COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 96-1972

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

JANE FULTON, BONNIE NORWOOD, MARY PATRICK ROWAN AND RUTH ROWAN,

PLAINTIFFS-RESPONDENTS,

V.

RAYMOND R. VOGT,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

MARK NICHOLSON AND NICHOLSON REALTY, INC.,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County: GEORGE A. BURNS, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Raymond R. Vogt appeals from orders granting summary judgment in favor of Jane Fulton, Bonnie Norwood, Mary Patrick Rowan, Ruth Rowan, (collectively "the Fultons"), Mark Nicholson and Nicholson Realty, Inc. (collectively "Nicholson"). The trial court dismissed Vogt's counterclaim and third-party complaint seeking rescission of his contract to purchase certain farmland owned by the Fultons and listed by Nicholson. Vogt claimed the Fultons and Nicholson misrepresented conditions of the property. The trial court dismissed Vogt's counterclaim and third-party complaint, ruling that the contract documents clearly indicate the property was sold in an "as is" condition, that, as a result, Vogt had no right to assert a misrepresentation claim based upon failure to disclose defects located on the property, and that no affirmative representations of fact regarding the use of the property were made. The trial court further determined that even if a statement of fact was made, Vogt waived his right to assert this claim because the contract stated Vogt was relying solely on his own inspection and not relying on any representations made by the Fultons or Nicholson. Because summary judgment in favor of the Fultons and Nicholson was proper based on the facts and the contract documents, we affirm.

I. BACKGROUND

After their father died, the Fultons (four sisters) inherited approximately seventy-five acres of farmland located in Oak Creek. Their father had farmed the land until 1978 when he retired. He began informally leasing the land to a local farmer. After Mr. Fulton died, the Fultons continued this arrangement until Vogt contacted them in 1990 seeking to purchase part of the land. The land consists of four tax parcels, three on Pennsylvania Avenue and one on Puetz Road.

Vogt contacted the Fultons and Nicholson, who had listed the property, with the intent to purchase the Puetz Road parcel for a mini-storage facility. Vogt met with Nicholson and inspected the Puetz Road property which contained a dilapidated barn. When Vogt commented on old sod cutting equipment he saw in the barn, Nicholson allegedly informed him that sod had been grown on the land previously, and advised him that there was no reason why it could not be grown again. Vogt also learned at this time that the Fultons had additional land for sale on Pennsylvania Avenue. Nicholson gave Vogt directions to this property, but did not accompany him. Nicholson advised Vogt that he did not know if sod had ever been grown on the Pennsylvania Avenue property, that he was not aware of any problems with the property, but that Vogt should contact the individual who was then leasing the property for additional information.

On October 21, 1990, Vogt submitted a written Vacant Land Offer to Purchase, in which he made a cash offer for the four parcels of $100,000, subject to his obtaining a home equity loan on his residence. Vogt agreed to accept the subject property "as is," understanding that neither the Fultons nor Nicholson could warrant or represent anything with regard to the property, and that Vogt was relying solely on his own inspection.

When Vogt was unable to meet the terms of the cash offer, the Fultons permitted Vogt to redesign the transaction. On November 26, 1990, Vogt entered into a Vacant Land Offer/Option to Purchase along with a lease dated December 1, 1990. This involved a combined rental agreement with an option to purchase the property where Vogt agreed to pay a total of $16,000 up front, with the option to purchase by December 1, 1991. The up front money included $6,000 of prepaid rent at the rate of $500 per month, with the remaining $10,000 to be applied toward the purchase price of $100,000 if the option was exercised and

forfeited if the option was not exercised. These documents indicated that the property was being sold "as is," that no warranties could be given, and stated that Vogt "is relying solely on his own inspection and has not asked the broker or seller to verify anything."

Vogt never exercised the option to purchase. He continued paying rent until spring of 1992, when he ceased payments, but remained on the land. The Fultons commenced an eviction action to remove Vogt. Vogt filed counterclaims and a third-party complaint against Nicholson alleging negligent misrepresentation, strict liability and failure to disclose certain conditions.

The Fultons and Nicholson filed a summary judgment motion seeking dismissal of Vogt's counterclaims and third-party complaint against them. The trial court granted the motion. Vogt now appeals.

II. DISCUSSION

This case comes to us following a grant of summary judgment. In reviewing a grant of summary judgment, we follow the same standards set forth in § 802.08, STATS., as does the trial court. *See* ***Wisconsin Patients Compensation Fund v. Wisconsin Health Care Liab. Ins. Plan***, 200 Wis.2d 599, 606, 547 N.W.2d 578, 580 (1996). Summary judgment methodology has been set forth in numerous cases and need not be repeated here. *See* ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis.2d 281, 289, 507 N.W.2d 136, 139 (Ct. App. 1993). Our review is *de novo*. *See* ***id.***

Vogt makes three claims in support of his argument that the trial court should not have granted summary judgment: (A) the "as is" language was inoperative because there were affirmative representations of fact; (B) the waiver

clause of the contract violated public policy; and (C) Nicholson failed to comply with his independent duty to investigate the land. Vogt makes brief reference to three additional claims: (D) that the trial court erred in dismissing Vogt's unjust enrichment claim; (E) that the trial court failed to address his negligence claim; and (F) that the trial court should have granted his request for security for costs pursuant to §§ 814.27-28, STATS. We reject each in turn.

A. The "As Is" Language.

The contract documents are clear. The Fultons' land was being sold "as is." The contract states: "Properties are being sold in an as is condition - no warranties to be given." The "as is" language appears three times within the contract.[1] The effect of an "as is" clause shifts the burden to the buyer to determine the condition of the property being purchased. *See* ***Grube v. Daun***, 173 Wis.2d 30, 61, 496 N.W.2d 106, 117 (Ct. App. 1992). "This shifting of the burden, with nothing more, protects a seller and his or her agent from claims premised upon nondisclosure." ***Id.*** The only exception to the rule is where the seller or his agent has made an affirmative representation about some aspect of the property. *See* ***id.*** at 59, 496 N.W.2d at 116.

Vogt claims that one of the Fultons and Nicholson made "affirmative representations about the property" so as to nullify the "as is" clause. Specifically, he asserts that Nicholson's affirmative representations were that

[1] Vogt claims that an "Addendum A" to the initial proposal contained the "as is" language and because this Addendum was never incorporated into the option contract, that he is not bound by any consequences of the "as is" clause. This argument is without merit. The option contract contained identical disclaimers and disclosures to the previous offer. Vogt was made aware of and agreed that the properties were being sold in an "as is" condition and that no warranties were being given. Therefore, it is irrelevant that the Addendum was not incorporated into the option contract.

"there is no reason that this property cannot be a successful sod farm," that he knew the property's history as a profitable sod farm and that he knew the owners. Vogt asserts that Jane Fulton told him that her father used the property as a sod farm, that it was profitable and suggested naming the farm the "Rowan Sod Farm." The trial court found that none of these statements constituted affirmative representations of fact, because the statements were opinion. We agree.

Statements that reflect opinion, or something that would likely occur in the future, are not actionable as they are not representations of fact. *See* ***Consolidated Papers, Inc. v. Dorr-Oliver, Inc.***, 153 Wis.2d 589, 594, 451 N.W.2d 456, 459 (Ct. App. 1989). Nicholson's statement about the quality of the farm for sod farming was an opinion regarding something that may occur in the future. The remaining statements were true statements about the previous owner and do not constitute affirmative representations of fact regarding the state of the property. *See* ***id.*** at 593, 451 N.W.2d at 459 (to establish misrepresentation claim, representation must be untrue).

Because there were no affirmative representations of fact, Vogt is bound by the contract, which indicated the land was to be sold "as is." Therefore, his misrepresentation claim fails.[2]

[2] Citing a case from Ohio, ***Mancini v. Gorick***, 536 N.E.2d 8 (Ohio Ct. App. 1987), Vogt also contends that the "as is" clause is not applicable to his fraudulent concealment claim. He claims that the Fultons fraudulently concealed the facts that the properties were in a wetland and that the property contained an underground storage tank as well as dangerous chemicals. He further alleges that the real estate agent fraudulently concealed knowledge that the properties may be subject to EPA liability. We are not persuaded.

(continued)

B. Public Policy.

Vogt also claims that the waiver clause in the contract was invalid because he actually relied on representations made by Nicholson and because it was not bargained for and, therefore, violated public policy. Again, we are not persuaded.

Vogt fails to cite, and we are unable to find, any Wisconsin case holding that an "as is" clause is not applicable to a fraudulent concealment claim. The elements of fraudulent concealment are similar to those of fraudulent misrepresentation. However, in lieu of establishing that the other party has made false representations, the party alleging concealment must show that the party failed to disclose a material fact. *See* ***Ollerman v. O'Rourke Co.***, 94 Wis.2d 17, 26, 288 N.W.2d 95, 100 (1980).

A fact is material if a reasonable purchaser would attach importance to its existence or non-existence in determining the choice of action in the transaction in question; or if a vendor knows, or has reason to know, that the purchaser regards, or is likely to regard, the matter as important in determining the choice of action, although a reasonable purchaser would not so regard it. *See* ***id.*** at 42, 288 N.W.2d at 107.

Here, Vogt raises four facts he alleges were material and concealed: (1) the property was in a wetland; (2) the property contained an underground storage tank; (3) the property contained the presence of dangerous chemicals; and (4) the property was subject to EPA liability.

However, Vogt also admits that the sales documents disclose that the property is located in a flood plain and flood fringe, and admits to knowing of the possibility of contaminants in the barn or on the land due to fertilization. Moreover, the real estate agent advised Vogt to speak with the individual who was currently farming the land, which Vogt did. The farmer told Vogt that he lost some crops to flooding, that there was an underground fuel tank on the property, and showed Vogt chemical containers in the barn. Thus, the facts that Vogt claims were concealed to him were actually known to him.

In addition, as noted within the text of this opinion, Wisconsin law provides that an "as is" clause shifts the burden to the buyer to determine the condition of the property being purchased. *See* ***Grube v. Daun***, 173 Wis.2d 30, 61, 496 N.W.2d 106, 117 (Ct. App. 1992). He cannot now avoid the consequences of the terms of a contract to which he is bound. Vogt waived his right to obtain an independent inspection, instead relying on his own inspection. He entered into a contract where he agreed to purchase the properties "as is," understanding that no warranties were being made, and agreed that he has not asked the real estate agent or seller to verify anything.

Vogt has not provided us with any reason or controlling legal authority to conclude that his fraudulent concealment claim voids the effect of the "as is" clause.

The reliance waiver referred to was that part of the contract documents that stated: "Buyer is hereby waiving his option for an independent investigation of said properties and is relying solely on his own inspection and has not asked the broker or seller to verify anything." The record is clear that Vogt conducted his own inspection and observations of the property and waived the right to an independent inspection. There is nothing about this language that violates public policy. Knowing that the property was being sold "as is," it was Vogt's responsibility to ascertain the condition of the property. He chose not to have an independent inspection done. He cannot now avoid the consequences of his actions.

C. Agent's Duty to Investigate Property.

Vogt next claims that Nicholson violated his duty to conduct an independent investigation of the property. We do not agree. When the seller or his agent makes an affirmative representation about some aspect of the property, the buyer is entitled to rely on that statement and expect full and fair disclosure of all material facts relating to that aspect of the property. *See* ***Grube***, 173 Wis.2d at 61, 451 N.W.2d at 117. We have already concluded here, however, that no affirmative representation was made. Therefore, Vogt's claim fails.

Even if we were to ignore the "as is" clause and conclude that Nicholson had a duty to independently inspect the properties, the duty does not extend to the defects that Vogt alleges were not discovered. The Wisconsin Administrative Code provides the following guidelines with respect to real estate brokers. WIS. ADM. CODE § RL 24.07(1)(a) provides that a licensee is required to make a reasonably diligent inspection of vacant land "to detect observable, material adverse facts." WIS. ADM. CODE § RL 24.07(1)(d) explains a broker's

duty relative to listing vacant land: "A reasonably competent and diligent inspection of vacant land does not require an observation of the entire property, but shall include, if given access, an observation of the property from at least one point on or adjacent to the property."

Vogt asserts that Nicholson should have disclosed to him the underground gas tank and the damaged drain tile. Both of these defects are underground. Thus, based on the foregoing provisions of the administrative code, Nicholson's duty to inspect would not include a duty to discover these hidden and not readily observable defects. Accordingly, Nicholson did not violate any duties.

D. Unjust Enrichment Claim.

Vogt claims the trial court erred in finding that the Fultons were not unjustly enriched by the sod crop that he was growing on the farmland. We disagree.

The elements of unjust enrichment are: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) acceptance or retention by the defendant of the benefit under circumstances making it inequitable for the defendant to retain the benefit without payment of its value. *See* ***Puttkammer v. Minth***, 83 Wis.2d 686, 688-89, 266 N.W.2d 361, 363 (1978). However, a loss to the plaintiff where no actual benefit accrues to the defendant is insufficient to support a claim of unjust enrichment. *See* WIS J I—CIVIL § 3028.

The only credible evidence in the record reveals that the sod growing on the farmland was unharvestable and worthless. This evidence was presented in the form of an affidavit from Thomas Kuehne, who has been in the sod business

for over thirty-five years. Kuehne, the president of Parkway Lawn Sod Farm, located in Wind Lake, Wisconsin, averred that he had personally examined the property on which Vogt was attempting to grow sod on at least two occasions. Following his first visit, he told Vogt that the sod was "uneven, very rough and full of empty holes and unharvestable" and that the crop "needed a lot more work to become harvestable." After the second inspection in 1995, Kuehne reached a similar conclusion and recommended that the land "be sprayed to kill vegetation or plowed under to begin a new crop." Kuehne stated that in his opinion the crop was "worthless" and had no commercial value.

Vogt failed to introduce any evidence to refute Kuehne's affidavit or opinions. Further, the record demonstrates that the trial court offered Vogt an opportunity to remove the sod and sell it if it was marketable. Even if Vogt could have sold the sod, he had no legal right to do so until he purchased the property. This was stated clearly in the contract documents.

Accordingly, Vogt has failed to establish any material issues of fact regarding any of the elements of his unjust enrichment claim. No benefit was conferred because the crop was worthless, the Fultons could not appreciate any benefit because the crop was unharvestable and, under these circumstances, there was no benefit for the Fultons to accept or retain. Therefore, there was no unjust enrichment.

E. Negligence Claim.

Vogt also claims the trial court erred by failing to address his negligence claim. We decline to consider this claim, however, because Vogt fails to develop this argument. *See* ***Vesely v. Security First Nat'l Bank***, 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 n.5 (Ct. App. 1985).

F. Security for Costs.

Finally, Vogt asserts the trial court should have granted his request for security for costs. We are not persuaded.

Section 814.27, STATS., provides in pertinent part: "in all cases where it shall appear reasonable and proper the court may require the plaintiff to give sufficient security for such costs as may be awarded against the plaintiff." Thus, whether to order security for costs is a discretionary determination dependent upon what is "reasonable and proper."

Here it did not appear reasonable or proper for the trial court to order security for costs for two reasons. First, Vogt's counterclaim and third-party complaint were dismissed. Therefore, there was no reason to require security for costs because Vogt did not prevail. Second, even if he had prevailed and received a judgment against the Fultons, security was unnecessary because the Fultons own real estate in Wisconsin. *See* ***Midwest Broadcasting Co. v. Dolero Hotel Co.***, 273 Wis. 508, 515, 78 N.W. 898, 902 (1956) (reasonable to award security for costs where party has no assets, address or office in Wisconsin). Had Vogt received a judgment against the Fultons, it would automatically act as a lien against the Fultons' real estate, thereby affording sufficient security.

By the Court.—Orders affirmed.

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