COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2010

A. John Voelker
Deputy Clerk of Court of Appeals

Appeal No. 2009AP2504 **Cir. Ct. No. 2008CV2701**

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

JOSH BYRD AND KATIE BYRD,

PLAINTIFFS-APPELLANTS,

V.

ROGER LANDOWSKI AND CARYN LANDOWSKI,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Josh and Katie Byrd appeal from a judgment dismissing their claims that Roger and Caryn Landowski misrepresented the extent of a defect in the basement of the home the Byrds purchased from the Landowskis. We conclude that material issues of fact preclude summary judgment and that the

circuit court erred in striking evidence from the Byrds' expert witness. We reverse the judgment and remand for trial.

¶2 The circuit court granted summary judgment. When reviewing a grant of summary judgment, we apply the same methodology as the circuit court and decide de novo whether summary judgment was appropriate. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). Summary judgment is warranted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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) (2007-08).[1] We will reverse a decision granting summary judgment if the circuit court incorrectly decided legal issues or material facts are in dispute. ***Coopman***, 179 Wis. 2d at 555. In our review we, like the circuit court, are prohibited from deciding issues of fact; our inquiry is limited to determining whether a material factual issue exists. *See* ***id.*** A court may not base its ruling on its assessment of the weight of the evidence or the witnesses' credibility. ***Pomplun v. Rockwell Int'l Corp.***, 203 Wis. 2d 303, 306-07, 552 N.W.2d 632 (Ct. App. 1996). The evidence, and the inferences therefrom, must be viewed in the light most favorable to the party opposing the motion. ***Kraemer Bros., Inc. v. U.S. Fire Ins. Co.***, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979). Any reasonable doubt as to the existence of a factual issue must be resolved against the moving party. ***Maynard v. Port Publications, Inc.***, 98 Wis. 2d 555, 563, 297 N.W.2d 500 (1980).

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

¶3 These facts are undisputed. The Byrds purchased the Landowskis' home in August 2005. On their real estate condition report the Landowskis checked the box indicating that they were "aware of defects in the basement or foundation (including cracks, seepage and bulges)." They explained:

> In the spring of 2004 we had a couple of inches of water in the basement for several hours. This was a spring of near record rainfall and one in which road/sewer construction kept the culverts along Maple Ave full for several months. Subsequent to this event we found that both sump pumps were installed incorrectly. Since correcting the problems with the pumps and installation of storm sewers along Maple Ave we had had no problems with water in the basement.

¶4 In the spring of 2006, the Byrds' first spring in the home, they observed mass quantities of water being constantly pumped out from the drain tile system of the home into the street. Water ran from the home beginning in March and ending in June. Water invaded the basement of the home in April and June 2006 during power failures. Each spring thereafter the Byrds observed massive quantities of water being pumped from the home's drain tile system and the pumping continued until June or July. In May and June 2008 water invaded the basement even while the sump pumps were operating. The Byrds came to learn that their home had been dubbed the "water house" because it had a long history of water problems.

¶5 The Byrds commenced this action alleging claims for breach of warranty, intentional misrepresentation, misrepresentation, and most significantly, a violation of WIS. STAT. § 100.18, for false advertising.[2] The Byrds sought

[2] The protection of WIS. STAT. § 100.18, also covers fraudulent representations made to a prospective purchaser. ***Below v. Norton***, 2008 WI 77, ¶42-43, 310 Wis. 2d 713, 751 N.W.2d 351.

compensation for the difference in value between the property as represented and its actual value, the cost of placing the property in the condition that it was represented to be in, repair costs, costs and reasonable attorney fees. While the action was pending the Byrds sold the home.

¶6 The Landowskis moved for summary judgment arguing that the Byrds had no evidence that the Landowskis had water in the basement on more than one occasion, that the Byrds no longer had a claim for a wet basement and recovery of the cost of raising the basement floor because they had sold the home, that they did not plead a cause of action related to the constant running of the sump pumps, and that they did not plead or support a claim for diminished value. In opposition to the motion for summary judgment the Byrds relied on Josh Byrd's affidavit; the deposition testimony of neighbors; the affidavit of Ben Olson, a professional engineer; the affidavit of their real estate agent regarding the reaction of prospective purchasers to the water pumping from the home; and the affidavit of Terry Carrick, a real estate appraiser. The circuit court granted summary judgment dismissing the Byrds' complaint.[3]

¶7 We first afford the Byrds' complaint a liberal reading under Wisconsin's notice pleading rules. *See* ***Farr v. Alternative Living Servs., Inc.***,

[3] Although our review of a summary judgment is de novo, we value the circuit court's decision. ***Olson v. Auto Sport, Inc.***, 2002 WI App. 206, ¶6, 257 Wis. 2d 298, 651 N.W.2d 328. The circuit court concluded that the sale of the home had changed the focus of the litigation and that to their detriment the Byrds had not amended their complaint accordingly. The court also criticized the valuation approach Carrick used and struck Carrick's report. Consequently, it found there was no evidence of diminished value. It determined that the disclosure by the Landowskis of the one-time intrusion of water in the basement is all that could be documented. It found that there could be no evidence that the basement was below the water table without an opinion from a hydrologist. It further determined that by their own real estate condition report the Byrds defined the constant pumping of water for three to four months each spring as a cosmetic issue.

2002 WI App 88, ¶11, 253 Wis. 2d 790, 643 N.W.2d 841 ("Wisconsin is a notice pleading state, and a pleading need only notify the opposing party of the pleader's position in the case—no 'magic words' are required."). The complaint alleges that the home has a long history of "water problems," and permits an inference that "water problems" exist because of the depth of the basement in relation to the water table. The complaint alleges that the Landowskis' explanation of the known defect with the basement or foundation misrepresented or failed to disclose the history of "water problems." The allegations identify the particular individuals involved, where and when misrepresentations occurred, and the content of the misrepresentation and are specific enough to meet the particularity requirement of WIS. STAT. § 802.03(2), which provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." *See also* ***Doe v. Archdiocese of Milwaukee***, 2007 WI 95, ¶39, 303 Wis. 2d 34, 734 N.W.2d 827. It was not necessary for the Byrds to specifically allege that the constant running of the sump pumps was the "water problem" that caused damages. That is a circumstance showing why the representation was false or inadequate. The complaint stated claims that the Landowskis failed to make an adequate disclosure of water problems that have "a significant adverse effect on the value of the property." WIS. STAT. § 709.03 (setting forth the form of a real estate condition report and the meaning of "defect").

¶8 The Byrds were not required to amend their complaint to allege a different type of damage after they sold the home and no longer would attempt repair by raising the basement floor. Diminishment of value is not a cause of action; it is a remedy. *See* ***Wussow v. Commercial Mechanisms, Inc.***, 97 Wis. 2d 136, 146, 293 N.W.2d 897 (1980) ("it is the operative facts that determine the unit

to be denominated as the cause of action, not the remedy or type of damage sought"). In any event, the complaint specifically requested the difference in value between the property as represented and its actual value.

¶9 Turning to the summary judgment record we conclude that there are disputed material facts. In affidavits filed in reply to the Byrds' opposition to the motion for summary judgment, the Landowskis indicated that they had no knowledge of problems with the water table being too high, that they had not experienced water in the basement except for the one disclosed instance, and that the discharge of water from one sump pump in the springs of their ownership for a couple of months was not excessive. The Byrds offered evidence that the water pumped from the home was excessive and lasted for periods longer than a couple of months. The amount of water and the duration of the pumping was contrasted to that of other homes in the same neighborhood. Additionally engineer Olson opined that "the groundwater level rose to the level of the property's drain tile system every spring during [the Landowskis'] ownership, which resulted in the pumping of mass quantities of water into the street or water invading the basement for several months each year."[4] This suggests the Landowskis experienced similar amounts of water pumping from the home. It is not a defense that the Landowskis were not bothered by the amount. Olson linked the constant running of the two sump pumps to the water table being at the level of the drain tile system. This permits a reasonable inference that the depth of the basement was a defect known

[4] Olson's reports and opinions cannot be rejected simply because he is not a hydrologist. *See* ***Anderson v. Combustion Eng'g, Inc.***, 2002 WI App 143, ¶4, 256 Wis. 2d 389, 647 N.W.2d 460 (WIS. STAT. § 907.02 "sets a fairly low threshold for the admissibility of opinion evidence that is beyond the presumed ken of ordinary jurors"); ***Wester v. Bruggink***, 190 Wis. 2d 308, 319, 527 N.W.2d 373 (Ct. App. 1994) ("whether a witness qualifies to testify as an expert depends on the witness's background, education and experience rather than a particular label").

to the Landowskis. There is disputed evidence here about the significance of the water problems at the home.

¶10 The Landowskis argue that the existence of working sump pumps is not a defect in the property. The water problem cannot be dismissed as only cosmetic when the Byrds put forth evidence that the constant running of the pumps impaired their use and enjoyment of the home.[5] The Byrds also had their own personal experience in trying to sell the home in the spring that the water pumping from the home stigmatized the property and scared off prospective purchasers. A reasonable inference exists that the amount of water pumping from the home impaired the value of the home. In short, the questions of what constituted water problems that were known and should have been disclosed are disputed factual determinations.

¶11 In deciding that there was no proof of damages, the circuit court struck appraiser Carrick's report on diminished value. The admissibility of expert evidence is within the circuit court's discretion. ***Hoekstra v. Guardian Pipeline, LLC***, 2006 WI App 245, ¶14, 298 Wis. 2d 165, 726 N.W.2d 648. The circuit court determined that Carrick's failure to use a comparable sales approach meant his report was "not based on a standard of law." That Carrick did not use a desired

[5] Josh Byrd's affidavit explained that in light of the mass quantities of water being pumped from the home each spring and the possibility of water invading the basement if the sump pumps would fail, the Byrds abandoned plans for a family entertainment room in the basement. During the times that sump pumps ran the Byrds were worried that water would invade the basement. Byrd also indicated the water pumped from the home became a breeding ground for algae and mosquitoes as well as a play area for birds, dogs, and neighborhood children.

comparable sales approach does not render his opinion completely inadmissible.[6] It only provides fodder to attack the credibility of the opinion. *See* ***Accuweb, Inc. v. Foley & Lardner***, 2008 WI 24, ¶22, 308 Wis. 2d 258, 746 N.W.2d 447 (attacks on valuation calculations are questions for the jury). The weight to be afforded Carrick's opinion is a matter for the jury to determine and credibility should not be determined on summary judgment. ***Id.***, ¶26; ***Hoekstra***, 298 Wis. 2d 165, ¶14.

¶12 The Landowskis suggested that the Byrds could not establish damages since they no longer needed to repair the home. We do not agree. First, the Byrds sold the home for less than what they paid for it. Second, as the owners the Byrds could give testimony as to their opinion as the value of the home. *See* ***Accuweb***, 308 Wis. 2d 258, ¶31. Carrick's report also established diminished value. There are disputed facts about the nature and extent of alleged damages. Summary judgment was not appropriate.

By the Court.—Judgment reversed and cause remanded.

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

[6] The Landowskis argues that the Carrick report should be stricken for the alternative reason that it improperly opines about the Landowskis' credibility because Carrick stated his belief that the "previous owner (Landowskis) gave false and misleading answers" to two questions in the real estate condition report. Carricks' opinion is not commentary on the credibility of any testimony given by the Landowskis. We need not decide whether any portion of Carrick's report should be stricken before submission to the jury.