

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 6, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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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. 98-0716

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

DESTIN L. LUNDE,

PLAINTIFF-APPELLANT,

V.

FREDRIC L. CHASE AND HELEN B. CHASE,

**DEFENDANTS-THIRD-PARTY
PLAINTIFFS-RESPONDENTS,**

LINDA ECHAVARRY AND CENTURY 21,

DEFENDANTS,

V.

**ASSURED REALTY, INC., D/B/A CENTURY 21
ASSURED REALTY, LINDA M. ECHAVARRY AND
AAI SYNDICATE #1, LTD.,**

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Affirmed.*

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

PER CURIAM. Destin L. Lunde appeals from a judgment dismissing his action against Fredric and Helen Chase for breach of warranty, breach of contract and misrepresentation in the sale of a house to Lunde. We conclude that Lunde waived any claims based on prior warranties or representations by choosing to close the transaction after his receipt of the condition report disclosing defects. See *Lambert v. Hein*, 218 Wis.2d 712, 730, 582 N.W.2d 84, 92 (Ct. App.), *review denied*, 220 Wis.2d 365, 585 N.W.2d 157 (1998). We affirm the judgment.

Lunde's offer to purchase the home owned by the Chases was accepted on August 22, 1995. The contract required the Chases to provide a Real Estate Condition Report within ten days of his acceptance of the sale contract. On September 28, 1995, the Chases provided the condition report which indicated an awareness of certain types of defects, including:

defects in the structure of the property. Structural defects with respect to the residence or other improvements might include, but are not limited to movement, shifting or deterioration in walls or foundation; major cracks or flaws in interior or exterior walls, siding, partitions or foundation; wood rot; or significant problems with driveways, sidewalks, patios, decks, fences, waterfront piers or walls, windows, doors, floors, ceilings, stairways or insulation.

Thirteen of the twenty-eight paragraphs in the form report indicated certain defects. The report even acknowledged that remodeling had been done during the Chases' ownership without required permits. In the "additional

information” section of the report, the Chases wrote in “Sold: AS-IS.” Lunde’s signature on the report acknowledges his receipt of the document.

The closing was held on October 9, 1995. After the purchase, Lunde began to perform “finishing touches” to remodeling work the Chases had performed. Much of the drywall began to crack and the ceiling started to cave in. In trying to make repairs, Lunde discovered that supporting beams and floor joists were missing. Other missing components were discovered as well. Eventually Lunde had the house razed because the cost of repairs exceeded the value of the house.

Lunde commenced this action alleging that the Chases misrepresented the condition of the home. During discovery, the Chases served Lunde with a request to admit “that the property was sold to you ‘as is.’” Lunde admitted that request but later moved to amend the admission. The circuit court concluded there were no questions of fact that the sale was “as is” and granted the Chases summary judgment dismissing Lunde’s claims.

Our review on summary judgment is independent of the circuit court’s determination. *See Lambert*, 218 Wis.2d at 722, 582 N.W.2d at 88. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See id.* at 723, 582 N.W.2d at 88.

It is undisputed that the condition report disclosed an awareness of numerous defects. Under § 709.05(1), STATS., Lunde had the right to rescind the purchase contract after receipt of the report which disclosed defects. Lunde chose to proceed with the purchase.

In *Lambert*, we held that proceeding with a real estate purchase despite awareness of a defect constitutes a waiver of any claim based on warranties or representations relating to the disclosed defect. See *Lambert*, 218 Wis.2d at 730, 732-33, 582 N.W.2d at 92-93. Our holding was based on the purposes of inspection and disapproval procedures, which are to avoid future disputes and possible litigation and to give the buyer the opportunity to make an informed choice about whether to proceed with the contract or seek amendments to its terms. See *id.* at 729, 582 N.W.2d at 91. The delivery of the condition report and consequential right to rescind serve the same purposes. Thus, Lunde waived his right to pursue a breach of warranty or misrepresentation claim regarding matters disclosed in the condition report.

Having determined that Lunde's choice to proceed in the face of disclosed defects precludes his claims, we need not decide the issues Lunde raises with respect to the "as is" clause penned in the condition report. The ability to rescind after disclosure of a defect is statutory and stands independent of the "as is" sale. We note, however, that Lunde's contention that the condition report, and consequently the "as is" clause, was not a part of the contract is facially weak because the second page of the offer to purchase specifically referred to the condition report and the report was required by law. Moreover, Lunde acknowledged receipt of the condition report, and the insertion of the "as is" clause did not stand as a unilateral contract modification.

Lunde claims that the circuit court erroneously exercised its discretion in not permitting him to modify his admission that the purchase was "as is." Lunde attempts to create an issue of fact by modifying his admission. Although the "as is" clause makes the Chases' position stronger, it is not the decisive contractual provision. Lunde's admission of an "as is" sale is of no

consequence because he had the right to rescind after receipt of the condition report which disclosed defects.

Lunde attempts to create a factual issue by questioning whether the disclosure in the condition report was “full and fair.” He contends that there was no actual disclosure because the condition report did not include an explanation as to the known defects. Lunde would like to explain away the disclosed defects as an acknowledgment that certain remodeling tasks had not been completed. If Lunde wanted more of an explanation of the defects than the “as is” clause inserted in the explanatory section provided, he should have asked for it. As *Lambert* notes, a real estate transaction is a fluid, not frozen, situation. *See id.* at 730, 582 N.W.2d at 92. Lunde accepted the report as complete enough.

Further, given the extent of the defects disclosed in the condition report—thirteen out of twenty-eight paragraphs affirmatively indicated defects—as a matter of law, Lunde knew that the Chases’ representation in the offer of no defects and their oral representation that they were selling Lunde a “good house” were false. Lunde chose to purchase the house despite that knowledge. Lunde’s reliance on any representations was not justifiable. *See id.* at 731-33, 582 N.W.2d at 92; *Foss v. Madison Twentieth Century Theaters, Inc.*, 203 Wis.2d 210, 218-20, 551 N.W.2d 862, 865-66 (Ct. App. 1996).

Finally, we address Lunde’s claim under § 100.18(1), STATS. We agree with the Chases that a claim under § 100.18(1) for false advertising is not adequately set forth in the complaint simply by parenthetically including the statutory reference, as Lunde did here. Even if adequately raised in the complaint, the claim fails. To recover under § 100.18, a plaintiff must show a causal connection between the illegal practice and the pecuniary loss suffered. *See*

§ 100.18(11)(b); *Tim Torres Enters., Inc. v. Linscott*, 142 Wis.2d 56, 70, 416 N.W.2d 670, 675 (Ct. App. 1987). The required causal connection includes an inquiry into whether the reliance on the information provided was justified. As we have already noted, Lunde's reliance was not justified in light of the condition report.

By the Court.—Judgment affirmed.

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

