

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 31, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2009AP1633

Cir. Ct. No. 2007CV2991

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

MATTHEW KOSEK AND EDEN H. KOSEK,

PLAINTIFFS-RESPONDENTS,

V.

LESLIE P. HANAUSKA AND LISA HANAUSKA,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Waukesha County:
RALPH M. RAMIREZ, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Leslie and Lisa Hanauska appeal from a judgment compensating Matthew and Eden Kosek under WIS. STAT. § 100.18 (2007-08)¹ for

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

a false representation on the real estate condition report the Hanauskas provided when they sold their home to the Koseks. The Hanauskas argue that their motion for summary judgment should have been granted because the Koseks' reliance on the report was unreasonable and that the special verdict should have included a question about whether the representation materially induced the Koseks to purchase the home. We affirm the judgment entered on the jury's verdict.

¶2 This is a leaky basement case. In the real estate condition report dated February 17, 2005, the Hanauskas checked "yes" to the statement that "I am aware of defects in the basement or foundation (including cracks, seepage and bulges)." Their explanation of the response was:

Previous owner had basement work done w/ beams + baseboard dewatering system. Buyer may see dampness in NW corner.... Since house was put on market, the water heater has sprung a leak. We will replace before closing. Since house was put on market, we had an engineer inspect basement walls. It was determined that we reinforce east and west walls. This work was done by Zablocki on 3-2-05.

¶3 The Koseks purchased the home in June 2005. The following spring water leaked into the basement from several areas from where the walls met the floor, from patched and painted cracks in the walls, and from cracks in the floor. At one point, there was standing water in the entire basement. The Koseks experienced leaks every spring thaw and after moderate to heavy rainstorms until they expended more than \$22,000 to repair the basement foundation by excavating, replacing block, and installing a new drain tile system and sump crock. The Koseks' complaint alleges that the Hanauskas made a false representation on the real estate condition report in violation of WIS. STAT. § 100.18. See *Below v. Norton*, 2008 WI 77, ¶43, 310 Wis. 2d 713, 751 N.W.2d

351 (purchaser of residential real estate is protected by § 100.18 from the false representations of a home seller).

¶4 The Hanauskas' motion for summary judgment to dismiss the complaint was denied. We review decisions on summary judgment de novo, applying the same methodology as the circuit court. *See M & I First Nat'l Bank v. Episcopal Homes*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995); WIS. STAT. § 802.08(2). That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See M & I First Nat'l Bank*, 195 Wis. 2d at 496-97. The moving party bears the burden of demonstrating the absence of a genuine issue as to any material fact with such clarity as to leave no room for controversy. *See Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), *abrogated on other grounds by Olstad v. Microsoft Corp.*, 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139. The inferences to be drawn from the moving party's proofs should be viewed in the light most favorable to the party opposing the motion and doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment. *Id.* at 338-39. We address the summary judgment motion on the record as it existed when it was decided by the circuit court and "not on a record expanded by the testimony at trial." *Super Valu Stores v. D-Mart*, 146 Wis. 2d 568, 573, 431 N.W.2d 721 (Ct. App. 1988). Meaning, we will ignore the Hanauskas' occasional reference to trial testimony in their appellate arguments about summary judgment. Further, we need not consider whether Matthew Kosek's affidavit, that he did not receive any report from the Hanauskas' engineer prior to closing, was contradicted by his testimony at trial thereby rendering the affidavit a sham affidavit. *See Yahnke v. Carson*, 2000 WI

74, ¶21, 236 Wis. 2d 257, 613 N.W.2d 102 (an affidavit that directly contradicts prior deposition testimony of the same witness is insufficient to create a genuine issue of fact for trial, unless the contradiction is adequately explained).

¶5 Relying on *Novell v. Migliaccio*, 2008 WI 44, ¶51, 309 Wis. 2d 132, 749 N.W.2d 544, the Hanauskas argue that summary judgment was appropriate because the circuit court could determine as a matter of law that the Koseks' reliance on their representation in the real estate condition report was unreasonable. *Novell* is also a leaky basement case. There the sellers' real estate condition report denied any knowledge of defects in the basement or foundation or the presence of any water intrusions or conditions. *Id.*, ¶¶8-9. The home inspector listed the basement in marginal condition, noted displacement and stair step cracks in the basement walls, improper placement of the sump pump drain hose, and water stains and high moisture levels in the southwest corner of the basement, recommended further examination by a foundation specialist and certain grading and drain pipe modifications, and expressed concerns about bowing and cracking in the basement walls and the presence of water in the basement. *Id.*, ¶¶10-13. The seller told the inspector that he had not painted the basement walls in the nine years that he lived there. *Id.*, ¶14. Months after purchasing the home, Novell noticed a foul odor in the basement, standing water in the northwest corner, and periodic flooding of that area. *Id.*, ¶16. Upon being advised that the sellers would have experienced similar water intrusions and it appeared the walls had been recently painted, Novell sought compensation from the sellers under WIS. STAT. § 100.18. *Novell*, 309 Wis. 2d 132, ¶¶18-21.

¶6 The sellers sought dismissal of the action, claiming that Novell had to establish that his reliance on the representation was reasonable. *Novell*, 309 Wis. 2d 132, ¶25. The supreme court confirmed that reasonable reliance is not an

element of a WIS. STAT. § 100.18 cause of action. *Novell*, 309 Wis. 2d 132, ¶48. Rather, reliance is an aspect of whether a representation caused the plaintiff's pecuniary loss and "a jury may consider the reasonableness of a person's reliance on a misrepresentation in determining whether there had been a material inducement." *Id.*, ¶¶49, 50. The court acknowledged that:

[T]here are cases in which a circuit court may determine as a matter of law that a plaintiff's belief of a defendant's representation is unreasonable, and as a result the plaintiff's reliance (which is based on the unreasonable belief) is also unreasonable. The circuit court may determine that the representation did not materially induce the plaintiff's decision to act and that plaintiff would have acted in the absence of the representation.

Id., ¶51.

¶7 In reviewing the circuit court's summary judgment determination that the buyer's reliance on the sellers' representations was unreasonable as a matter of law because of the infirmities listed in the inspection report and the inspector's recommendation that the buyer seek the professional opinion of a foundation specialist, the *Novell* court concluded that the evidence was equivocal as to that consideration. *Id.*, ¶¶54-55. The court observed that although the inspection report described several problems with the foundation and basement, it could not be concluded as a matter of law that the report alerted the buyer to the water problems he experienced after moving into the home. *Id.*, ¶56. Notably the problems at issue in the action were in a different area than the potential problems addressed by the inspection report. *Id.*, ¶57. Further, the buyer's decision whether to hire another expert to examine the foundation or whether to remove the paneling to examine the wall behind were based upon the sellers' statement they had never painted the walls and had never experienced water problems in the basement. *Id.*, ¶59. The court held that the circuit court erred in granting

summary judgment as the evidence was such that a reasonable jury could determine that the sellers' representations caused the buyer's loss. *Id.*, ¶62.

¶8 The Hanauskas argue that this case is the type of case the *Novell* court had in mind when it acknowledged that in some circumstances reliance is unreasonable such that the circuit court may determine as a matter of law that the representation did not materially induce the buyer's decision to act. They point out that the Koseks had three inspection reports alerting them to problems with the foundation and water in the basement. They suggest this case is different from *Novell* because there was no family relationship or personal dealings between the buyers and sellers as in *Novell*, there was disclosure of defects and wetness in the northwest corner, that although the Hanauska basement was freshly painted, the concealed cracks and tuck pointing had been disclosed in the condition report, and there was nothing vague or ambiguous about the inspection reports the Koseks reviewed.

¶9 We do not agree with the Hanauskas' contention that even if the Koseks had all the inspection reports,² that the reports alerted the Koseks to the type of basement flooding they experienced. The inspection report from the Koseks' home inspector noted fresh and old stains indicating moisture in the basement. The report also noted that the water heater was leaking and needed to be replaced. The report noted: "Repairs have been done and should stabilize walls. My concern is grade around foundation and pitch of concrete and asphalt will cause future problems with water in basement."

² The summary judgment record reveals a question of fact of whether the Koseks were provided the report of an engineer hired by the Hanauskas.

¶10 The “Anderson report” on which the Hanauskas rely was authored on February 24, 2005, by a home inspector hired by a previous couple who had made an offer to purchase the home and cancelled the offer under the inspection contingency. The report noted wall displacement in the basement and recommended a review of the entire foundation by a qualified specialist. It also noted that beams on the west wall were displaced and repairs appeared inadequate. As to evidence of moisture, the report observed, “Water stains on base of wall/s most often indicates poor grading and/or missing or blocked sections of the roof gutter and downspout system. It may also indicate damaged drain tile/s.”

¶11 Based on the Anderson report, the Hanauskas had Jendusa Engineering Associates, Inc. examine the property. The Jendusa report noted moisture at the northwest corner and along the base of the west wall and attributed it to a disconnected downspout. The report recommended the corner grade be sloped away from the wall, the replacement of wall reinforcement tubes along west walls with stronger tubes, the reinforcement of the east wall with tubes, and the repair of cracks in the south wall. It concluded, “There is not evidence of long term moisture problems. Proper grading & maintenance of gutters/downspouts should eliminate moisture problems.”

¶12 None of the inspection reports suggest that the Koseks could anticipate the type of water intrusion they experienced. Although the engineering report noted problems, it suggested repairs. The Hanauskas’ real estate condition report represented that the suggested repairs had been completed. The Koseks were shown a basement that was freshly painted after the repairs were completed. They understood the water stains to be related to the leaking water heater and a pipe under the utility sink. The Koseks required regrading of the driveway to address the concern of their home inspector. Moreover, the engineering report,

like the Hanauskas' real estate condition report, limited moisture to the northwest corner. Contrary to the Hanauskas' characterization, the question is not whether it was patently unreasonable for the Koseks to believe they were buying a home with a sound and dry basement. They anticipated commonplace dampness in the northwest corner. The Koseks' claim relates to more than just commonplace dampness in the northwest corner. A genuine issue of fact existed as to whether the condition real estate report and inspection reports disclosed, as the Hanauskas now claim, that the basement had "serious issues." On the summary judgment record, genuine issues of material fact existed as to whether the Koseks' reliance on the Hanauskas' representation was unreasonable.³ Summary judgment was properly denied.

¶13 At the jury trial, the Hanauskas requested that the special verdict include the following question: "Did the defendants' representation materially induce (cause) the plaintiffs to purchase the subject property?" The circuit court denied the request. The form of the special verdict is discretionary with the circuit court. *Gumz v. Northern States Power Co.*, 2007 WI 135, ¶23, 305 Wis. 2d 263, 742 N.W.2d 271. An erroneous exercise of discretion occurs when the special verdict questions fail to cover all issues of fact or are inconsistent with the law. *Id.*, ¶24. Whether the special verdict accurately reflects the law applicable to the issues of fact in a given case presents a question of law that we review de novo. *Id.*

³ We are not persuaded that the absence of family relationship or direct dealings with the sellers should make the buyers more suspect of the representations in the real estate condition report. We need not address whether the absence of family relationship or direct dealings with the sellers distinguishes this case from *Novell v. Migliaccio*, 2008 WI 44, 309 Wis. 2d 132, 749 N.W.2d 544.

¶14 The Hanauskas do not try to hide the fact that their requested special verdict question was intended to ask the jury to consider the reasonableness of reliance on the representation. Inasmuch as *Novell*, 309 Wis. 2d 132, ¶¶48-50, holds that reasonable reliance is not an element of a WIS. STAT. § 100.18 claim, it is not appropriate to make a separate inquiry directed at reasonable reliance. See *Wausaukee v. Lauerman*, 240 Wis. 320, 326, 3 N.W.2d 362 (1942) (a separate question splitting the issue of negligence should not have been included on the special verdict). To do so would unfairly make what is only a consideration in determining cause an element of the claim. The special verdict addressed the material elements of the Koseks' claim. It was not an erroneous exercise of discretion to reject the Hanauskas' proposed special verdict question.⁴

By the Court.—Judgment affirmed.

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

⁴ Because we find no error, we need not consider whether the Hanauskas were prejudiced. Thus, we do not consider the Hanauskas' improper attempt to impeach the verdict based on the letter one juror wrote to the court after the trial. See *Brophy v. Milwaukee Elec. Ry. & Transp. Co.*, 251 Wis. 558, 567, 30 N.W.2d 76 (1947) (subsequent reflections by jurors are not to be allowed to impeach the verdict); WIS. STAT. § 906.06(2) (“a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon the juror’s or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith”).

