COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 96-2121

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

THOMAS ROSKOS, D.O, M.D., AND ANGELA HALL, D.C.,

PLAINTIFFS-RESPONDENTS-CROSS APPELLANTS,

v.

MARY MELLOWES,

DEFENDANT,

FEDERATED REALTY GROUP, INC.,

DEFENDANT-APPELLANT-CROSS RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Reversed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

NETTESHEIM, J. Federated Realty Group, Inc. (Federated) appeals from a judgment in favor of Thomas Roskos and Angela Hall (Roskos) based upon a jury verdict which determined that Federated violated § 100.18, STATS., 1993-94, by misrepresenting the size of certain real estate purchased by Roskos. Among its appellate issues, Federated argues that the trial court should have granted its postverdict motion challenging the jury's finding that Roskos had justifiably relied on Federated's representations. We agree. We conclude that the evidence presented at trial, viewed in the light most favorable to Roskos, does not support the jury's finding of justifiable reliance. On this basis, we reverse the judgment and the order.[1]

BACKGROUND

In October 1993, Mary Mellowes and Roskos closed a real estate transaction in which Mellowes sold Roskos 26.6 acres of property bordering on Lake Michigan in the Town of Grafton, Ozaukee County.[2] The events preceding this sale, as they relate to information provided to Roskos regarding the acreage of the property, form the basis for this action.

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[1] Federated also argues that it was entitled to dismissal of Roskos' complaint pursuant to § 452.23(2)(b), STATS., which provides that a broker is not required to disclose information which is otherwise revealed to a buyer in a written inspection report. In addition, Federated argues that the documents it issued were not within the purview of § 100.18, STATS., 1993-94, and that the representations upon which Roskos actually relied were made by Roskos' agent, not Federated. Since we decide this case based on another dispositive issue, we need not address these additional issues. Nor do we address Roskos' argument on cross-appeal which challenges one of the trial court's evidentiary rulings. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed). Because we reverse the judgment, we additionally reject Roskos' claim for attorney's fees pursuant to § 100.18(11)(b)2.

[2] Roskos also brought a separate claim against Mellowes alleging breach of contract and negligent misrepresentation. Roskos' claims were dismissed at summary judgment. In a prior appeal by Roskos, we affirmed the trial court's dismissal. *See* ***Roskos v. Mellowes***, No. 96-1567, unpublished slip op. (Wis. Ct. App. 1997) (per curiam).

Mellowes listed the property with Federated in May 1993. Roz Krause, a Federated agent, was assigned to handle the listing. At trial, Krause testified that Mellowes told her that the property had "approximately 29 acres" and thus Krause noted on the property data sheet that the property had "app. 29 acres." Krause also sent information to the Multiple Listing Service (MLS) indicating that the property had "29 acres." Krause additionally obtained a hand-drawn diagram of the property from Mellowes' attorney. This diagram depicted the four individual lots which comprised Mellowes' total property. The diagram did not expressly state the total acreage of the Mellowes property. Instead, the diagram noted the acreage of three of the four lots. The individual acreage of these three lots totaled 26.63 acres.

Roskos learned that the property was for sale through Federated. He was interested in subdividing the property. After he drove by the property, Roskos contacted Thomas Braatz, his own real estate agent. Braatz obtained information about the property through MLS. This information described the property as having a lot size of "29 acres." Braatz then contacted Krause who sent him the diagram previously prepared by Mellowes' attorney. However, unlike the original diagram, this diagram now also indicated the acreage of the fourth lot as 3.00 acres. According to this diagram, the individual acreage of the four lots totaled 29.63 acres. Mellowes' attorney testified that the handwriting indicating the acreage of this fourth lot was not his.

Roskos testified that, based on the diagram and data sheet indicating that the property had approximately 29 acres, he made an offer to purchase the property. This initial offer, prepared by Braatz, described the property lot size as

"approximately 29 acres."[3] This offer also contained a contingency escape clause for Roskos which voided the offer if a closing on other property which Roskos was then trying to sell did not take place before August 23, 1993.

After two offers and counteroffers, Roskos and Mellowes entered into a purchase agreement on June 29, 1993. This agreement, which incorporated Mellowes' third counteroffer, continued to represent the acreage at "approximately 29 acres" as recited in Roskos' initial offer. The agreement also modified the escape clause regarding the sale of Roskos' property by providing that if the closing on Roskos' property had not occurred by the designated date, Roskos would forfeit $20,000 of the earnest money he had paid.

Two days prior to the scheduled closing on the property, Roskos' lender informed him that it would need a survey of the property. Roskos immediately obtained a survey which was completed the day before the closing. Roskos and Braatz received two copies of the survey, one of which they delivered to Roskos' lender. Roskos testified that he did not examine the survey before the closing. Roskos proceeded with the closing under the assumption that the property consisted of 29 acres. Several months later, when Roskos received his tax bill, he finally examined the survey of his property. The survey stated that the property had 26.4 buildable acres.

[3] We note that in the first amended offer of purchase, Mellowes' attorney changed the description of the property from "approximately 29 acres" to a statement identifying the property by its tax key numbers. However, this change was not repeated in the subsequent documents. Instead, the original language—"approximately 29 acres"—reappeared.

Roskos commenced this action against Federated alleging that it had misrepresented the size of the property in violation of § 100.18, STATS., 1993-94.[4] Roskos sought damages for the value of the approximate three acres of missing land. In answer to the first question, the jury found that Federated had made an untrue, deceptive or misleading representation. In answer to the second question, the jury further found that Roskos had justifiably relied on the representation. The jury awarded Roskos $9900 in damages.

Federated filed motions after verdict, including a challenge to the jury's determination that Roskos had justifiably relied on Federated's representations. The trial court denied Federated's motions and entered judgment on the verdict. Federated appeals.

DISCUSSION

A motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, "shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." Section 805.14(1), STATS.[5] This standard applies both to the trial court and to the

[4] Section 100.18(1), STATS., 1993-94, prohibits the making of an untrue, deceptive or misleading representation regarding various commercial transactions, including the sale of real estate.

[5] We note that Federated additionally argues that the trial court should have granted its motion for directed verdict at the close of the evidence because the evidence at trial did not support a finding of justifiable reliance. However, Federated did not raise this argument at the close of the evidence. As such, we address only Federated's motion after verdict, challenging the jury's answer to the "justifiable reliance" question.

(continued)

appellate court reviewing the trial court's ruling. *See* ***Weiss v. United Fire & Cas. Co***., 197 Wis.2d 365, 388, 541 N.W.2d 753, 761 (1995). Because the trial court is in a better position to decide the weight and relevancy of the testimony, an appellate court must give substantial deference to the trial court's better ability to assess the evidence. *See* ***id***. at 388-89, 541 N.W.2d at 761. We will not overturn a trial court's decision to dismiss for insufficient evidence unless the record reveals that the trial court was clearly wrong. *See* ***id***. at 389, 541 N.W.2d at 761.

Federated contends that the trial court erred in refusing to grant its motion after verdict because, as a matter of law, the evidence at trial showed no justifiable reliance on the part of Roskos. In answer, Roskos maintains that he justifiably relied on Federated's statements. Although the trial court denied Federated's motion, its holding was less than enthusiastic. The court stated: "The question is, is the verdict supported by the evidence.… I am satisfied, again, that a person of even an ordinary prudence maybe wouldn't have relied upon that. The jury chose not to adopt that view of the evidence. They found reliance. They found justifiable reliance."

It is undisputed that the information provided by Federated on the MLS data sheet and a diagram of the property indicated that the property was approximately 29 acres. It is also undisputed that the property consisted of 26.4 acres—not 29 acres. Thus, the jury's answer to the first question of whether

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We also note that Federated brought its motion challenging the sufficiency of evidence under § 805.14(5)(b), STATS., which governs the entry of judgment notwithstanding the verdict, not motions challenging the sufficiency of the evidence. However, at the hearing on the motion, Federated clearly challenged the sufficiency of the evidence as to the jury's "justifiable reliance" answer and expressly requested the court to change the jury's answer to verdict question 2. Because the parties and the court treated the motion as one challenging the sufficiency of the evidence and a request to change the jury's answer, we do likewise, despite Federated's "mislabeling" of the motion.

Federated made an untrue, deceptive or misleading representation was well supported by the evidence.

However, Federated argues that in order to recover under § 100.18, STATS., 1993-94, the plaintiff must additionally show a causal connection between the illegal practices and the pecuniary losses suffered. *See* § 100.18(11)(b)2; ***Tim Torres Enters., Inc. v. Linscott***, 142 Wis.2d 56, 70, 416 N.W.2d 670, 675 (Ct. App. 1987). Federated argues that this causal connection includes an inquiry into whether the plaintiff's reliance on the information was justified. It is on this basis that Federated challenges the jury's verdict.

The jury instructions given by the court were based on an instruction proposed by Roskos. The court's instruction stated:

> In determining whether or not [Roskos] actually relied upon the representations, the test is whether or not they would have acted in the absence of the representations. It is not necessary that you find that reliance was the sole and only motive inducing them to enter into the transaction. If the representations were relied upon and constitute a material inducement, that is sufficient.
>
> If you find, however, that the plaintiffs or persons to whom the representations were made knew them to be false, then there can be no justifiable reliance as nobody had the right to rely upon representations that they knew were untrue.
>
> Nor can there be justifiable reliance if [Roskos] relied on representations which they should have recognized at once as preposterous or which are shown by facts within their easy observation and their capacity to understand to be so patently and obviously

> untrue that they must have closed their eyes to avoid discovery of the truth.[6]

Federated argues that, as a matter of law, there was no justifiable reliance on the part of Roskos and therefore, the information it provided did not cause the pecuniary damages suffered by Roskos. We agree.

Roskos' own testimony establishes that he entered into the negotiations knowing that the size of the property was "approximately 29 acres." Therefore, Roskos' initial offer drafted by Braatz, Roskos' own agent, stated the acreage of the property in these approximate terms. Despite other changes during the parties' subsequent and substantial negotiations, this language endured into the parties' final counteroffer and acceptance and into their final purchase agreement. Despite this less than precise recital of the acreage, Roskos did not seek a survey on his own.

While the history to this point may not permit us to say that Roskos' reliance was not justifiable, when combined with the subsequent events, it clearly does. Two days before the closing, Roskos obtained a survey of the property at his lender's demand. The survey states the exact acreage of the property. But Roskos did not read the survey. We fail to understand how a person can be said to justifiably rely on a statement of acreage couched in "approximate" terms when the person has in hand subsequent information *which, if read, would correct any*

[6] The Uniform Civil Jury Instructions Committee has not, as yet, drafted an instruction covering § 100.18, STATS., 1993-94. Causation, however, is an element of an action under the statute. Section 100.18(11)(b)2, which authorizes a private action under the statute, states: "Any person suffering pecuniary loss *because* of a violation of this section … may sue … and shall recover such pecuniary loss." (Emphasis added.) Here, the verdict and the instructions did not expressly address this concept in terms of "cause." Instead, the verdict and instructions addressed the concept in terms of "justifiable reliance."

prior misinformation and which was prepared for the very purpose of delineating the borders of the property and establishing its acreage.

Roskos testified that he did not read the survey because of the flurry of events just before the closing and because he stood to lose $20,000 of his earnest money if he did not close. However, neither the delay in obtaining the survey nor Roskos and Mellowes' agreement regarding the earnest money can be attributed to Federated. A prudent buyer, purchasing "approximately 29 acres," would not wait until two days before a closing to obtain a survey. In fact, under the circumstances of this case, Roskos would not have obtained a survey at all had it not been for the insistence of his lender. Similarly, under these facts, a prudent buyer would read the survey regardless of the pressures presented by other provisions of the parties' agreement.[7]

This court was faced with an analogous situation in ***Foss v. Madison Twentieth Century Theaters, Inc.***, 203 Wis.2d 210, 551 N.W.2d 862 (Ct. App. 1996). There, Foss purchased land from Twentieth Century. Prior to the closing, Foss obtained a survey of the property which indicated that the property contained underground storage tanks. *See* ***id***. at 214-15, 551 N.W.2d at 864. Twentieth Century had not informed Foss about the tanks nor did Foss inform Twentieth Century that he had learned of the tanks. Additionally, Foss did not attempt to amend the offer of purchase to reflect his discovery. Foss proceeded with the closing without ascertaining either independently or through Twentieth Century whether the tanks were leaking. *See* ***id***. at 216, 551 N.W.2d at 864. When Foss had the tanks removed one month later, he discovered that one tank had been

[7] We also note that the record is silent as to whether the contingency involving the sale of Roskos' property had been met.

leaking into groundwater. Foss sought to recover damages from Twentieth Century for fraudulent misrepresentations alleging that it knew the underground tanks existed when Foss made his offer of purchase. *See* ***id***. at 217, 551 N.W.2d at 865.

This court stated that in order to succeed on a fraudulent misrepresentation claim, the plaintiff must do more than establish that the defendant misrepresented the facts. *See* ***id***. at 218, 551 N.W.2d at 865. The plaintiff must additionally prove that he or she believed the representation to be true and relied on it to his or her damage. *See* ***id***. As to Foss' claim, this court concluded:

> In early 1992 Foss learned that the property contained underground storage tanks, but he nevertheless closed the purchase of the property in July 1992. When he learned that a misrepresentation had been made, Foss was undeceived and, as a matter of law, he could no longer rely on the prior representation. The law will not permit a person to predicate damage upon statements which he does not believe to be true, for if he knows they are false, it cannot be said that he is deceived by them. Nobody has the right to rely on representations he or she knew to be untrue.

See ***id***. at 218-19, 551 N.W.2d at 865-66 (citation omitted).

We acknowledge that the facts of ***Foss*** differ from those presented in this case. While Foss admitted knowing, prior to closing, that there were underground storage tanks on the land, Roskos denies having learned of the actual acreage of the property until after the closing. In spite of this factual difference, we nevertheless see ***Foss*** as instructive. We see little difference between having the information and reading it, as Foss did, and having the information and not reading it, as Roskos did.

As the trial court instructed, there can be no justifiable reliance "if [Roskos] relied on representations … which are shown by facts within their easy observation and their capacity to understand to be so patently and obviously untrue that they must have closed their eyes to avoid discovery of the truth." We conclude that the evidence presented at trial, viewed in the light most favorable to Roskos, does not support the jury's finding of justifiable reliance. As such, the trial court's denial of Federated's motion after verdict was clearly wrong. We reverse the judgment entered on the verdict and the order denying its postverdict motions.[8]

[8] The dissent lays the blame for Roskos' troubles on the bank, reasoning that if the bank had not requested a survey, Roskos then could not be faulted for failing to read something that did not exist. This logic fails because it assumes that one who drafts his own offer to purchase with an "approximate" amount of acreage of unplatted lands without a survey is acting prudently in the first instance. Were the facts limited to those, a jury question as to justifiable reliance might exist. But the subsequent facts take this case out of the realm of reasonable debate as to Roskos' justifiable reliance. Here, the bank's requirement for a survey gave Roskos a second chance to protect his interests. Again, he failed to do so. The dissent's "tunnel vision" of the facts refuses to acknowledge that Roskos' conduct before the survey has any bearing on the question of justifiable reliance. As a result, the dissent fails to grasp that Roskos' failure to read the survey compounded, rather than negated, the unreasonableness of his reliance on Federated's representation.

The dissent also says that we have fashioned a new duty and provide no law in support. The dissent is wrong. The duty and the law are provided by § 100.18, STATS., 1993-94, which, as we have explained, requires the link of causation between the misrepresentation and the pecuniary loss. This law was presented via the jury instruction, proposed by Roskos himself, which phrased this element in terms of justifiable reliance.

The dissent apparently believes that every human act which might be branded as unreasonable or unjustifiable must be documented in some case or statute. That is not so for two reasons: first, it would be impossible for the law to set out such an endless recital; second, the law already provides the general standards by which a person's specific act in a specific situation is measured. Thus, a particular act in one setting might be reasonable or justified while in another it might be just the opposite. As the law has repeatedly said, each case must be judged on its unique facts. Here, Roskos himself asked that his conduct be gauged under the standard of justifiable reliance. His conduct failed his own test.

By the Court.—Judgment and order reversed.

Not recommended for publication in the official reports.

No. 96-2121(D)

BROWN, J. *(Dissenting).* I respectfully dissent from the majority decision because, in my view, it does not give full faith to the facts or full credit to the jury. Initially, it is important to underscore our standard of review. The jury is the ultimate arbiter of the facts, and a reviewing court will not and should not overturn a jury finding if there is *any credible evidence, under any reasonable view*, to support the verdict. *See* ***Meurer v. ITT Gen. Controls*****,** 90 Wis.2d 438, 450, 280 N.W.2d 156, 162 (1979).

Here, the majority has rendered a "spin" on the facts that the jury did not accept and then has reached conclusions based on its own dramatization. For example, the majority makes much of the fact that Roskos did not pick up the survey until shortly before the closing and, based upon the neglect shown in failing to get the survey until late in the hour, concludes that Roskos' excuse of being too rushed to read the survey was not credible. The majority appears to be saying, as a matter of law, that a person in Roskos' position would surely have set aside more time to purchase, retrieve and examine the survey.

But that was not the testimony. In truth, it was Roskos' lender, the bank, not Roskos, who suddenly demanded a survey forty-eight hours before the closing. This sent Roskos scrambling to get a survey to the bank in time to guarantee his financing. If Roskos failed to get the survey to the bank in time, he risked losing his financing and forfeiting $20,000 of the earnest money he had paid. And to say that Roskos "picked up" the survey, as claimed by the majority, is too simple a recitation of the facts. What really occurred was that Roskos went to the surveyor's office with his realtor, Braatz. Time was of the essence since the

bank wanted that survey. Braatz was "in ... a hurry to take it up to the bank to give it to the real estate transaction officer." Roskos let Braatz take care of it because Braatz was handling "everything." Roskos simply paid the bill. He saw a piece of paper in Braatz' hands. He never read it. As he told the jury, "As far as the details on [the survey] … I had no reason to worry about that. I was told it was 29.63 acres of land. I relied on what Federated said. There was no reason for me to look on the survey."

The jury could have easily concluded that for Roskos, the survey represented nothing more than a last-second obstacle he had to circumvent in order to appease his lender. His one and only concern was having a survey completed and in his lender's hands in less than forty-eight hours. Time was of the essence and Roskos felt he had no time. Although the majority may question Roskos' decision not to read the survey when the opportunity presented itself, I do not know how it can say that no other credible but contrary inference existed to support the jury's finding.

The majority cites ***Foss v. Madison Twentieth Century Theaters, Inc.***, 203 Wis.2d 210, 551 N.W.2d 862 (Ct. App. 1996). There, the purchaser of property lost a case on summary judgment when the trial court ruled that any purchaser who reads a survey and knows from the survey that a representation by the seller is untrue cannot as a matter of law be said to have "relied" on the seller's misrepresentation. *See* ***id.*** at 218-20, 551 N.W.2d at 865-66. The court of appeals affirmed. The majority concludes that this case can be decided as a matter of law just like ***Foss***, with the minor exception being that Roskos did not read the survey, while Foss did. The majority seems to contend that, in both cases, the purchaser had the truth in his hands.

Foss is inapplicable to the facts of this case. In ***Foss*****,** the purchaser obtained the survey because he knew the size of the land as stated in the offer to purchase to be wrong. *See* ***id.*** at 214-15, 551 N.W.2d at 864. He got the survey, therefore, with the intention of reading, understanding and applying it. The purchaser in that case admitted reading the survey, finding out about some underground tanks that he did not know about before, and making the conscious decision to rely on the seller's misrepresentation made in the contract even though he knew the facts to be otherwise. *See* ***id.*** at 215, 551 N.W.2d at 864.

But, unlike the purchaser in ***Foss***, Roskos had no reason to get a survey. He was satisfied based on the information that had already been given to him. It was not his idea to get a survey. It was the bank's. And the bank asked for it late in the hour and when time was of the essence. To say therefore that the only difference between Roskos and Foss was that Roskos did not read the survey and Foss did, is too simplistic. Foss had motive and purpose to obtain and read the survey. And Foss did read the survey. Roskos had no motive or reason to either obtain or read the survey.

In the body of its opinion, the majority appears to be unimpressed by this distinction. I arrive at this conclusion based on language in the majority decision found at page 9. There, the majority states that "[a] prudent buyer, purchasing 'approximately 29 acres' would not wait until two days before closing to obtain a survey." Majority op. at 9. What the majority is saying by this commentary is that any reasonable person in Roskos' position has a duty to order a survey so as to find out for certain what the exact acreage is that he is buying. Because Roskos did not obtain a survey at an earlier time, he cannot complain if he felt too hurried to read the survey. The majority appears to be holding that, in cases where a purchaser of unplatted land is only told of the approximate acreage,

the purchaser cannot justifiably rely on the representation as to the approximate acreage; the purchaser instead has a *duty* to independently determine the true and exact acreage.

I must profess that I am unclear about the point that the majority is trying to make in its response to my dissent. I read the footnote to sort of back away from its statement at page 9 of the opinion. In the footnote, the majority reasons that even if Roskos had no responsibility to order a survey early on, he certainly had a duty to read the survey when the opportunity presented itself. Thus, I am unclear whether the majority still believes that a prudent buyer of approximate acreage has some responsibility to get a survey and get it early. But I suspect that the majority does not mean to back off of its statement at page 9 of the opinion. I get this from its comment that Roskos' failure to read the survey when the opportunity arose, "compounded" his unreasonable action. I guess this means that the majority still feels that there is a duty to order a survey.

Despite its disclaimer that it is not creating a new duty for buyers of approximate acreage, that is exactly what the majority opinion stands for. It is saying that a person in Roskos' position has a duty to find out the exact acreage and, even if the purchaser does not do so, when given the opportunity to read a survey and find out the exact acreage, the purchaser has the duty to do so rather than rely on someone else's representation as to what the acreage is.

The majority cites no law to support its fledgling duty because none exists. The law does not require Roskos to read a survey, let alone commission it; he has violated no known legal duty. The majority's new found "duty" does not arise from a tome of law, but from its own evaluation of what a purchaser of unplatted land *should* do in these situations. Perhaps another person buying

unplatted land with only an approximate acreage available would order a survey well before closing or read a survey, if available, to learn the exact acreage. But Roskos did not and was under no obligation to do so. If he wanted to rely on the representation made to him by Federated, it was up to the jury to decide whether such reliance was reasonable.

It is within the province of the jury, not the reviewing court, to decide reasonable reliance. That is why we have a jury instruction to that effect. I see no reason to hold Roskos to a higher standard of conduct, as a matter of law, than the law requires. The trial judge correctly decided that the question was for the jury when it let the jury verdict stand. I respectfully dissent.[9]

[9] I would affirm the cross-appeal. However, I do not believe it necessary to discuss my reasons.