the defendant's personal knowledge or experience or in circumstances where the defendant ought to have known the truth or untruth of the statement; (4) the defendant had an economic interest in the transaction; and (5) the plaintiff believed such representation to be true and relied on it. See *Reda v. Sincaban*, 145 Wis. 2d 266, 268-69, 426 N.W.2d 100 (Ct. App. 1988). The circuit court found that the first, fourth, and fifth elements were satisfied, while the second and third were at issue.

¶6 The circuit court issued a written decision in which it found in favor of Nancy Sprinkle's testimony that the Sprinkles' disclosures on the real estate condition report were true. The court concluded Zinn and Kloth had failed to prove by the greater weight of the credible evidence that the representation of fact was untrue. It reasoned the "issue is not whether there was a problem in the 10 years prior to 2013[;] rather whether the [Sprinkles] were aware of such problems." The court also concluded the testimony did not support a misrepresentation of fact with respect to the dining room ceiling damage. Kloth now appeals.

DISCUSSION

¶7 On appeal, Kloth identifies evidence that weighs in her favor. However, such argument ignores the deferential standard of review we give to a circuit court better situated to assess credibility. Where the circuit court acts as the fact-finder, it is the ultimate arbiter of witness credibility. See WIS. STAT. § 805.17(2) (“due regard shall be given to the opportunity of the [circuit] court to judge the credibility of the witnesses”). When more than one reasonable inference can be drawn from the credible evidence, we must accept the inference drawn by the circuit court. *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 249-50, 274 N.W.2d 647 (1979). We will only set aside a court’s factual finding if the record shows it to be clearly erroneous, after accepting all credibility determinations made and reasonable inferences drawn by the fact-finder. *Id.* Thus, in cases tried without a jury, “the standard for reversal is heavily weighted on the side of sustaining [circuit] court findings of fact.” *Leimert v. McCann*, 79 Wis. 2d 289, 296, 255 N.W.2d 526 (1977).

¶8 Here, the court heard testimony from both parties and from other witnesses, and it found in favor of the Sprinkles in a written decision that explained its reasoning. The court’s decision is supported by the record. Specifically, the court found credible Nancy Sprinkle’s trial testimony, which was consistent with the representations made in the Real Estate Condition Report, that the Sprinkles had experienced—and disclosed—water problems in the basement in the spring of 2013, but prior to that, they were unaware of any water problems after remodeling the basement in 2001. So, too, the circuit court accepted Nancy Sprinkle’s testimony that she and her husband were not aware of any problems with the dining room ceiling. The circuit court’s findings of fact and

determinations based thereon were not clearly erroneous. Simply because there is conflicting evidence is not a basis for reversal. *See id.*

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

