

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 23, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1270

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

KELLY M. DORNEY AND KIM M. DORNEY,

PLAINTIFFS-APPELLANTS,

V.

**HOWARD D. WHITE, ESQ. AND CONTINENTAL CASUALTY
COMPANY,**

DEFENDANTS-RESPONDENTS.

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

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kelly and Kim Dorney appeal a judgment dismissing their legal malpractice action against Howard White and his insurer. White represented the Dornays in a land contract foreclosure action. The Dornays contend that White negligently failed to tender performance and close the

transaction and that he failed to assert legal defenses available to them. The jury found White not negligent. The Dorneys argue that White was negligent as a matter of law based on this court's earlier decision affirming the foreclosure judgment and based on undisputed evidence. We reject these arguments and affirm the judgment.

¶2 Under the terms of the land contract, the Dorneys were to purchase Bruce and Mary Walker's farm by paying the Walkers' mortgage payments for seven months and then making a balloon payment of \$89,500 plus interest on May 1, 1993. The contract stated that if the Dorneys failed to make any payment when due, "this land contract shall be terminated in the discretion of the Vendors and all prior payments shall be forfeited." The contract also provided that "time is of the essence and ... in the event of a default in the payment of any principal or interest which continues for a period of 30 days following the specified due date ... the entire outstanding balance under this contract shall become immediately due and payable in full" The contract also gave the Walkers other discretionary remedies that were not exercised.

¶3 The Dorneys obtained a \$65,000 loan commitment from a bank contingent on a clear title opinion. They did not acquire the clear title opinion and never received the loan from the bank. They did not make the balloon payment due May 1, 1993. The Walkers' attorney, Kevin Klein, then informed the Dorneys on May 6 that the contract was terminated.

¶4 The Dorneys retained White on May 25, 1993. He advised them that the land contract gave them a thirty-day "grace period" within which they could

attempt to make the balloon payment.¹ The Dorneys acquired a loan commitment of \$15,000 from a friend and informed White that they had the funds to pay off the contract and wished to do so. White contacted Klein on May 26 to discuss the Dorneys' payment of the land contract. Klein reiterated the Walkers' position that the contract had terminated and the Dorneys should vacate the premises. At that time, the Dorneys had not received the \$65,000 loan from the bank nor the \$15,000 loan from their friend, the combined total of which would have left them approximately \$10,000 short of the balloon payment due.

¶5 The Dorneys then filed an action for specific performance against the Walkers. Klein responded with a settlement offer that would allow the Dorneys to pay off the remainder of the land contract. On June 9, 1993, he gave the Dorneys five days in which to transfer the entire balloon payment to his trust account. During the five-day period, the Dorneys acquired the \$15,000 from their friend which they deposited in White's account. They would not allow White to transfer the \$15,000 to Klein's trust account during that period. They had still not obtained a clear title opinion and did not have the \$65,000 from the bank's contingent loan commitment.

¶6 The Walkers commenced an action for strict foreclosure on June 25, 1993. At a hearing scheduled to consider appointment of a receiver on July 21, the trial court determined, based on the parties' pleadings, that the Dorneys had no defense to the foreclosure action. White argued for a redemption period, stating that the Dorneys had equity in the farm and a loan commitment for the entire

¹ In this decision, as in our previous decision, we assume without holding that the contract allowed the Dorneys to make the balloon payment within 30 days after May 1, 1993. The parties have not briefed that issue and have assumed that this interpretation is correct. Because it does not affect our decision, we accept that interpretation.

amount. Klein argued that the Dorneys already had a redemption period since the due date almost three months earlier and that the Dorneys had not produced payment within that time. White countered that the bank would not release the \$65,000 loan without a clear title opinion and that defects in the title prevented closing. The trial court found in favor of the Walkers and granted strict foreclosure with no redemption period. The Dorneys requested reconsideration and an opportunity to present additional evidence regarding their equity in the farm. The trial court denied the motion, and the Dorneys appealed.

¶7 This court affirmed the judgment of strict foreclosure providing no redemption period, holding that the Dorneys did not properly preserve an objection to the court considering the merits of the foreclosure action at the July 21 hearing, their answer admitted all of the facts necessary to support a judgment of strict foreclosure, and the court properly exercised its discretion when it allowed no redemption period.

¶8 The Dorneys then brought this legal malpractice action against White, arguing that he should have tendered performance before the end of the grace period and should have scheduled a closing to force the Walkers to present clear title, thereby meeting the bank's requirement for the \$65,000 loan. They also faulted White for his failure to object to considering the merits of the foreclosure at the July 21 hearing and for waiving their defenses by focusing only on the request for a redemption. Both parties presented expert witnesses supporting their divergent views of an attorney's duties under the circumstances. The jury found that White was not negligent.

¶9 This court's earlier decision does not compel the conclusion that White was negligent as a matter of law. The opinion noted that he did not object

to the lack of notice that the July 21 hearing would decide the foreclosure and redemption issues. The opinion does not suggest, however, that such an objection would have been sustained or that the Dorneys were prejudiced by the lack of objection. The trial court could have merely rescheduled the hearing at which the Dorneys would again have no defense and no equitable basis for demanding a redemption period. Our opinion did not consider whether White reasonably chose to focus on the redemption question at that time.

¶10 In our earlier decision, we also noted that the answer admitted all facts necessary to support the strict foreclosure judgment. That opinion does not implicitly fault White for failing to raise defenses or suggest that any valid defenses existed. It implies no criticism of White for making the tactical decision to focus on requesting a redemption period rather than pursuing any other defenses of questionable merit. White could reasonably conclude that the defense that the Walkers repudiated the contract would not prevail, particularly when the Dorneys lacked proof that they could have obtained the necessary funds to perform during the grace period or the five-day settlement offer.

¶11 This court's earlier decision also concluded that the equities did not support granting a redemption. The land contract's short duration, the provision that time was of the essence, the lack of a down payment, and the failure to take advantage of the Walkers' June 9 offer to sell the property support the lack of a redemption period. The Dorneys further fault White for failing to present evidence in support of a redemption period. The evidence presented in the malpractice action does not establish any greater basis for a redemption period than the facts considered by this court in the earlier decision. Therefore, nothing in our earlier decision compels the conclusion that as a matter of law White negligently represented the Dorneys in the foreclosure action.

¶12 Next, the Dorneys challenge the sufficiency of the evidence to support the jury's verdict. The verdict will be sustained if there is any credible evidence to support it, particularly when it has the trial court's approval. *See Fehring v. Republic Ins. Co.*, 118 Wis. 2d 299, 305-06, 347 N.W.2d 595 (1984). The witnesses' credibility and the weight afforded their testimony are the jury's province. *See id.* It is this court's duty to search for credible evidence to sustain the jury's verdict.

¶13 Sufficient evidence supports the jury's finding that White was not negligent for his failure to tender performance or schedule a closing during the grace period. A reasonable view of the evidence supports White's position that the Dorneys did not have the ability to perform. The jury had the right to accept White's expert's testimony that a reasonable attorney would not misrepresent the ability of his clients to perform and would not schedule a closing knowing that his clients could not come up with the necessary funds by the closing date.

¶14 The jury could also reasonably find that the Dorneys were not able to comply with the five-day June deadline set by Klein. In addition, the Dorneys instructed White not to transfer funds into Klein's trust account even though that was a condition of the settlement offer. The jury could reasonably determine that the Dorneys, not White, failed to perform within the time allowed.

¶15 Sufficient evidence also supports the jury's finding that White was not negligent when he abandoned other defenses and focused on the redemption period at the July 21 hearing. White's expert testified that White was

faced with trying to salvage what was best for his client in the face of something that was not going very well. And rather than pursue tactics like requests for adjournment, which would probably not be granted ... or make requests

which the court appeared not to want to hear, he did what he could to try to salvage it for his client.

The evidence supports the finding that White made a reasonable tactical choice when he abandoned defenses of dubious merit in favor of a request for a redemption period. He succeeded in getting the trial court to seriously consider granting strict foreclosure and a thirty-day redemption period. The court ultimately changed its mind. The ultimate lack of success does not establish that the strategy was incorrect, much less negligent.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

