

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 20, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 00-3077

Cir. Ct. No. 99-CV-87

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JEFFREY D. RIESTER AND JONE M. RIESTER,

PLAINTIFFS-RESPONDENTS,

V.

ARNOLD SCHLEICHER AND DIANE I. SCHLEICHER,

**DEFENDANTS-THIRD-
PARTY PLAINTIFFS-APPELLANTS,**

V.

CAROLYN HITZEMAN AND PROFESSIONAL REALTY, INC.,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Door County:
PETER C. DILTZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Arnold and Diane Schleicher appeal a judgment granting Jeffrey and Jone Riester specific performance on an option to purchase real estate. The trial court separated this action from the Schleicher's third party misrepresentation action against the real estate agent who arranged the transaction. The Schleichers argue that: (1) the trial court should have conducted a single jury trial on all claims rather than trying the equity claims first to the court; (2) they were denied a fair trial because they did not have adequate notice that the equity action would be tried to the court; and (3) the court improperly allowed the real estate agent's attorney to examine witnesses in this trial. Because we conclude that the trial court properly separated the claims and tried the equity issues without a jury, and the Schleichers have not established any prejudice from lack of notice that the claims would be tried to the court or from the real estate agent's attorney's participation, we affirm the judgment.

¶2 The Schleichers agreed to sell the Riesters eighty acres of real estate for \$80,000 at the Riesters' option. When the Riesters exercised that option, the Schleichers refused to convey the property. The Riesters brought this action for specific performance of the option contract. The Schleichers defended their refusal to sell, alleging fraudulent misrepresentation, and counterclaimed against the Riesters, seeking money damages for that misrepresentation. They also impleaded the real estate agent, seeking money damages against her for the misrepresentation. The trial court granted the Riesters summary judgment on the counterclaim for damages. It then required the Schleichers to elect a remedy because the claim for rescission was inconsistent with the claim for money

damages. The Schleichers elected rescission.¹ The court then conducted a trial to the court on the specific performance and rescission claims. The court found against the Schleichers on the misrepresentation claims and ordered them to convey the property to the Riesters.

¶3 The trial court properly determined that a separate trial on the equity issues should be tried without a jury. Upon electing the remedy of rescission for the alleged misrepresentation, only equity issues existed between the Riesters and the Schleichers.² Specific performance and rescission of a contract are actions in equity and are not triable as a matter of right to a jury. *See Green Spring Farms v. Spring Green Farms*, 172 Wis. 2d 28, 33, 492 N.W.2d 392 (Ct. App. 1992).

¶4 The Schleichers have not established any prejudice from their lack of advance notice that the equity actions would be tried to the court. They do not identify any strategy or preparation that would have been different if the case had been tried to a jury. We perceive no disadvantage to the Schleichers in having trial to the court when they were expecting a trial by jury. Therefore, any error in failing to give them additional notice was harmless. *See WIS. STAT. § 805.18* (1999-2000). The Schleichers' position is not comparable to the circumstances described in *Norwest Bank Wis. Eau Claire v. Plourde*, 185 Wis. 2d 377, 390-91,

¹ The Schleichers argue that, at a subsequent hearing, the trial court determined that the Schleichers would not be required to make an election of remedies. Their citation to the record, however, does not support that statement. They cite the clerk's minutes which indicate that the court concluded the matter would not be tried to a jury. The minutes do not indicate any change in the election of remedies.

² The trial court has not yet determined whether the action for damages against the real estate agent survives the election of remedies. The trial court took that issue under advisement at the pretrial conference and the Schleichers have never requested that the court rule on the issue. We express no opinion on that issue or whether the Schleichers are entitled to a jury trial if the third party action is tried.

518 N.W.2d 265 (Ct. App. 1994) where the parties, during the trial, did not know whether the jury was the ultimate fact finder or merely an advisory jury. Here, the parties presented their evidence knowing that there was no jury.

¶5 Likewise, the Schleichers have not established prejudice from the real estate agent's attorney's participation in the trial. They speculate that they may be prejudiced if there is a trial on their third party complaint against the real estate agent because the Riesters might then be deemed nonparties for purposes of discovery and hearsay exceptions. That speculative chain of events does not constitute sufficient harm to merit review of the issue.

By the Court.—Judgment affirmed.

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

