COURT OF APPEALS DECISION DATED AND FILED

October 14, 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. 98-1406

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

FRED W. SCHMELZLE,

PLAINTIFF-APPELLANT,

V.

KEN ADE AND KAREN ADE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

NETTESHEIM, J. Fred W. Schmelzle appeals from a small claims order dismissing his claim against Ken Ade and Karen Ade. Schmelzle alleged that the Ades misrepresented the condition of a dwelling he purchased from them and that he suffered significant damages as a result. On appeal, Schmelzle argues that the circuit court erroneously concluded that he failed to present sufficient evidence to support his claims of misrepresentation and damages. Schmelzle

additionally requests a new trial in the interests of justice. We reject Schmelzle's arguments.

On January 5, 1998, Schmelzle, acting pro se, filed a small claims complaint against the Ades.[1] The complaint alleged that in July 1996, Schmelzle purchased a home from the Ades based on a real estate condition report which contained misrepresentations as to the condition of the property. Schmelzle alleged that he suffered "multiple damages" as a result of the Ades' failure to disclose information regarding "floods, unauthorized construction and restructure of original design … without required permits."

A hearing was held before a circuit court commissioner on January 27, 1998, at which time a default judgment was entered against the Ades for failure to appear. Later the Ades' attorney filed a motion to vacate the default judgment. The court commissioner granted this motion and scheduled the matter for trial before the circuit court.

At the bench trial, the circuit court heard testimony from Schmelzle regarding the condition of the property. Following Schmelzle's testimony, the court explained to Schmelzle that although he had testified as to the specific problems with the property, he had failed to support his misrepresentation claim with evidence that the Ades knew or should have known of the problems prior to the closing. The court noted the absence of expert testimony as to the condition of the property, the cause of the condition and the noticeability of the condition. In

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[1] Schmelzle additionally named Bear Realty of Kenosha, Inc., as a defendant in the action. However, Bear Realty is not a party to this appeal.

addition, the court noted that Schmelzle had not presented competent evidence regarding damages.[2]

Because Schmelzle did not indicate that he had any further evidence to satisfy these deficiencies, the Ades moved for dismissal. In granting the Ades' motion to dismiss, the circuit court stated:

> [E]ven if you could overcome that first hurdle, namely, proving that these sellers knew about these conditions and lied about them at the time they sold you this house, you haven't and would not be able to overcome your second hurdle; that is, the damage portion of this case and prove by competent evidence that the value of this property was diminished as a result of their misrepresentation, as opposed to anything else.

On appeal, Schmelzle first challenges the circuit court's finding that he failed to present sufficient evidence to support his claim of misrepresentation. However, Schmelzle fails to develop any argument supporting this challenge; therefore, we deem it abandoned. *See* ***Reiman Assocs., Inc. v. R/A Advertising, Inc.***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 (Ct. App. 1981). On this basis alone, we affirm the order dismissing Schmelzle's complaint.

Alternatively, we affirm on the merits the circuit court's insufficiency of evidence rulings as to both misrepresentation and damages. "A motion challenging the sufficiency of the evidence may not be granted 'unless the court is satisfied that, considering all credible evidence 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 a party.'" ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 388, 541 N.W.2d 753, 761 (1995) (quoted source omitted). Applying

[2] The only evidence which Schmelzle proffered as to damages was hearsay—an assessment from the city assessor.

this standard to the evidence presented in this case, we conclude, as did the circuit court, that Schmelzle failed to present any evidence to sustain a claim of misrepresentation or damages.

"The elements of a claim for intentional misrepresentation are well established in this state: first, there must be a false representation of fact; second, it must be made with intent to defraud and for the purpose of inducing another to act upon it; third, such other person must rely on it and thereby be induced to act, to his own injury or damage." ***Lundin v. Shimanski***, 124 Wis.2d 175, 184, 368 N.W.2d 676, 680-81 (1985). The plaintiff must prove the elements of misrepresentation by clear and convincing evidence. *See* ***id***. at 175, 368 N.W.2d at 681. Schmelzle failed to do so in this case.

During his testimony, Schmelzle identified various problems with the condition of the property which conflicted with representations made on the real estate condition report. However, he did not present any evidence as to whether the Ades knew or should have known of the condition of the property. For instance, when asked whether the Ades were aware that the boards underlying the roofing were rotten, Schmelzle replied, "I wouldn't know if they knew or not." Schmelzle gave a similar response when asked whether the Ades were aware of a problem with the electrical system.

Essentially, Schmelzle relied upon the conflicts between the alleged condition of the house and the real estate condition report to support his claim of misrepresentation. Schmelzle assumed that the Ades would have been aware of the property condition because they had lived on the premises for sixteen years. However, we conclude that a mere conflict between the sellers' condition report and the alleged actual condition of the property is not, standing alone, sufficient

evidence of misrepresentation. As noted by the circuit court, Schmelzle did not present, nor was he prepared to present, any expert evidence as to the severity or duration of the conditions or whether they were sufficiently noticeable such that the Ades should have been aware of them.

As for damages, Schmelzle failed to provide testimony as to the effect that the conditions would have on the property value. An appraisal provided by Schmelzle indicated that the real estate was valued in an amount greater than the purchase price. Although Schmelzle also provided an assessment that the value of the property decreased from 1996 to 1997, he testified that this was the result of a reevaluation done by the city. More importantly, there was no explanation provided by either Schmelzle or the assessor as to the underlying cause of the decrease in value. We agree with the circuit court's ruling that Schmelzle failed to provide sufficient evidence to support his damages claim.[3]

Next, Schmelzle requests a new trial in the interests of justice because he did not have an opportunity to meaningfully present all the evidence in this case to the circuit court[4] and because he was not prepared to present much of

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[3] Schmelzle also contends that the circuit court erroneously limited the damages inquiry to direct damages. Schmelzle argues that he was additionally entitled to indirect and consequential damages. However, based on our review of the record, we conclude that Schmelzle failed to present sufficient evidence as to any claim of damages. Therefore, we need not reach this issue. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

[4] On this issue, Schmelzle also contends that the circuit court prematurely terminated the proceedings before he could present the testimony of an additional witness, his tenant who lived on the premises. Although Schmelzle does not develop this argument, we note that in an offer of proof, Schmelzle informed the court that this witness would be providing additional testimony as to the condition of the property. However, this witness would have simply echoed the testimony which Schmelzle had already presented. The tenant's proffered testimony would not have satisfied the deficiencies in the evidence which the circuit court had correctly noted.

the potential evidence due to his unfamiliarity with the process and "the nature of his evidentiary burdens." We reject Schmelzle's request.

Schmelzle's request for a new trial in the interests of justice is premised on the fact that the trial of this matter was conducted before the circuit court instead of a court commissioner. Schmelzle reasons that had the matter first been tried before the court commissioner, he then would have been prepared to shore up the gaps in the evidence which prompted the circuit court to dismiss his claim. Schmelzle contends that "according to the intent of the legislature, there is a learning process that occurs in pro se small claims litigation whereby informal hearings and trials before court commissioners allow plaintiffs to present their case in a way that gives them feedback and knowledge of the legal procedures and burdens involved in their particular case."

In so arguing, Schmelzle does not point to any statute or legislative history which shows either a legislative intention or requirement that a pro se small claims litigant is entitled to a "practice" hearing before a court commissioner before trying the case de novo before the circuit court. To the contrary, whether a small claims action will be tried by the circuit court or by a court commissioner is determined by the nature of the court commissioner's position and the authority delegated to the court commissioner, s*ee* § 799.206, STATS., not on the basis of whether a party to the action would benefit from the additional learning experience provided by a trial before a court commissioner. Schmelzle fails to advise us of the applicable procedure in Kenosha county.

Moreover, even if we were to adopt Schmelzle's reasoning as to this issue, his argument is waived. Schmelzle never objected to either the court commissioner's referral of the matter to the circuit court or the circuit court's

acceptance of the referral. The critical question is whether Schmelzle received a trial on his complaint. He did. We therefore reject Schmelzle's request for a new trial in the interests of justice.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.