COURT OF APPEALS
DECISION
DATED AND RELEASED

June 8, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0551-FT

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

THOMAS P. REITZ,
and SHERRY A. REITZ,

Plaintiffs-Respondents,

v.

ACRES OF AMERICA, INC.,
STEVE LOEHRKE,
and JUDY NOWAK,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed*.

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. Acres of America, Inc., Steve Loehrke and Judy Nowak appeal from a judgment finding them negligent and ordering them to

pay the plaintiffs $2,490.[1] The issue is whether the trial court set the proper damages. We conclude it did. We affirm.

Plaintiffs Thomas P. Reitz and Sherry A. Reitz alleged that Acres of America had a listing contract to sell vacant real estate owned by Valda J. Quant. Loehrke was president of Acres of America and Nowak was the real estate agent who showed the property to the plaintiffs. The property for sale was lots 30 through 33 in a certain subdivision. The plaintiffs alleged the defendants were negligent in showing and describing the property, in that the property shown actually included parts of lots 34 and 35, which Quant did not own. The plaintiffs purchased the property and commenced construction of a residence, partly on lots 34 and 35, which they did not own. Plaintiffs later purchased those lots for $4,150.

The case was tried to the court. We have been provided with a transcript of only the court's decision, not the testimony. Therefore, we must rely on the trial court's findings to state the facts, which do not appear to be in dispute. When showing the property, Nowak stated that she believed the property lines of the lots for sale were near two power poles. In fact, parts of lots 34 and 35 also lie between the poles. The trial court found that Nowak did not actually know where the property lines were and that she was negligent in making her representation.[2]

The parties agree on appeal that the proper measure of damages is the "out-of-pocket" rule provided in WIS J I—CIVIL 2406, which sets damages as the difference, if any, between the market value of the property at the time of purchase and the amount of money that the plaintiff paid for the property. In addition to a recovery of general damages under the out-of-pocket rule, a plaintiff can also recover consequential damages if they can be proved with reasonable certainty, do not duplicate a recovery already gained under the general measure of damages, and were proximately caused by the misrepresentation. ***Gyldenvand v. Schroeder***, 90 Wis.2d 690, 698, 280 N.W.2d

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[1] This is an expedited appeal under RULE 809.17, STATS.

[2] The court also found the plaintiffs negligent in failing to obtain a survey or locate the lot lines before commencing construction. The court apportioned the negligence sixty percent to the defendants and forty percent to the plaintiffs.

235, 239 (1979). Consequential damages may include the "expense of adapting other property for use with the property plaintiff has been induced to buy from the defendant." Comment to WIS J I—CIVIL 2406. While the plaintiffs could not recover the price of the additional lots under the general measure of damages stated above, we conclude that those expenses meet the criteria for recovery of consequential damages.

The defendants argue that the plaintiffs paid for six lots and own six lots, and have therefore suffered no damage. They argue that although the plaintiffs were forced to pay extra money to purchase extra lots, they received extra property equivalent in value to the extra money paid. This argument is contrary to the record presented on appeal. The plaintiffs did not receive "extra property" when they purchased lots 34 and 35. Rather, they received the remainder of the property between the poles which the defendants had represented was for sale in the first place. In other words, while the plaintiffs now own two more lots than they originally expected, they own no more acreage than expected.

The defendants also argue that if the plaintiffs have suffered damage, it should be calculated by subtracting the value of two of the lots originally purchased from the purchase price of the two lots purchased later. Otherwise, they argue, the plaintiffs will be overcompensated because they will have paid for four lots, but will own six. This argument is essentially a restatement of the first, and we reject it for the same reason.

By the Court.—Judgment affirmed.

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