COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2189 **Cir. Ct. No. 2006CV793**

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

KORRY ARDELL,

PLAINTIFF-APPELLANT,

V.

ANGELLA CLARKE AND DIAMOND REALTY,

DEFENDANTS-RESPONDENTS,

DREW E. GARCZYNSKI AND ERIN R. GARCZYNSKI,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed.*

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

¶1 ANDERSON, J. Korry Ardell purchased property for $3000 less than its appraised value of $153,000. He alleges that he was led to believe that the property consisted of four buildable lots with 192 feet of lake frontage. It did not. He sued the sellers, Drew E. Garczynski and Erin R. Garczynski, their real estate agent, Angella Clarke, and her real estate agency, Diamond Realty. Ardell asserted claims of misrepresentation (intentional, strict responsibility and negligent), false advertising contrary to WIS. STAT. § 100.18 (2007-08),[1] theft by fraud, rescission of the real estate contract, and unjust enrichment. The Garczynskis prevailed on summary judgment, and Ardell appealed. ***Ardell v.***

[1] WISCONSIN STAT. § 100.18(1) provides:

> **Fraudulent representations. (1)** No person, firm, corporation or association, or agent or employee thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by such person, firm, corporation or association, or agent or employee thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

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

Clarke, No. 2007AP1692, unpublished slip op. at 2 (Wis. Ct. App. November 26, 2008). We summarily affirmed the circuit court's grant of summary judgment to the Garczynskis. Thereafter, the case was returned to the circuit court; Clarke and Diamond Realty filed a motion for summary judgment. In opposition to their motion, Ardell filed, among other proofs, a new appraisal valuing the property at $91,000 at the time of purchase. The circuit court granted summary judgment to Clarke and Diamond Realty emphasizing that because the law of the case determined in the summary judgment granted to the Garczynskis sets the value of the property at $153,000, Ardell cannot now introduce a new appraisal to show harm. We affirm. We conclude that the proper analysis is under the law of issue preclusion, under which Ardell is bound to the earlier summary judgment adjudication and cannot now litigate the issue of damages when he had the opportunity the first time around to dispute the appraisal and did not.

¶2 These are the undisputed facts in more detail. In June 2004, Drew and Erin Garczynski entered into a listing contract with Angella Clarke, a broker for Diamond Realty, to sell their vacant land on Little Elkhart Lake in the town of Rhine (the property). On July 3, 2004, Ardell contacted Clarke after seeing listings for the property in the Sheboygan Press Homes book and on the Diamond Realty website. The listings stated that the property had 192 feet of lake frontage and consisted of four lots. Ardell went to personally view the property and, at that time, saw that an asphalt roadway (Wehmeyer Street) separated the property from the lake. After viewing the property, Ardell met with Clarke the same day and made an offer to purchase the property for the asking price.

¶3 Ardell's offer used the standard form approved by the Wisconsin Department of Regulation and Licensing, WB-13 Vacant Land Offer to Purchase, which contained language stating that the offer was contingent upon the seller

providing a map of the property prepared by a registered land surveyor, within fifteen days of acceptance of the offer. After the sellers accepted Ardell's offer, a survey was done, and a map based on that survey was prepared and provided by the seller to Ardell. The survey showed that the property was bounded in the north by Wehmeyer Street, which separated the property from the lake.

¶4 As part of Ardell's efforts to obtain financing, his mortgage lender retained an appraiser who stated that the property had a fair market value of $153,000, $3000 higher than the purchase price. The sale closed in November 2004 with the Garczynskis receiving the agreed-upon purchase price of $150,000 and Ardell receiving a warranty deed vesting him with all right, title and interest in the property. Ardell testified that it was after purchasing the property that he discovered it did not have any lake frontage and that there was only one buildable lot.

¶5 In October 2006, Ardell sued the Garczynskis, their real estate agent, Clarke, and her real estate agency, Diamond Realty. Ardell alleged that Clarke represented to him verbally, through advertisements and a site plan that the Garczynskis' property consisted of four buildable lots with 192 feet of lake frontage. Ardell alleged that he only later discovered that the property had no lake frontage. The property was separated from the lake by a road, and Ardell opined that he did not have any riparian rights. Ardell also claimed that the property had only one buildable lot, which he claimed the Garczynskis and Clarke knew or should have known and which caused Ardell to purchase the property at an overstated price. Ardell asserted claims of misrepresentation (intentional, strict responsibility and negligent), false advertising contrary to WIS. STAT. § 100.18, theft by fraud, rescission of the real estate contract, and unjust enrichment.

¶6 As already noted, the Garczynskis prevailed on summary judgment, and Ardell appealed. We summarily affirmed. Thereafter, the case was returned to the circuit court; Clarke and Diamond Realty filed a motion for summary judgment. In opposition to the motion, Ardell filed, among other proofs, a new appraisal valuing the property at $91,000 at the time of purchase. The circuit court granted summary judgment emphasizing that because the law of the case sets the value of the property at $153,000, Ardell cannot introduce a new appraisal. Thus, Ardell cannot show harm. Ardell appeals.

¶7 Under the doctrine of issue preclusion, "[w]hen an issue of fact or law is actually litigated and determined by a valid judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." ***Precision Erecting, Inc. v. M & I Marshall & Ilsley Bank***, 224 Wis. 2d 288, 592 N.W.2d 5 (Ct. App. 1998).

¶8 We review a grant of summary judgment de novo, applying the same standards as the circuit court. *See* ***Thomas ex rel. Gramling v. Mallett***, 2005 WI 129, ¶26, 285 Wis. 2d 236, 701 N.W.2d 523. Summary judgment is warranted if the parties' submissions show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). We construe the evidence in the light most favorable to the nonmoving party. ***Thomas***, 285 Wis. 2d 236, ¶4. We review the grant or denial of summary judgment independently, but apply the same methodology as used by the trial court. ***Wisconsin Mall Props., LLC v. Younkers, Inc.***, 2006 WI 95, ¶19, 293 Wis. 2d 573, 717 N.W.2d 703. 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. Sec. 802.08(2). The inferences to be drawn from the underlying

facts are to be viewed in the light most favorable to the party opposing the motion. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751. If there is any reasonable doubt regarding whether there exists a genuine issue of material fact, that doubt must be resolved in favor of the nonmoving party. *See* ***Schmidt v. Northern States Power Co.***, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294. Whether courts may apply issue preclusion presents a question of law, which we review independently of the circuit court. *See* ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 686, 495 N.W.2d 327 (1993).

¶9 Ardell proffers the following arguments on appeal, which we will address as necessary:

> I. The circuit court erred in granting summary judgment in favor of Angella Clarke and Diamond Realty because a genuine issue of material fact existed as to whether Clarke and Diamond Realty were acting outside the scope of their agency when they represented that the property had lake frontage and four buildable lots….
>
> II. The circuit court erred in applying the doctrine of claim preclusion in this case when determining that the new appraisal could not be used to show pecuniary loss because the claim against Angella Clarke and Diamond Realty is separate from the claim against the Garczynskis and does not undo the dismissal of the Garczynskis….
>
> III. The circuit court erred in finding that the economic loss doctrine applied because Clarke and Diamond Realty were not parties to the contract….
>
> IV. The circuit court erred in granting summary judgment because a reasonable jury could have found that Mr. Ardell reasonably relied on Angella Clarke's misrepresentation, thereby creating an issue of fact for the jury….
>
> V. The circuit court erred in determining that the principle of unjust enrichment is not applicable because there was no contract between Angella

> Clarke and Diamond Realty and Ardell because Clarke and Diamond Realty were acting outside the scope of agency when she misrepresented the property.

¶10 We first note that we agree with Ardell that the economic loss doctrine does apply. In the recent case of ***Shister v. Patel***, 2009 WI App 163, ¶¶1, 24, 322 Wis. 2d 222, 776 N.W.2d 632, we clarified that the economic loss doctrine does not bar tort claims by buyers against the seller's real estate broker or his or her employer. Because there is no contractual relationship between the buyer and the seller's broker, an independent duty arises. ***Id.***, ¶12. ***Shister*** stemmed from the buyer's purchase of real estate. ***Id.***, ¶1. There, the buyer claimed that he suffered damages when the sellers and their real estate broker failed to disclose that the sellers had remodeled the basement without the proper permits and that there was a pending reassessment on the property which resulted in an increased property tax. ***Id.*** The buyer appealed the circuit court's summary judgment order that the economic loss doctrine bars all tort claims against the seller's broker and his or her employer. ***Id.*** We explained:

> Under well-established Wisconsin law, "an agent who does an act that would be a tort if he [or she] were not then acting as an agent for another is not relieved from liability to an injured third party, simply because he [or she] was acting as an agent when he [or she] caused the injury." ***Ramsden v. Farm Credit Servs.***, 223 Wis. 2d 704, 715, 590 N.W.2d 1 (Ct. App. 1998) (citing ***Grube v. Daun***, 173 Wis. 2d 30, 51, 496 N.W.2d 106 (Ct. App. 1992)). "There is no insulation from liability [for an agent] under the law for making untrue factual statements about the condition of property during the course of a sale." ***Ramsden***, 223 Wis. 2d at 719, 590 N.W.2d 1.

Shister, 322 Wis. 2d 222, ¶15 (alterations in original). We reversed the circuit court, concluding that the economic loss doctrine does not bar the buyer's tort claims against the sellers' broker and his or her employer and that the circuit court

erred in limiting the buyer's damage claim against the broker. ***Id.***, ¶24. Thus, Ardell's tort claims against Clarke and Diamond Realty are not barred.

¶11 However, although Ardell's tort claims are not precluded by the economic loss doctrine, he cannot prevail on this theory. Ardell runs into the same problem he faced in his claims against the Garczynskis: he cannot prove damages based on the undisputed facts. The most instructive case is ***Precision Erecting***. In order to understand why ***Precision Erecting*** defeats Ardell's position, we describe the pertinent parts of that decision.

¶12 In ***Precision Erecting***, a Waukesha company named AFW Foundry contracted with Antonic & Associates, Ltd., to coordinate improving an AFW business property. ***Id.*** at 293. While performing on this contract, Antonic purchased a piece of equipment from Nambe Mills, Inc. ***Id.*** Antonic made a $7000 down payment on the $70,000 price, and Nambe delivered the equipment. ***Id.*** Nambe received no further payment. ***Id.*** Nambe was not the only subcontractor or supplier on the project not getting paid. ***Id.*** Precision Erecting, one of the other subcontractors, sued AFW for unpaid bills and AFW responded with a third-party complaint against Antonic, Nambe, and twenty-two other third-party defendants. ***Id.*** at 293-94.

¶13 Precision Erecting and the other third-party subcontractors and suppliers alleged that AFW owed them a total of $365,000. ***Id.*** at 294. AFW claimed that Antonic was not its agent, but rather a general contractor and, therefore, AFW's liability was limited to the amount it owed Antonic under AFW's contract with Antonic. ***Id.*** This amount, AFW argued, was $86,317.76 because some subcontractors and suppliers had already agreed to accept a pro rata portion of the amount owed. ***Id.*** Antonic filed an answer alleging it was a project

manager, not a general contractor. ***Id.*** Similarly, Nambe filed an answer alleging Antonic was an agent, not a general contractor. ***Id.*** AFW moved for summary judgment against all of the third-party defendants, requesting a judgment establishing its liability to these various defendants in the amount of approximately $86,000. ***Id.*** Antonic, in a turnaround of sorts, submitted a letter stating it did not oppose AFW's summary judgment motion. ***Id.*** While Nambe was noticed about the motion, it did not appear or in any way participate in the motion for summary judgment. ***Id.*** The circuit court granted summary judgment, declaring that Antonic was a general contractor and directing that all subcontractors and suppliers be paid out of an $85,957.35 trust funded by AFW. ***Id.*** at 294-95. The circuit court subsequently allocated $11,340 of this trust to Nambe, an amount representing eighteen percent of Nambe's $63,000 claim. ***Id.*** at 295. Nambe appealed the judgment. ***Id.***

¶14 On appeal, Nambe effectively asked that it be allowed to litigate the contractual relationship between AFW and Antonic because of Nambe's own interest in holding AFW liable for the balance due to Nambe. ***Id.*** at 300. This court described the issue as "whether the summary judgment to AFW against Antonic precludes Nambe from arguing that Antonic was an agent of AFW rather than a general contractor." ***Id.***

¶15 We determined that issue preclusion barred any further litigation regarding the relationship between AFW and Antonic. ***Id.*** at 304-10. An important part of our issue preclusion analysis hinged on the fact that Nambe could have but failed to "assert[] itself at the summary judgment stage if it felt material facts regarding Antonic's status were in dispute." ***Id.*** at 301. We explained, "[t]he very fact that a summary judgment motion was made alerted Nambe that someone was alleging that there were no facts in dispute. If [Nambe]

did not agree, it should have come forward at that time." ***Id.*** at 309. We further explained:

> We observe it to be self-evident that a summary judgment motion by its very nature alleges certain facts to be undisputed. If a litigant who is not the subject of the motion for summary judgment nonetheless has reason to dispute the facts supporting the motion, it is that litigant's duty to appear and object to the motion. If not, and summary judgment is granted, the facts underlying that judgment are binding on all other parties to the suit as a matter of issue preclusion.

Id. at 292-93.

¶16 Like Nambe in ***Precision Erecting***, Ardell passed up his chance to litigate an issue critical to his success. We made clear in ***Precision Erecting*** that a litigant in a multiparty suit who does not want to lose the opportunity to litigate a critical issue should "closely examine any exposure it might have whenever one of the other parties files a motion for summary judgment against another party [and] not against the litigant." *See* ***id.*** at 292. This rationale readily applies in the case at bar. In fact, here, if possible, Ardell passing up his chance is even more inexcusable than Nambe passing up its chance. Unlike, Nambe who was a third party, Ardell was the *named* litigant and his duty to "closely examine any exposure" was unmistakable.

¶17 The very fact that a summary judgment motion was made against Ardell put him on notice that unless he disputed the facts as presented in the motion, they would remain undisputed facts. If he did not agree with the $153,000 appraisal, he should have come forward at that time with a second appraisal. He did not. He is therefore held to the undisputed facts in the previous adjudication. And, as in the previous adjudication, assuming misrepresentations were made to

Ardell, he cannot show harm. Likewise, assuming a WIS. STAT. § 100.18 violation, he cannot show pecuniary loss.

¶18 In short, under ***Precision Erecting***, because summary judgment was granted to the Garczynskis, the facts underlying that judgment are binding on all other parties to the suit as a matter of issue preclusion. *See* ***Precision Erecting***, 224 Wis. 2d at 292-93. If we were to hold otherwise, it would not only be a waste of judicial resources and detract from the finality of judgments, it would pave the way for inconsistent results. This we will not do. Ardell had a duty to "closely examine any exposure" and oppose the summary judgment on every issue crucial to his success. *See* ***id.*** at 292, 309. He did not. As such, he will not be allowed two kicks at the cat.

By the Court.—Judgment affirmed.

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