

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 22, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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**Nos. 98-2301
98-2302**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

No. 98-2301

**RONALD A. ARTHUR, HALCO FINANCIAL AND REALTY
CORP.,**

**PLAINTIFFS-RESPONDENTS-CROSS-
APPELLANTS,**

ZUPFER TIMBER CORPORATION INTERNATIONAL,

PLAINTIFF-RESPONDENT,

V.

WILLIAM J. KEEFE, AND RANDY KEEFE,

**DEFENDANTS-APPELLANTS-CROSS-
RESPONDENTS,**

STATEWIDE LOG AND LUMBER CO.,

DEFENDANT.

No. 98-2302

**RONALD A. ARTHUR, HALCO FINANCIAL AND REALTY
CORP.,**

**PLAINTIFFS-RESPONDENTS-CROSS-
APPELLANTS,**

V.

HANSON & LEJA LUMBER AND MEISTER LOG & LUMBER,

DEFENDANTS,

WILLIAM J. KEEFE AND RANDY KEEFE,

**DEFENDANTS-APPELLANTS-CROSS-
RESPONDENTS,**

STATEWIDE LOG & LUMBER CO., INC.,

DEFENDANT.

APPEAL and CROSS-APPEAL from an order of the circuit court
for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. William and Randy Keefe appeal from an order
dismissing the claims of Ronald Arthur and Halco Financial and Realty Corp.
(collectively Arthur) with prejudice and costs.¹ The gravamen of the Keefes'

¹ It would appear that the Keefes are not aggrieved by the circuit court's final order. The circuit court, however, dismissed the Keefes' defenses and counterclaims in prior non-final orders. By our November 11, 1998 order, we concluded that the Keefes were aggrieved by those non-final orders and that the Keefes had properly waited until the circuit court's final order to appeal. See WIS. STAT. RULE 809.10(4) (1997-98).

contentions is that the circuit court erroneously exercised its discretion when it sanctioned them for discovery abuse by dismissing their defenses and counterclaims and finding liability in Arthur's favor. Because we conclude that the circuit court properly exercised its discretion, we affirm.²

¶2 Arthur cross-appeals contending that the circuit court erred by: (1) failing to enter judgment in his favor for the specific dollar amount demonstrated, after finding the Keefes in default and liable on Arthur's claims; (2) ultimately dismissing Arthur's claims against the Keefes on the grounds that Arthur misused his attorney-client relationship with the Keefes; and (3) dismissing his claims against Hanson & Leja Lumber.³ We affirm the trial court's dismissal of Arthur's claims, but on grounds other than those relied upon by the circuit court. We conclude that Arthur failed to establish that the Keefes fraudulently induced him to enter into the logging contracts, and further, that he waived the right to present additional evidence on this issue when accorded the opportunity to do so. Consequently, Arthur cannot void the contracts and pursue his tort claims. Because Arthur has failed to establish a cause of action, we affirm the trial court's dismissal of his claims against the Keefes.

¶3 We also conclude that Arthur's failure to object to the trial court's dismissal of his claims against Hanson & Leja, and his decision not to present additional evidence of those claims despite the opportunity to do so, constitutes

² We conclude that the Keefes' additional contentions of trial court error are resolved by our determination that the circuit court properly exercised its discretion when it sanctioned the Keefes for discovery abuses.

³ Hanson & Leja Lumber purchased logs from Arthur. Arthur claims that the company underpaid him the value of the logs it purchased.

waiver of the claims against Hanson & Leja. Therefore, we affirm the trial court's dismissal of the claims against Hanson & Leja as well.

FACTUAL BACKGROUND

¶4 In September 1993, Ronald Arthur, a Milwaukee attorney, organized a complex joint venture project among himself, Halco (a business for which he served as president), the Keefes, Statewide Log and Lumber Company (Statewide) and Hanson & Leja. This project involved acquiring land, harvesting trees on the land, turning the trees into lumber, selling the lumber, and then subdividing and re-selling the land. By mid-April 1995, the relationship between the parties had disintegrated and the joint venture collapsed. Throughout the joint venture's existence, Arthur also served as the Keefes' attorney.

¶5 This appeal arises out of two trial court cases. In April 1995, Arthur filed a complaint in Marquette County seeking to enjoin the Keefes and Statewide from entering certain parcels of land and removing logs from the logging operation. The circuit court entered a temporary injunction. The Keefes answered, disputing the facts underlying Arthur's complaint and further alleging that Arthur had committed criminal acts. The Keefes demanded that the injunction be vacated, that the district attorney investigate criminal charges against Arthur, that all logs and property be returned to the Keefes, and that a security be posted for damages. Arthur amended his complaint seeking to bar the Keefes from committing further unlawful acts against his real or personal property. The Keefes responded by filing counterclaims against Arthur alleging fraudulent misrepresentation, misuse of the attorney-client relationship, and breach of contract. Those counterclaims were later amended in August 1997 to include

allegations of perjury, breach of contract, malicious prosecution, timber theft, defamation, abuse of process, and misrepresentation.

¶6 In August 1995, Arthur filed a separate action in Dodge County seeking a money judgment against the Keefes, Hanson & Leja, and Statewide. His complaint contained allegations of unfair trade practices in violation of WIS. STAT. § 100.18 (1997-98),⁴ conspiracy to cause trade and business injury in violation of WIS. STAT. § 134.01, timber theft in violation of WIS. STAT. §§ 26.05 and 26.09, theft in violation of WIS. STAT. § 943.20, trespass to land in violation of WIS. STAT. § 943.13, and conversion of personal property. In response, the Keefes moved for change of venue, a protective order staying discovery, and to dismiss the complaint. It appears that the Keefes then filed the same initial answer and counterclaims as those filed in Marquette County.

¶7 The Dodge County case was transferred to Marquette County in February 1996. The Keefes moved for consolidation, but the Marquette County circuit court was unable to consider the motion at the time because the Dodge County file had not been transferred to Marquette County. Throughout late 1995 and well into 1996, Arthur filed numerous sets of interrogatories, requests for admission, and requests for production of documents. Apparently, several of those requests went unanswered. On February 18, 1997, the court held a hearing in response to Arthur's motion seeking sanctions for discovery violations. Concluding that the Keefes had failed to respond to several discovery requests, including failing to deny requests for admission that they falsely and knowingly provided misleading accusations about certain "missing" documents in a bad faith

⁴ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

attempt to refuse to provide discovery evidence, the court imposed discovery sanctions. The court ruled that the Keefes had forfeited their day in court as far as any claims that they could present on the subject matter, and that liability would be determined against the Keefes on Arthur's claims. The court, however, specifically left open the determination of damages.

¶8 A written decision and order entered on May 9, 1997, clarified the February 18 bench ruling. The court held that by failing to respond to Arthur's requests for admissions: (1) the requests would be deemed admitted; (2) liability would be determined against the Keefes; (3) the Keefes' counterclaims would also be precluded; and (4) the matter of damages remained open. In addition, the court concluded that because the requests for admissions were filed in connection with the Dodge County case, and because there was no order as of yet consolidating the cases, only the liability issues formed by the Dodge County pleadings were determined against the Keefes, and the sanction applied only to the Dodge County case. The court applied this same holding to the Keefes' Dodge County counterclaims. According to the order, if any of the same issues were pleaded in the Marquette County case, they survived. The court instructed the parties to file appropriate motions to clarify the status of the two cases.

¶9 Arthur responded by submitting numerous motions, including a motion to consolidate the Dodge and Marquette County cases and a request that the February 18, 1997 sanctions apply to both actions. In a June 1997 oral decision, the court ordered the cases consolidated, and in August, the Keefes filed additional counterclaims in the Marquette County case. Additional motions followed, including another motion by Arthur seeking sanctions for egregious discovery violations as the result of still unanswered discovery requests. The court issued a scheduling order on February 24, 1998, directing that: (1) trial be

set in May; (2) the subject matter of the trial be limited to evidence on: (a) the nature and extent of Arthur's damages as a result of the facts set forth in the Dodge County case; (b) the Keefes' and Statewide's liability; (c) the facts established in the May 9, 1997 order; and (d) the Keefes' counterclaims properly asserted in the Marquette County case; (3) a separate hearing would decide preclusion issues and simplify issues of fact and law resulting from the party admissions; and (4) as to Arthur's latest discovery sanctions motion, Arthur would resubmit those requests and the Keefes were to respond by a date certain.

¶10 In March 1998, Arthur filed another motion seeking sanctions for allegedly egregious discovery violations. This motion alleged additional acts of dilatory conduct, including the Keefes' failure to attend a noticed deposition. On March 24, 1998, the court conducted another pre-trial conference, at which the Keefes did not appear. Arthur indicated that the Keefes had failed to respond to the discovery deadline issued in the prior scheduling order. The court granted judgment as to liability in Arthur's favor, finding the Keefes in default for failing to appear at the pre-trial conference. The court, however, declined to sanction the Keefes for failing to attend a deposition or for failing to respond to the discovery requests by the court-ordered deadline.

¶11 On May 1, 1998, the court entered a written order providing that, because the Keefes were in default for failing to appear at the pretrial conference, which had been set for the purpose of determining the nature of the trial evidence and the claims that would be the subject of the trial, and because they failed to attend a scheduled deposition, *all* of their claims were dismissed and the Keefes would not be allowed to submit evidence except in rebuttal. Furthermore, concluding that it was unable to determine whether a valid cause of action had been pleaded or established, the court ordered Arthur to prove at trial "with

sufficient credible evidence a cause of action in contract or quasi-contract such as unjust enrichment, evidence, in all of the usual elements, i.e., a valid contract, lawful termination, default or repudiation, appropriate election of remedies, plaintiffs' lawful rights to assets, income or other damages sought based on the terms of the contract or other cause, and damages specific to the party or parties responsible."

¶12 The trial commenced on May 13, 1998, and continued on June 17, 1998. The trial court ultimately dismissed Arthur's claims against the Keefes on the grounds that Arthur had misused his attorney-client relationship with the Keefes by engaging in a business relationship without advising them of a conflict of interest, instead seeking to protect his own self-interest.

KEEFES' APPEAL

¶13 We first turn to the merits of the Keefes' appeal. The Keefes contend that the trial court erroneously exercised its discretion when, on more than one occasion, it sanctioned them for discovery violations by dismissing their defenses and counterclaims and finding liability in Arthur's favor. In essence, the trial court's orders sanctioned the Keefes by granting a default judgment against them.

¶14 Default judgment may be granted as a sanction for violating discovery statutes or orders. WIS. STAT. § 804.12(2)(a)3. We review a trial court's decision to enter a default judgment under an erroneous exercise of discretion standard. *Midwest Developers v. Goma Corp.*, 121 Wis. 2d 632, 650, 360 N.W.2d 554 (Ct. App. 1984). A court properly exercises its discretion if it examines the relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could

reach. *See Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). To enter a default judgment, the trial court must determine that the “noncomplying party’s conduct is egregious or in bad faith and without a clear and justifiable excuse.” *Hudson Diesel, Inc. v. Kenall*, 194 Wis. 2d 531, 542, 535 N.W.2d 65 (Ct. App. 1995). We will sustain the court’s default judgment sanction if there is a reasonable basis for its determination. *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 276-77, 470 N.W.2d 859 (1991).

¶15 We conclude that the trial court did not erroneously exercise its discretion. The record sustains the trial court’s findings of progressive discovery violations. It contains a series of instances of the Keefes’ failures to provide adequate discovery, to comply with court orders directing responses to discovery requests, and to appear at a noticed pre-trial conference. The Keefes’ conduct caused Arthur to file no less than three motions for discovery violations. Furthermore, the record does not establish that the Keefes had a clear and justifiable excuse for failing to comply with discovery requests and court orders relating to discovery.

¶16 In the first of its orders imposing sanctions, the court considered both the Keefes’ written response to Arthur’s first motion and their testimony at the February 18, 1997 motion hearing. The Keefes did not deny, in either instance, that they had failed to respond to the requests for admission or the interrogatories. Instead, the Keefes offered a variety of excuses, claiming, for example, that they had not received the discovery requests and that their business records had disappeared or had been stolen. The court concluded that the Keefes did not demonstrate a justifiable excuse for their failure to produce and that their dilatory conduct was undertaken in bad faith. Accordingly, the court imposed

sanctions dismissing only the Keefes' Dodge County case defenses and counterclaims and found liability in Arthur's favor in that case.

¶17 Responding to a second motion, the court provided the Keefes an opportunity to complete the discovery process by identifying the specific remaining unanswered discovery requests, ordering Arthur to resubmit the requests, and providing the Keefes with a date certain in which to respond. Nevertheless, the Keefes failed to respond to the discovery deadline, defying the court's order. In addition, they failed to attend a subsequently noticed deposition and failed to appear at a noticed pre-trial conference. Ultimately, the court found the Keefes in default, dismissed all of their claims, and restricted the evidence they would be allowed to submit on rebuttal.

¶18 In each instance, the court identified and evaluated the Keefes' discovery violations. The record demonstrates that the acts were distinct and cumulative in nature. They included numerous failures to respond to discovery requests, defiance of court orders to appear and to respond to discovery, and failure to attend a noticed deposition and pre-trial conference. The record demonstrates that the Keefes were simply not willing to submit to the discovery process. The sanctions were imposed for what the trial court could properly characterize as egregious and unjustified conduct. It is apparent from the record that the trial court examined the relevant facts and applied the proper legal standards. *See Loy*, 107 Wis. 2d at 414-15. Based on its analysis, the trial court reached a conclusion that a reasonable judge could reach under the facts of this case. *See id.* Therefore, we conclude that the trial court properly exercised its discretion and we affirm.

ARTHUR'S CROSS-APPEAL

¶19 Arthur contends that the trial court erred by: (1) failing to enter judgment in his favor for the specific amount established at trial after declaring the Keefes in default and liable on Arthur's claims; (2) dismissing his claims against the Keefes on the ground that he misused his attorney-client relationship with the Keefes; and (3) dismissing the claims against Hanson & Leja. We begin by addressing Arthur's first two allegations of error.

¶20 It is undisputed that Arthur's relationship with the Keefes was predicated on the joint venture logging contracts. The underlying events alleged in the complaints arose because of those contracts. Arthur, however, has not sued for breach of contract. Rather, he seeks to rescind the contracts and sue under various tort theories. He claims that he was fraudulently induced to enter into the contracts based on his reasonable reliance on the Keefes' misrepresentations as to the volume of timber on the parcels of land being harvested, which convinced him to structure the contracts to include the Keefes sawing services in order to increase the timber's value.

¶21 Under Wisconsin law, a material misrepresentation of fact may render a contract void or voidable. *Bank of Sun Prairie v. Esser*, 155 Wis. 2d 724, 731, 456 N.W.2d 585 (1990). An action for rescission is addressed to the trial court's discretion. See *Mueller v. Michels*, 184 Wis. 324, 334, 197 N.W. 201 (1924). As we have previously stated, we will sustain the trial court's discretionary decision if the trial court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). And, even if the trial court considered

improper facts or held to a mistaken view of the law, we may still affirm if an independent review of the record reveals a basis for sustaining the trial court's action. *State v. Pittman*, 174 Wis. 2d 255, 268-69, 496 N.W.2d 74 (1993).

¶22 A claim of fraudulent inducement requires a statement of fact that is untrue, that the false statement was made with the intent to defraud and for the purpose of inducing the other party to act on it, and the other party's reliance on the false statement to his or her detriment. *Merten v. Nathan*, 108 Wis. 2d 205, 209 n.2, 321 N.W.2d 173 (1982). In addition, the detrimental reliance must be reasonable. See *Williams v. Rank & Son Buick, Inc.*, 44 Wis. 2d 239, 245, 170 N.W.2d 807 (1969).

¶23 In order to prove the cause of action, Arthur must present sufficient credible evidence from which a reasonable fact finder could conclude that he was fraudulently induced to enter into the logging contracts with the Keefes. Upon our independent review of the record, we conclude that Arthur has failed to meet his burden.

¶24 Arthur contends that the Keefes misrepresented the amount of timber on the various parcels of land, intentionally estimating a lower quantity than what they knew existed, in order to persuade him to structure the contracts to include the Keefes' sawing services because, according to the Keefes, sawed logs would increase the timber's value. Arthur supports his fraudulent inducement claim by relying on the higher volume of timber that was actually harvested, his contention that the Keefes only counted every other log harvested, and his testimony that he later learned from other sources that the information the Keefes represented to him was inaccurate. From this, he draws the inference that the Keefes knew more timber existed prior to negotiating the contracts, but withheld that information in

order to procure the sawing services, and then miscounted the trees as they were harvested to support their volume estimate.

¶25 We conclude that the inferences Arthur seeks to have drawn from the evidence are unreasonable. A discrepancy between the timber estimate identified in the contracts and the actual harvest is not sufficient, in itself, to give rise to a reasonable inference that the Keefes knew a higher volume of timber existed on the parcels of land or that the Keefes misrepresented the timber volume in order to defraud Arthur. Furthermore, Arthur's contention that the Keefes counted only every other log during the tree harvesting is without any evidentiary basis. Arthur offered no evidence that this actually occurred, and his testimony consisted of mere speculation and conjecture. Arthur appears to suggest that he reasonably relied on the Keefes' estimates because he was inexperienced and unfamiliar with estimating timber volume. However, the evidence establishes just the opposite. At trial, Arthur offered into evidence five detailed and complex damage calculations that he prepared. These calculations incorporated such variables as acreage, tree species, tree size, density of timber volume per acre, estimated percentage of merchantable trees and percentage of estimated board feet produced.

¶26 Considering the evidence Arthur presented in its totality, we conclude that Arthur has failed to establish a prima facie case of fraudulent inducement. His claim is grounded on unsupported, unreasonable inferences and speculation. We further conclude that he waived the opportunity to present additional evidence in support of his fraudulent inducement claim when he declined the trial court's invitation to schedule a second day of trial. Because we conclude that Arthur has failed to establish that he was fraudulently induced to enter into the logging contracts with the Keefes, he cannot void the contracts and

pursue his tort claims. Accordingly, because Arthur has failed to establish a cause of action, we affirm the trial court's dismissal of his claims against the Keefes.

¶27 Finally, we turn to Arthur's contention that the trial court also erred when it dismissed the claims against Hanson & Leja. According to WIS. STAT. § 805.11(1), a failure to object before a ruling or order is made constitutes a waiver of any possible error.⁵ Here, the trial court suggested that as a result of dismissing Arthur's claims against the Keefes, the action against Hanson & Leja would also get dismissed. The court stated that it was not asking for an immediate response and invited Arthur to present additional evidence at another day of trial. Arthur did not object to dismissal of the claims against Hanson & Leja and declined to present additional evidence when accorded the opportunity to do so. We conclude that Arthur waived any claim of trial court error on this issue. *See State v. Marshall*, 113 Wis. 2d 643, 653, 335 N.W.2d 612 (1983) (holding that failure to object to an alleged error at trial constitutes waiver of that claim on appeal). Consequently, we affirm the trial court's dismissal of the claims against Hanson & Leja.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

⁵ WISCONSIN STAT. § 805.11(1) provides: "Any party who has fair opportunity to object before a ruling or order is made must do so in order to avoid waiving error. An objection is not necessary after a ruling or order is made."

