

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 22, 2005

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. 04-1673
STATE OF WISCONSIN**

Cir. Ct. No. 03CV185

**IN COURT OF APPEALS
DISTRICT III**

**JERRY SCHALLENBERGER AND COURTNEY
SCHALLENBERGER,**

PLAINTIFFS-APPELLANTS,

v.

ANGELA MUNSON,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dunn County:
ROD W. SMELTZER, Judge. *Reversed and cause remanded for further proceedings.*

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

¶1 PER CURIAM. Jerry and Courtney Schallenberger appeal a summary judgment dismissing their claims against Angela Munson for strict liability and intentional misrepresentation. The Schallenbergers argue a genuine issue of material fact remains as to the truthfulness of Munson's disclosure on the

real estate condition report she completed. We agree, reverse the judgment and remand for further proceedings.

BACKGROUND

¶2 On April 19, 2002, Angela Munson filled out a real estate condition report in preparation to sell her house in the Town of Weston. She had owned the house for three years. On the report, she disclosed that she was aware of defects in the basement or foundation and explained, “Basement leaks during spring thaw. Sump pump prevents flooding.”

¶3 In May 2002, the Schallenbergers purchased Munson’s house. Between June and October, the basement flooded between ten and fifteen times. There were six to eight inches of standing water in the basement with the sump pump running. In October, the sump pump broke and was replaced by the Schallenbergers. In March or April of 2003, the Schallenbergers installed a third sump pump.¹

¶4 On July 15, 2003, the Schallenbergers commenced this suit. They claimed intentional and strict responsibility misrepresentation, alleging that Munson had misrepresented the extent of the water problem when she filled out the condition report.

¶5 Munson moved for summary judgment. She contended that because the Schallenbergers’ expert had concluded that a properly installed sump pump

¹ It is not clear from the record whether, when they installed the second pump, the Schallenbergers replaced the sump pump that was installed when they purchased the house or if they also changed the configuration. The third sump pump merely replaced the second pump and was improperly installed.

would prevent flooding in the basement and they introduced no evidence to rebut her contention that the basement did not flood when she lived there, no trial issues remained. The circuit court concluded that Munson had made an adequate disclosure of the water problems in the basement and granted summary judgment in her favor.

STANDARD OF REVIEW

¶6 We review the grant or denial of a summary judgment independently, using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08. We view the facts in the light most favorable to the nonmoving party. *State Bank of La Crosse v. Elsen*, 128 Wis. 2d 508, 511-12, 383 N.W.2d 916 (Ct. App. 1986). If conflicting inferences can be drawn from the facts, summary judgment is inappropriate. *Grams v. Boss*, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980).

DISCUSSION

¶7 To prevail on their claim of strict responsibility misrepresentation, the Schallenbergers need to prove (1) that Munson made a representation of fact (2) that was untrue (3) and that she should have known was untrue (4) in a transaction in which she had an economic interest and (5) that they relied on her representation believing it to be true. *See* WIS JI—CIVIL 2402. To prove their intentional misrepresentation claim, the Schallenbergers must meet a higher standard on the third element—that Munson knew the representation was untrue or that she made it recklessly without caring about its truthfulness. *See* WIS JI—CIVIL 2401.

¶8 The Schallenbergers contend a genuine issue of material fact remains on the truthfulness of Munson's disclosure. We agree. The circuit court focused on the fact that a properly installed sump pump would have prevented flooding. However, we conclude the relevant question is not whether a properly installed sump pump would have prevented flooding but, rather, whether the sump pump in the house at the time Munson lived there did, as she disclosed, prevent flooding.

¶9 There is evidence in the record that Munson's disclosure was truthful. Munson certified by signing the report that the basement leaked but did not flood during the three years she lived there. Additionally, the Schallenbergers testified that the basement leaked but did not flood the second year they lived in the house. Therefore, a jury could conclude that the basement leaked but did not flood during the three years Munson lived in the house and, accordingly, her disclosure of basement leaks but no flooding was truthful.

¶10 On the other hand, there is also evidence that the basement did not merely leak but flooded while Munson lived in the house. The Schallenbergers testified the basement flooded ten to fifteen times during the five-month period immediately following the sale, with the same sump pump installed as during Munson's tenancy. Hans Timper, an expert who inspected the house, concluded that flooding would have occurred for many years prior to the Schallenbergers' purchase. A second expert, Marty Fleming, likewise concluded the basement flooding would have been ongoing for several years prior to 2002. This is evidence from which a jury could conclude that the basement flooded, not leaked, during Munson's tenancy, that the sump pump did not prevent flooding and, therefore, her disclosure on the condition report was untruthful.

¶11 Because a genuine issue of material fact remains as to the truthfulness of Munson's disclosure, we reverse the summary judgment and remand for further proceedings.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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

