

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 22, 2003**

Cornelia G. Clark  
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. 02-2931  
STATE OF WISCONSIN**

**Cir. Ct. No. 01-CV-125**

**IN COURT OF APPEALS  
DISTRICT III**

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**F & M BANK-WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**JAMES L. VANDENBERG,**

**DEFENDANT-THIRD-  
PARTY PLAINTIFF-RESPONDENT,**

**BANK OF LITTLE CHUTE,**

**DEFENDANT-RESPONDENT,**

**V.**

**MICHAEL D. HERBERT AND CORRINE A. HERBERT,**

**THIRD-PARTY DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. F & M Bank-Wisconsin appeals from a judgment dismissing its foreclosure action and voiding a loan guaranteed by James Vandenberg. The bank argues that Vandenberg did not rely upon the bank's statements in agreeing to execute the mortgage and security agreement. Alternatively, the bank contends that to the extent Vandenberg did rely on the bank's statements, that reliance was neither justified nor reasonable under the circumstances. In turn, Vandenberg argues that the bank's appeal is frivolous and requests attorney fees and costs pursuant to WIS. STAT. § 809.25.<sup>1</sup> We reject these arguments, affirm the judgment and deny Vandenberg's request to impose costs for a frivolous appeal.

## I. BACKGROUND

¶2 Michael Herbert, a used car salesman, leased his car lot from Vandenberg. In order to make improvements on the lot and purchase additional cars, Herbert sought a \$50,000 loan from the bank. The bank notified Herbert that the lot would have to be held as collateral for the loan. Herbert thus asked Vandenberg to offer the property on which the car lot was located as collateral. Because Vandenberg was reluctant to offer his property as collateral, the bank's representative assured him that there was relatively little chance of loss because Herbert's home and recreational property were also being held as collateral for the loan. Vandenberg was also assured that Herbert had a five-star credit rating. Based on the bank's representations, Vandenberg agreed to sign the Real Estate

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Mortgage and Security Agreement. Contrary to the Bank's representations, Herbert's property did not, however, secure the loan, nor did Herbert have a five-star credit rating.

¶3 Herbert subsequently defaulted on the loan and the bank filed suit to foreclose on the mortgage and security agreement. As an affirmative defense to the foreclosure action, Vandenberg alleged that he was induced into executing the mortgage and security agreement based on negligent misrepresentations made by the bank's representative. The trial court agreed, concluding:

I do find that there is a negligent misrepresentation which has been proved by clear, satisfactory and convincing evidence as an affirmative defense to the action brought by [the bank]. That negligent misrepresentation is the relatively little chance of loss based upon representations made – representations of fact made to Mr. Vandenberg that there was other collateral that would protect his pledging of his property, his real estate, and the primary lender's financial status would cover these loan obligations.

The court dismissed the bank's foreclosure action and voided the mortgage and security agreement. This appeal follows.

## II. ANALYSIS

¶4 In order to prove a claim for negligent misrepresentation, Vandenberg must prove that: (1) a representation of fact was made by the bank; (2) the representation of fact was untrue; (3) the bank was negligent by making the representation of fact; and (4) Vandenberg believed the representation was true and relied on it to his detriment. *See* WIS JI—CIVIL 2403. The specific elements of a cause of action in negligence are: (1) a duty of care or a voluntary assumption of a duty on the part of the defendant; (2) a breach of the duty (which involves a failure to exercise ordinary care in making a representation or in ascertaining the

facts); (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury. *See, e.g., Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 319, 401 N.W.2d 816 (1987).

¶5 Here, the bank argues the trial court erred by finding that Vandenberg relied upon the bank's statements in agreeing to execute the mortgage and security agreement. A trial court's findings of fact are reviewed under a clearly erroneous standard. WIS. STAT. § 805.17(2). Under this standard, even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the finding. To command reversal, the evidence supporting a contrary finding must constitute the great weight and clear preponderance of the evidence. *Sellers v. Sellers*, 201 Wis. 2d 578, 586, 549 N.W.2d 481 (Ct. App. 1996).

¶6 Vandenberg testified at trial that he relied on the bank representative's assurances when he executed the mortgage and security agreement. Specifically, Vandenberg relied on the statements that Herbert's property secured the loan and that Herbert had a five-star credit rating. Despite any testimony to the contrary, the trial court is the ultimate arbiter of the credibility of witnesses and of the weight to be given to each witness' testimony. *Plesko v. Figgie, Int'l*, 190 Wis. 2d 764, 775, 528 N.W.2d 446 (Ct. App. 1994). We conclude there is sufficient evidence to support the trial court's finding.

¶7 The bank nevertheless argues that Vandenberg's reliance on the negligent misrepresentation was unjustified or unreasonable under the circumstances because Vandenberg failed to read the documents or otherwise investigate the bank's representations. As a matter of law, however, failure to read a contract does not bar a party from claiming that misrepresentation induced

formation of the contract. *Bank of Sun Prairie v. Esser*, 155 Wis. 2d 724, 733-34, 456 N.W.2d 585 (1990). The reasonableness of one's reliance on a misrepresentation is judged after reviewing the facts of each case, including "the intelligence and experience of the misled individual and the relationship between the parties." *Id.* at 734.

¶8 The trial court heard evidence that Vandenberg is an unsophisticated businessman who does not hold a high school diploma. During his career as the operator of an auto body shop, Vandenberg testified that he has dealt with only one bank and that he had no reason not to trust or believe this bank's representative. The bank drafted the documents and was in the best position to know Herbert's credit rating and whether Herbert's property secured the loan. Based on the facts of this case, the trial court's finding that Vandenberg reasonably relied on the misrepresentations is not clearly erroneous.

¶9 The bank also argues that because Vandenberg was aware he was relying on the bank representative's opinion regarding Vandenberg's risk of loss, he assumed that risk when he decided to sign the mortgage papers. The bank's discussion of opinion is misplaced, however, as it ignores the factual misrepresentations made regarding Herbert's credit rating and the attachment of Herbert's personal property as security for the mortgage. Regardless of whether the bank representative's assurances regarding risk of loss constitute opinion, Vandenberg relied on what turned out to be misstatements of fact.

¶10 Finally, Vandenberg argues that the bank's appeal is frivolous and requests attorney fees and costs pursuant to WIS. STAT. RULE 809.25(3). We are not persuaded. In order to impose sanctions against a party for frivolous appeal under RULE 809.25(3), the court must find one or more of the following:

1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

¶11 An appeal is not frivolous merely because the court does not agree with the appellant's argument. *Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis. 2d 605, 614, 345 N.W.2d 874 (1984). While we reject the bank's arguments, there is nothing to suggest that those arguments were not made in good faith. Therefore, we cannot conclude that this appeal is frivolous.

*By the Court.*—Judgment affirmed.

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

