COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP978 **Cir. Ct. No. 2014CV1207**

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

SARAH GARVER,

PLAINTIFF-RESPONDENT,

V.

CAROLYN KRUEGER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. In this residential real estate misrepresentation case, Carolyn Krueger appeals from an order denying her posttrial motion to change answers in the verdict on the basis of insufficient evidence or, alternatively, for a new trial. The order also granted Sarah Garver's motion for all costs of investigation and litigation reasonably incurred pursuant to WIS. STAT. § 895.446(3)(b) (2015-16).[1] We affirm.

¶2 In April 2013, the Kruegers put their approximately sixty-five-year-old house on the market.[2] They had owned the house for about ten years. They indicated in the Real Estate Condition Report that they were unaware of any basement leaks or any other basement or foundation defects.

¶3 Garver first viewed the property online. She reviewed the Condition Report with her real estate agent over the phone and, the next day, submitted an Offer to Purchase without personally having seen the interior of the house. Garver made her offer contingent on her viewing the property and on a home inspection that disclosed no defects.

¶4 Garver engaged a state-licensed home inspector, who also is a degreed mechanical and structural engineer, to do the inspection. He identified a variety of concerns consistent with a house of that age, but saw no visible indication of basement moisture or stains, noted a working sump pump, and rated "basement drainage" as "satisfactory."

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless noted.

[2] Garver purchased the home from Carolyn Krueger and her husband, Carl. Carl is not a defendant, as he was deceased at the time this action was filed. "Krueger" refers to Carolyn.

¶5 The Kruegers' listing agent came to the house during the home inspection. The home inspector documented in his report: "Listing agent stated that owners had some seepage in basement in past however they sealed the cove and no more leaks since." The walls in the cove area looked freshly painted. The agent testified he did not know when the seepage happened, when the cove area was painted, or if the seepage was a one-time event.

¶6 Krueger accepted Garver's Amended Offer to Purchase which reflected a $4000 price reduction. The deal closed on June 15, 2013. Just one week later, Garver discovered water "streaming" into the basement from multiple points at the base of the walls. The leaks persisted, especially during heavy rains.

¶7 In 2014, Garver consulted two other experts, a professional structural engineer and a foundation repair person with forty-two years' experience. The engineer testified that in his opinion, based on the age of the property, the appearance of moisture staining, and how shortly after closing Garver saw seepage, the basement had been leaking for over ten years. He did not believe the attempt to seal the cove area with waterproofing paint was a proper repair. He estimated the cost of repairs to be approximately $24,000.

¶8 The foundation expert evaluated the basement walls in March 2014 and gave a repair estimate of nearly $19,000. He visited again shortly before trial in 2016. Heavy water staining and cracks not visible in 2014 were apparent in 2016. He estimated these additional repairs would come to about $6200, putting the two experts' repair estimates in the same ballpark.

¶9 Garver filed this action, alleging breach of contract (warranty), intentional misrepresentation, misrepresentation under WIS. STAT. §§ 895.446 and 943.20(1)(d), and misrepresentation under WIS. STAT. § 100.18. Garver withdrew

the breach-of-contract claim at the close of the evidence. The jury found that Krueger made false representations of fact regarding the property; knew the representations were false; made the representations with intent to deceive and defraud Garver; and obtained money through the sale of the property.

¶10 The jury also found that Garver believed Krueger's representations to be true; justifiably relied upon the representations to her pecuniary damage; was defrauded by the representations; and suffered monetary losses as a result. The jury found that $35,000 would fairly and reasonably compensate Garver for her monetary loss and awarded $25,000 in exemplary damages.

¶11 Krueger filed a motion under WIS. STAT. § 805.14(5)(c) to change two answers in the verdict—the jury's finding that Krueger violated WIS. STAT. §§ 943.20(1)(d) and 100.18—or, alternatively, to grant a new trial. Garver moved for all reasonably incurred costs of investigation and litigation. *See* WIS. STAT. § 895.446(3)(b). The trial court held a hearing on the motions, at which it denied Krueger's motion and granted Garver's.[3] Krueger appeals from that order.

¶12 Although she roundly challenges the jury's findings, Krueger contends our standard of review is de novo, reasoning that we must engage in statutory construction and review the denial of her 2015 motion for summary judgment. She misunderstands both our standard of review and what is before us.

¶13 First, a party who proceeds to trial waives the right to appeal an order denying his or her earlier motion for summary judgment. ***Wittke v. State ex***

[3] The transcript of the January 23, 2017 postverdict hearing was timely prepared and filed with the circuit court but was not transmitted as part of the record on appeal. This court granted Krueger's motion to supplement the record with that transcript.

rel. Smith, 80 Wis. 2d 332, 345, 259 N.W.2d 515 (1977). Beyond that, summary judgment was denied "for the reasons and on the grounds stated on the record." Krueger did not provide the hearing transcript. We thus must assume it supports the court's ruling. ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

¶14 Second, reviewing the denial of her postverdict motion to change verdict answers does not call for statutory construction. WISCONSIN STAT. § 805.14(5) governs motions after verdict. "Any party may move the court to change an answer in the verdict on the ground of insufficiency of the evidence to sustain the answer." Sec. 805.14(5)(c). Section 805.14(1) sets forth the standard of review for a challenge to the sufficiency of evidence to sustain a jury verdict:

> No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom 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 party.

We must affirm the trial court's denial of a motion to change verdict answers if there is any credible evidence to support the verdict, even when that evidence is contradicted and the contradictory evidence is stronger and more convincing. *See* ***Richards v. Mendivil***, 200 Wis. 2d 665, 672, 548 N.W.2d 85 (Ct. App. 1996). Motions challenging the sufficiency of evidence to support the verdict or an answer in a verdict are to be granted only if no credible evidence supports the verdict. ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 433-34, 509 N.W.2d 75 (Ct. App. 1993).

¶15 Krueger first argues that Garver could not have justifiably relied upon the misstatement in the original real estate condition report because Krueger

corrected it before Garver's right to terminate the offer to purchase under the inspection contingency had expired. "The general rule in Wisconsin, as elsewhere, is that the recipient of a fraudulent misrepresentation is justified in relying on it, unless the falsity is actually known or is obvious to ordinary observation." ***Hennig v. Ahearn***, 230 Wis. 2d 149, 170, 601 N.W.2d 14 (Ct. App. 1999). "[W]hether falsity is obvious is usually a question of fact." ***Id.*** at 170.

¶16 The evidence was sufficient for the jury to conclude that Krueger's late-stage recollection of the painted-over seepage did not correct the condition report but added another layer of falsity that was not obvious to Garver. It reasonably could conclude that Garver justifiably relied on the Kruegers' condition report answer that, despite ten years of ownership, they were not aware of basement problems—an answer later developments showed was suspect.

¶17 Krueger also asserts that Garver failed to prove the elements of a civil cause of action under WIS. STAT. § 895.446 and the requisite criminal intent under WIS. STAT. § 943.20, the theft-by-fraud statute because any "false" representation on the condition report was corrected when Krueger suddenly "remembered the prior seepage and repairs." At least one expert opined that the basement experienced leakage for years. Krueger testified she did laundry in the basement. Garver testified that Krueger's washer and dryer were located on an elevated slab and that that was one of the areas of later seepage. It cannot be said that "no credible evidence supports the verdict." ***Sievert***, 180 Wis. 2d at 433.

¶18 In yet another challenge to the sufficiency of the evidence, Krueger contends that Garver failed to establish her WIS. STAT. § 100.18(1) claim. To prevail, one must prove that, with the intent to induce an obligation, a party made a representation to a member of "the public," ***id.***, that the representation was

untrue, deceptive or misleading, ***id.***, and that the representation caused a pecuniary loss, § 100.18(11)(b)2.; ***K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.***, 2007 WI 70, ¶19, 301 Wis. 2d 109, 732 N.W.2d 792.

¶19 Whether Garver was a member of the public was a jury question. *See* ***K & S Tool & Die***, 301 Wis. 2d 109, ¶2. There was evidence that Garver received the condition report before contracting to purchase the house, making her a member of the public. *See* ***Fricano v. Bank of Am., N.A.***, 2016 WI App 11, ¶28, 366 Wis. 2d 748, 875 N.W.2d 143.

¶20 Krueger also asserts that Garver did not prove that the claimed misrepresentations materially induced her alleged pecuniary loss. A plaintiff need not prove justifiable reliance in a WIS. STAT. § 100.18 claim, but the reasonableness of his or her reliance may be relevant in considering whether the representations induced the pecuniary loss. ***Novell v. Migliaccio***, 2008 WI 44, ¶47, 309 Wis. 2d 132, 749 N.W.2d 544. Whether misrepresentations cause pecuniary damage is a question of fact. ***K & S Tool & Die***, 301 Wis. 2d 109, ¶2.

¶21 Krueger contends Garver could not have been materially induced to buy the property based on the original statement in the condition report because the misstatement was timely corrected. Garver testified, however, that she trusted in the Kruegers' condition report statements, as they had lived there for a decade, and that she also relied on the results of the inspections which initially did not reveal leakage. The misrepresentations did not have to be the sole motivation for Garver's decision to purchase the property. *See* ***Fricano***, 366 Wis. 2d 748, ¶34. There was evidence to allow the jury to decide that the representations materially induced her pecuniary loss. *See* ***id.***, ¶35.

¶22 Beyond that, Krueger asserts that Garver did not suffer pecuniary loss because as of trial she had not yet undertaken any repairs and, further, as the parties had negotiated a $4,000 price reduction, she actually came out ahead. We reject such a crabbed reading of the meaning of "pecuniary loss."

¶23 "[A]lthough WIS. STAT. § 100.18 does not define 'pecuniary loss,' the plain meaning of the term is broad enough to encompass any monetary loss, including the full purchase price, subject to the claimant's proof…. BLACK'S LAW DICTIONARY defines pecuniary damages as '[d]amages that can be estimated and monetarily compensated.'" ***Mueller v. Harry Kaufmann Motorcars, Inc.***, 2015 WI App 8, ¶22, 359 Wis. 2d 597, 859 N.W.2d 451 (alteration in original; emphasis omitted).

¶24 Garver testified that she already had rejected one house with a known leaky basement and that if Krueger's basement had been shown in its true condition, she "definitely" would have gotten "an estimate of what this may cost and negotiate from there." Her experts testified that necessary repairs likely would run in the tens of thousands of dollars. Garver testified that she thought it prudent not to undertake the repairs pending the outcome of trial. Sufficient evidence supported the jury's finding that Garver incurred pecuniary loss.

¶25 Krueger also complains that the trial court erred by allowing testimony about the reason for the $4000 price reduction. Krueger objected to testimony that the home inspection revealed the immediate need for a new roof, that it would cost $8000, and that the parties agreed to split the cost. Noting that the parties had dealt with the matter pretrial, the court overruled Krueger's objection "consistent with the earlier ruling of the court." Krueger now complains that the court erred by allowing testimony about the intended use for the $4000

because a court "cannot allow parole [sic] evidence to be admitted at trial that confounds the clear and plain language of the amended offer to purchase," which is silent in that regard.

¶26 Krueger had filed a motion in limine to preclude testimony regarding the purpose of the price reduction. The court denied the motion. We review such rulings under a discretionary standard and will not reverse if the court made a reasonable decision based on the pertinent facts and applicable law. ***F.R. v. T.B.***, 225 Wis. 2d 628, 649, 593 N.W.2d 840 (Ct. App. 1999).

¶27 Garver asserts that, under ***Cobb State Bank v. Nelson***, 141Wis. 2d 1, 7-8, 413 N.W.2d 644 (Ct. App. 1987), the court "properly declined to exclude testimony based on the disfavored parol evidence rule." Krueger did not provide the hearing transcript, however, so we do not know with certainty the court's rationale for its ruling. Again, we assume a transcript supports the court's ruling. *See* ***Fiumefreddo***, 174 Wis. 2d at 26-27. And Krueger does not allege that admitting the challenged testimony has affected her substantial rights. *See* WIS. STAT. RULE 805.18(2).

¶28 Finally, Krueger's brief is sprinkled with criticisms of the "special verdict jury instructions." She neither develops a cohesive argument nor directs us to any part of the record. We could stop there, as an appellate court need not consider undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶29 We point out, however, that the form of special verdict questions is within the trial court's wide discretion. ***Estate of Hegarty v. Beauchaine***, 2006 WI App 248, ¶46, 297 Wis. 2d 70, 727 N.W.2d 857. Our review of the special verdict and the postverdict hearing transcript satisfies us that the trial court gave

careful attention to fashioning special verdict questions that covered all of the material factual issues, and thus did not erroneously exercise its discretion. *See* ***Meurer v. ITT Gen. Controls***, 90 Wis. 2d 438, 445-46, 280 N.W.2d 156 (1979).

By the Court.—Order affirmed.

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