COURT OF APPEALS
DECISION
DATED AND FILED

May 5, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP763 **Cir. Ct. No. 2010CV4300**

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

PAUL MARCHESE AND COLLEEN MARCHESE,

PLAINTIFFS-APPELLANTS,

V.

TROY MILLER AND TOTAL REALTY, LLC,

DEFENDANTS-RESPONDENTS,

TREUL ENTERPRISES, LLC, VICTORIA TREUL AND BRUCE ANNOYE,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: JANE V. CARROLL, Judge. *Reversed and remanded with instructions.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Paul and Colleen Marchese (the Marcheses) appeal a circuit court order overturning a jury verdict, in which the jury found that Troy Miller and Total Realty, LLC intentionally misrepresented a property for sale, engaged in unfair trade practices, and were negligent in their role as real estate brokers. Because sufficient evidence in the record supports the jury's verdict, we reinstate the verdict and reverse the circuit court's decision to the contrary.

BACKGROUND

¶2 On June 20, 2009, the Marcheses submitted an offer to purchase the vacant lot at 8502 West Euclid St., Milwaukee, to build a home. The Offer to Purchase was drafted by Troy Miller, a real estate agent for Total Realty, LLC (Total Realty). Miller was the listing and selling broker for the property. Treul Enterprises, LLC (Treul Enterprises) owned the property and was the named "seller" and "builder" on the Offer to Purchase. Miller submitted the offer to Bruce Annoye, an agent for Treul Enterprises, who signed it on June 22, 2009.

¶3 The lot had a storm water retention pond that had to be removed prior to building. Accordingly, the offer to purchase stated, "Builder shall obtain approval from City of Milwaukee and Homeowner's Association to relocate drainage pond within ten days of acceptance." Nine days after submitting the offer, the Marcheses had not heard anything about the relocation of the pond, prompting Colleen to contact Miller. Miller emailed Colleen, instructing her to draft an amendment to the Offer to Purchase, which would state: "Buyers to obtain construction loan by August 31, 2009. Construction to commence upon securing loan. First draw to include purchase of vacant lot by buyers." Instead, the Marcheses drafted an amendment to the Offer to Purchase, which specifically addressed their concerns about the pond, stating: "First draw on lot will not be

made until retention pond is relocated and homeowners association settlement is satisfied." The Marcheses signed the amendment and faxed it to Miller. They followed up with an email to Miller asking if the amendment was satisfactory. Miller responded, "That shouldn't be a problem." On July 30, 2009, Miller sent the Marcheses a fully executed copy of the amendment,[1] signed by Annoye, on behalf of Treul Enterprises.

¶4 On October 28, 2009,[2] Colleen and Miller began another email exchange about the pond. Colleen emailed Miller asking, "Is Bruce going to get started prior to closing with moving the pond?" Miller responded, "I would think that would all be done when they have the excavator there to finish digging the hole as I'm sure it needs to be expanded for the foundation." Colleen sent Miller a follow-up email on November 14, 2009, confirming that Annoye would move the pond prior to closing. She stated the condition "was part of our initial conversation and was on one of the amendments that it would be moved prior to the first draw on the lot." Miller did not address Colleen's comment about the amendment, but responded: "The pond will be moved in conjunction with the rest of the foundation being dug on the house."

¶5 On December 2, 2009, the parties closed on the sale of the lot. According to trial testimony, the Marcheses knew the pond had not been moved before closing, but assumed that the terms of the amendment were included in the closing documents and that money would not be drawn or paid to the sellers until the pond was moved. With Miller present, the Marcheses signed a number of

[1] Hereinafter we refer to the amendment as the "July 2009 amendment."

[2] The closing date was extended multiple times, with the parties eventually closing on December 2, 2009.

documents that they were seeing for the first time, including the closing statement. At no point during the closing process did Miller explain the terms of the closing statement, tell the Marcheses that the amendment would not be honored, or tell the Marcheses that the amendment was not even included in the closing statement.

¶6 In early January 2010, Colleen's mother, a retired real estate agent, reviewed the documents the Marcheses signed at closing. Colleen's mother informed the Marcheses that they signed a document authorizing payment to the seller (Treul Enterprises) for $100,000 and that the money was disbursed at closing—contrary to the terms of the July 2009 amendment. The pond was never moved and the Marcheses had to purchase a different property.

¶7 The Marcheses filed suit against Treul Enterprises, Victoria Treul (the owner of Treul Enterprises), Annoye, Miller and Total Realty. The Marcheses alleged common law intentional misrepresentation, unfair trade practices and civil theft against all of the defendants. As to Treul Enterprises, the Marcheses additionally alleged breach of contract. As to Miller and Total Realty, the Marcheses also alleged negligence. The case was tried to a jury.

¶8 After hearing testimony from multiple witnesses, the jury found that all of the defendants, except Victoria Treul, engaged in intentional misrepresentation and unfair trade practices. The jury found that Treul Enterprises breached its contract with the Marcheses, and that Miller, Total Realty, and the Marcheses were all negligent. The jury awarded the Marcheses damages in the amount of $133,300, attributing 60% of causal negligence to Miller, 30% to Total Realty, and 10% to the Marcheses.

¶9 Miller and Total Realty filed motions after the verdict. As relevant to this appeal, they argued there was insufficient evidence to support the jury's

verdict and that the jury could not find negligence without expert testimony about the standard of care required for real estate brokers.

¶10 The circuit court granted the motions and dismissed all of the claims against Miller and Total Realty with prejudice. At the hearing on the motion, the circuit court said:

> Three of the claims alleged against Total Realty and against Troy Miller, the common-law intentional misrepresentation, the violation of section 100.18 (unfair trade practices), and this civil theft, all require that a misrepresentation of fact be made.
>
> ….
>
> There [were] e-mails back and forth between the plaintiffs and Troy Miller, acting as the intermediary for Treul Enterprises and Mr. Annoye, and the e-mail reads as follows, quote: "That shouldn't be a problem."
>
> And that is one of the statements that the plaintiff is relying on as a statement of fact that was untrue.
>
> But in order for that to be an untrue statement, the evidence would have to support a finding that Troy Miller made that statement knowing full well that Mr. Annoye never intended to move the pond or intended to take the first draw on the money before he moved the pond in contrast to the statement in the amendment to the offer to purchase.
>
> And there was no testimony that Troy Miller knew or should have known or had reason to know that Mr. Annoye essentially defrauded the Marcheses by signing the amendment knowing full well that he was not going to follow through with the amendment. So that statement … "That shouldn't be a problem," it cannot form the basis for a claim of fraud or intentional misrepresentation or civil theft.
>
> The second statement … is found in the contract itself, which has the amendment….
>
> ….

> And [the] jury found that, in fact, the handwritten amendments were on the amendment at the time that Mr. Annoye signed it, making it a part of the valid contract that was the offer to purchase in this case….
>
> And Mr. Miller cannot be found to have misrepresented a fact by simply presenting a valid, lawful, signed contract to the buyers…. I don't even really understand the argument of how that is a misrepresentation. And the last portion of the plaintiff's argument that his silence somehow constituted a misrepresentation, that's just not supported by … evidence that … Mr. Miller … knew that Mr. Annoye intended to breach the contract, knew that he intended to make the draw before the pond was drained, and that he, by his silence, he misrepresented that intention….
>
> ….
>
> And, finally, with respect to the negligence claim, the negligence claim required the jury to understand it was essentially a professional negligence claim, a malpractice type of claim that Mr. Miller and Total Realty were somehow acting in a negligent manner. There was no testimony about the role of a realtor in this transaction….
>
> There was no testimony to conclude what [Miller's] obligations were, even if the record was developed as to what he knew when in terms of Mr. Annoye's intentions vis-à-vis the pond. So even though the record wasn't factually developed as to that, for the jury to conclude that he was somehow negligent in performing his duties does require expert testimony.

¶11 This appeal follows. Additional facts will be included as relevant to the discussion.

DISCUSSION

¶12 On appeal, the Marcheses argue that the circuit court erroneously dismissed the unfair trade practices, intentional misrepresentation and negligence claims against Miller and Total Realty. We conclude that credible evidence supports the jury's verdict on unfair trade practices and intentional

misrepresentation. We also conclude that the testimony here regarding the customs and practices in the real estate industry regarding closings of sales amply supports the jury's verdict on the question of negligence.

Standard of Review.

¶13 On appeal, our review of a jury verdict is strictly confined to whether the record contains any credible evidence that under any reasonable view supports the verdict. *See* ***Staehler v. Beuthin***, 206 Wis. 2d 610, 617, 557 N.W.2d 487 (Ct. App. 1996). We search the record for evidence supporting the jury's verdict, not for evidence that would sustain a verdict the jury could have reached but did not. *See* ***id.*** The task of assessing the credibility of the witnesses and the weight to be given to their testimony is one left solely to the jury, and where more than one reasonable inference may be drawn from the evidence, we must accept the inference drawn by the jury. *See* ***id.*** We review the need for expert testimony on the duty element of the negligence claim, a question of law, independently of the circuit court. *See* ***Stephenson v. Universal Metrics, Inc.***, 2002 WI 30, ¶15, 251 Wis. 2d 171, 641 N.W.2d 158.

Unfair Trade Practices.

¶14 The Marcheses argue that Miller and Total Realty falsely marketed the vacant lot as a lot upon which a home could be built. They allege that Miller and Total Realty knew during marketing that the lot was not buildable and could not become buildable until *after* purchase, and then, only *if* several impediments were removed, none of which were certain. Thus, the representation that the

Marcheses were purchasing a buildable lot at closing was false, in violation of WIS. STAT. § 100.18(1) (2013-14).[3]

¶15 WISCONSIN STAT. § 100.18(1) prohibits sellers from making deceptive, false or misleading representations or statements of fact to prospective buyers. *See* ***Malzewski v. Rapkin***, 2006 WI App 183, ¶23, 296 Wis. 2d 98, 723 N.W.2d 156. Section 100.18(1) provides in relevant part:

> No person, firm, corporation or association, or agent or employee thereof ... with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate ... shall make ... an advertisement, announcement, statement or representation of any kind to the public relating to such purchase ... which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

¶16 The purpose of WIS. STAT. § 100.18 is to protect the public by deterring sellers from making false and misleading representations. ***Novell v. Migliaccio***, 2008 WI 44, ¶30, 309 Wis. 2d 132, 749 N.W.2d 544. To establish a claim under §100.18, a claimant must prove three elements: (1) the defendant made a representation to the public with the intent to induce obligation; (2) the representation was untrue, deceptive, or misleading; and (3) the representation materially induced (caused) the plaintiff a pecuniary loss. ***Novell***, 309 Wis. 2d 132, ¶49. *See also* WIS JI—CIVIL 2418.[4]

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[4] Miller and Total Realty argue that WIS. STAT. § 100.18 is inapplicable because the Marcheses were no longer members of the public once the closing documents were signed. We do not address this issue because the fact remains that at the time Miller and Total Realty marketed the property, the Marcheses were members of the public who relied on Miller and Total Realty's representations.

¶17 Miller testified that he and Total Realty marketed the lot as a lot upon which a home could be constructed. Miller stated that he and Total Realty actually marketed the pond as a positive feature because the foundation was already dug, saving excavation costs. However, at trial Miller admitted the house could not be built upon the lot until the pond was moved and admitted that the lot was of little value if it was not buildable. Annoye testified that to have the pond moved, the City of Milwaukee would have to approve a storm water management plan, which had not been done before or during the marketing and sale of the property. Miller admitted that as of July 1, 2009, well before the closing, he knew the Homeowner's Association was against moving the pond and that the City would not approve moving the pond until the Association did. Finally, Annoye testified that he told Miller that he would not move the pond until he got paid—which would not happen until the closing. Thus, even if the Homeowner's Association and the City agreed to move the pond, which was by no means certain, Miller knew that Annoye would not move the pond until after Annoye got paid—after the closing. It is undisputed that the Marcheses purchased the lot to build a home, but, as of the date of closing, the lot was not buildable (nor was it buildable at the time of trial). Because they were unable to build on the lot, the Marcheses had to purchase land in a different location, resulting in a pecuniary loss.

¶18 The record amply supports the jury's finding that Miller and Total Realty engaged in unfair trade practices prohibited by WIS. STAT. § 100.18(1).

Intentional Misrepresentation.

¶19 Intentional misrepresentation has three elements: (1) a false representation of fact; (2) made with the intent to defraud and for the purpose of

inducing another to act on it; and (3) such person relies on the representation to his or her detriment. ***Lundin v. Shimanski***, 124 Wis. 2d 175, 184, 368 N.W.2d 676 (1985). A party claiming intentional misrepresentation must allege that the defendant misrepresented a fact to the claimant or to a third person with the intent that it would be communicated to or influence the claimant. *See* ***Friends of Kenwood v. Green***, 2000 WI App 217, ¶13, 239 Wis. 2d 78, 619 N.W.2d 271; ***Rendler v. Markos***, 154 Wis. 2d 420, 429, 453 N.W.2d 202 (Ct. App. 1990).

¶20 The Marcheses argue that by representing that the terms of the July 2009 amendment "shouldn't be a problem," Miller intentionally misrepresented that the first draw would not be made, and therefore the sellers would not be paid, until *after* the pond was moved as the July 2009 amendment specified. The Marcheses also allege that Miller never explained the terms of the closing statement to the Marcheses, and that Miller did not reveal that he never included the July 2009 amendment with the closing papers, which led the Marcheses to believe that the sellers would not receive sale proceeds at closing and that the July 2009 amendment was being honored.

¶21 At trial, Miller admitted that he knew the Marcheses were concerned about the pond approximately one month before they added the July 2009 amendment. Miller said that he received the closing statement for the property a week before the actual closing, but he was unable to recall when, if ever, he sent the closing documents to the Marcheses. He also claimed he could not recall if he sent the amendment to the title company for inclusion in the closing documents. Miller admitted it was his duty to provide all of the sale papers to the title company for the closing and to explain all of the closing documents to the Marcheses. He admitted that he did not explain to the Marcheses that the amendment was not included in the closing papers. When asked if he felt he had

been fair and honest with the Marcheses by not submitting the amendment at closing, Miller said yes because he did not believe the amendment was valid.

¶22 The Marcheses said they never saw the closing statement before the actual closing. Colleen Marchese testified that the first time Miller told her he did not believe the amendment was valid was on January 14, 2010, more than one month *after* the closing.

¶23 Annoye testified that he told Miller multiple times between July 30, 2009 (the day the amendment was executed) and December 2, 2009 (the closing date) that he (Annoye) did not intend to move the pond until he was paid for the lot.

¶24 The jury found as a fact that "the amendment to the offer of purchase of July 30, 2009 [was] part of a valid contract between the plaintiffs and Treul Enterprises[.]" The circuit court, in its decision on Miller's motions after the verdict, found, as a matter of law, that the amendment was a part of a valid contract between the Marcheses and Treul Enterprises:

> I do believe that that amendment was an enforceable contract, and the extensions to the contract incorporated the amendment, even though they didn't specifically say "the contract that was entered into and the amendment," that contract had been amended by that subsequent amendment; so I have no problem with that being part of the contract that existed between the parties, as the jury found.

Miller disagrees with this finding on appeal, but does not develop his argument.[5] We will not develop it for him. *See* ***Industrial Risk Insurers v.***

[5] Miller does not develop any theory or support for his conclusion that the amendment had expired. We cannot image how he could because the amendment and each successive extension of the closing date expressly incorporates all the preceding documents. And although the closing apparently occurred a few days after the last closing date, it closed on the terms of the preceding documents and so was with the parties' implicit stipulation to a further extension.

American Eng'g Testing, Inc., 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (we will not develop a party's argument for him).

¶25 A failure to disclose a material fact supports a claim for intentional misrepresentation if one has a duty to disclose. ***Ollerman v. O'Rourke Co.***, 94 Wis. 2d 17, 26, 288 N.W.2d 95 (1980). It is undisputed that Miller failed to disclose that the July 2009 amendment was not included in the closing statement and that the sellers would be paid at closing without having moved the pond. This was an intentional misrepresentation because Miller knew the Marcheses thought the sellers would not be paid until the pond was moved. Miller admitted that he had a duty to disclose all aspects of a valid contract, which the July 2009 amendment was.

¶26 The record also contains evidence that:

- Miller knew the Marcheses did not want the seller paid until the pond was moved. That was the point of the July 2009 Amendment;

- Miller instructed the Marcheses to draft an amendment to the offer to purchase after they shared their concerns, which they did;

- Miller confirmed that the terms of the amendment could be met. When Colleen Marchese asked Miller in her July 30, 2009 email if the language added to the Amendment was acceptable, Miller responded in an email of the same date: "That shouldn't be a problem."

- Miller admitted at trial that as of July 1, 2009, well before the closing, he knew the Homeowner's Association was against moving the pond and that the City would not approve moving the pond until the Association did.

- Annoye testified that he told Miller he did not intend to move the pond until he was paid;

- Miller knew of Annoye's intentions, but did not disclose this to the Marcheses.

Based on this evidence, we are satisfied that the jury could—and did—reasonably conclude that Miller and Total Realty falsely represented that, as required by the July 2009 amendment, the first draw would not be made until the pond was removed, and thus that the seller would not be paid until the pond was moved. This false representation was made with the intent to induce the Marcheses to close on the lot. The Marcheses relied on that false representation to their detriment.

Negligence.

¶27 The Marcheses contend that Miller and Total Realty negligently performed their duties as real estate brokers when they: (1) failed to submit the July 2009 amendment to Land Title Services, the company that prepared the closing documents for the lot; (2) failed to explain the terms of the closing statement to the Marcheses; and (3) failed to provide the Marcheses with the closing documents prior to the closing date. Because the circuit court concluded that the Marcheses' claim was essentially a professional negligence claim which required expert testimony, and that the testimony of the closing company employees who prepared the documents was insufficient, the court set aside the jury's verdict on the negligence claim.

¶28 Requiring expert testimony is an extraordinary step, ***Weiss v. United Fire and Casualty Co.***, 197 Wis. 2d 365, 379, 541 N.W.2d 753 (1995), that should

be taken only "when the issue to be decided requires an analysis that would be difficult for the ordinary person in the community." ***State v. Blair***, 164 Wis. 2d 64, 75, 473 N.W.2d 566 (Ct. App. 1991). "Expert testimony is not generally required to prove a party's negligence, and requiring expert testimony before a claim can get to the jury is an extraordinary step that should be ordered 'only when unusually complex or esoteric issues are before the jury.'" ***Trinity Lutheran Church v. Dorschner Excavating, Inc.***, 2006 WI App 22, ¶26, 289 Wis. 2d 252, 710 N.W.2d 680 (quoted source and internal citation omitted). "Where the presence or absence of negligence is 'reasonably comprehensible to the jury,' even though inferences are involved, expert testimony is not necessary." ***Id.*** (citation omitted). Testimony from lay witnesses "is generally held to be competent" when the witnesses testify "regarding matters within their field of expertise." ***Black v. General Elec. Co.***, 89 Wis. 2d 195, 212, 278 N.W.2d 224 (Ct. App. 1979); *see also* WIS. STAT. § 907.01. "The opinions are valid even though such opinions are not based upon technical or academic knowledge but upon expertise gained from experience." ***Black***, 89 Wis. 2d at 212; *see also* ***Tanner v. Shoupe***, 228 Wis. 2d 357, 596 N.W.2d 805 (Ct. App. 1999) (where witness was an auto mechanic with knowledge of the use and dangers of automobile batteries, witness did not need expertise in writing warnings in order to testify about a defective battery); ***Vonch v. American Standard Ins. Co.***, 151 Wis. 2d 138, 150-51, 442 N.W.2d 598 (Ct. App. 1989) (police officer who investigated the scene of an auto accident was qualified, based on his experience as officer, to testify as a lay witnesses regarding the scene of the accident, the location of the debris, the damage to the vehicles, the point of impact and if the absence of skid marks indicated whether the driver attempted to brake).

¶29 Whether Miller and Total Realty failed to provide adequate brokerage services to the Marcheses is neither unusually complex nor esoteric. Thousands of people in Milwaukee County have purchased real estate and thus have personally experienced closings of such purchases. According to 2012 data for Milwaukee County, there are 198,768 owner-occupied housing units within Milwaukee County.[6] The number of owner-occupied units comprises 51.3 percent of all housing units in Milwaukee County.[7] Companies, such as Land Title Services and numerous others in this area, specialize in preparing and providing the multiple documents necessary to purchase or sell real estate. While the experience of participating in the closing of a purchase or sale of real estate may not be universal, it is certainly not uncommon.

¶30 Here, witnesses employed for many years by Land Title Services[8] testified about the customary process of preparing closing documents. They explained the custom and practice of the closing industry based on their experience in that industry. Jackie Brown, a closing manager, testified that she has prepared documents for and attended closings since 1986. Brown stated that when closing services are ordered by a broker, in this case, Miller, it is customary for her to receive all of the necessary documents from the broker. Brown testified that offers to purchase can often be changed by amendments, making such amendments crucial to preparing accurate closing documents. Brown testified that the July 2009 amendment was never provided for the closing file of the lot Miller sold to the Marcheses.

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[6] *See* http://www.city-data.com/county/Milwaukee_County-WI.html (last visited April 29, 2015).

[7] *See* http://quickfacts.census.gov/qfd/states/55/55079.html (last visited April 29, 2015).

[8] Land Title Services performed the closing services for the lot at issue.

¶31 Carrie Fezzey, another employee of Land Title Services, testified that she prepared the actual closing statement used in this transaction. Fezzey stated that amendments to offers to purchase can contain terms that affect the offer to purchase, and are necessary to have a complete sales contract. She stated that she has conducted hundreds of closings in her seventeen years as a closer. She also stated that she sent the closing documents to Miller one week before closing, and the July 2009 amendment was not a part of the closing file.

¶32 Miller testified that as a listing broker, his responsibilities included ensuring that the transaction closes upon the agreed-upon terms and that the parties to the transaction understand the closing documents. Miller does not dispute that he failed to send the amendment to the title company (he said he did not recall), but instead excuses its omission by arguing that the amendment was not a valid contract because it had expired.[9] He said he received the closing documents from the title company a week prior to closing, but could not say when he provided those documents to the Marcheses. Colleen Marchese stated unequivocally that Miller did not give her the documents before the closing.

¶33 Based on this testimony described, expert testimony was not necessary for the jury to understand negligence as it applied to broker responsibilities; specifically, responsibilities to provide complete documents for closings and to explain the documents to the parties. Brown's testimony was admissible to explain Miller's duty to provide the amendment and explain all of the closing documents to the Marcheses—including the absence of the

[9] We note that Miller's appellate argument about the validity of the contract is different from his trial testimony. At trial he said it was not valid as written because Colleen Marchese had added language to the amendment. On appeal, he argues that it was not valid because it had expired prior to the closing date. As we have stated, the circuit court found it was a valid contract and we agree.

amendment. "[W]hen a member of one profession is 'familiar with the situation in issue,' such a person is 'competent to testify as to the accepted practice' applicable to a member of the other profession.'" *See* ***Kerkman v. Hintz***, 138 Wis. 2d 131, 148, 406 N.W.2d 156 (Ct. App. 1987), *reversed in part on other grounds by* 142 Wis. 2d 404, 418 N.W.2d 795 (1988) (citation omitted). The record established that Brown was sufficiently familiar with the documents necessary at closings to know that the July 2009 amendment should have been provided by Miller. The testimony established, without serious dispute, the routine practices for real estate brokers who order documents for closings and handle closings of real estate transactions. There was ample evidence from which the jury could conclude that Miller failed to provide the July 2009 amendment to Land Title Services, resulting in an inaccurate closing statement. The evidence also amply supports a jury finding that Miller did not give the Marcheses the relevant documents prior to closing, nor did he explain the terms of the closing statement to the Marcheses—most significantly that the entire purchase price of the lot would actually be paid immediately, even though the holding pond had not been removed. No additional expert testimony was required in this case to support the jury's verdict of negligence by Miller and Total Realty. The circuit court erroneously set aside the jury's verdict on negligence.

¶34 For the forgoing reasons, we reverse the circuit court's order. We remand with instructions to reinstate the jury verdict and take such further action as may be consistent with this opinion.

By the Court.—Order reversed and remanded with instructions.

Not recommended for publication in the official reports.