COURT OF APPEALS
DECISION
DATED AND FILED

August 20, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0416 **Cir. Ct. No. 01 SC 19792**

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

VICTORIA A. BADZINSKI,

PLAINTIFF-RESPONDENT,

V.

MERLE PATNODE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Reversed.*

¶1 SCHUDSON, J.[1] Merle Patnode, *pro se*, appeals from the trial court order, following a small claims court bench trial, awarding Victoria A. Badzinski $5000 plus costs. Although Patnode makes many assertions that do not

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a), (3). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

easily reduce to legal arguments, he primarily seems to contend that the trial court erred in: (1) basing its factual findings and decision "on warranties and contract which were clearly not part of the Home Inspector's Pre-Inspection Agreement, stating no implied or expressed warranties"; and (2) awarding damages for costs that, he maintains, were caused by Victoria A. Badzinski and her husband after his inspection of the home they purchased.

¶2 Because the Patnode-Badzinski inspection agreement specifically stated that no such warranty was provided, and because nothing in the inspection report altered that provision, this court concludes that the trial court erred in determining that Patnode provided a warranty and was therefore liable for foundation repairs to the Badzinski's home. Accordingly, this court reverses.

¶3 According to the trial evidence, Badzinski and her husband were considering the purchase of a home for which they received a Real Estate Condition Report stating, in part, that the owner was "aware of defects in the basement or foundation (including cracks, seepage and bulges)," and referring to "light seepage during heavy rain." Consequently, on June 6, 2000, Mr. Badzinski contracted with Patnode, a licensed home inspector, to perform an inspection of the property for $75.

¶4 The Badzinski-Patnode "Pre-Inspection Agreement" provided that the inspection would be of the "foundation only." It further specified, in part:

> The Inspector will perform a visual inspection and prepare a written report of the apparent condition of the readily accessible installed systems and components of the property existing at the time of the inspection. Latent and concealed defects and deficiencies are excluded from the inspection.
>
> The parties agree that the American Society of Home Inspectors, Inc. … "Standards of Practice" … shall

> define the standard of duty and the conditions, limitations, and exclusions of the inspection and is incorporated by reference herein. A copy of the Standards is included with this report.
>
> ….
>
> The parties agree and understand the Inspector is not an insurer or guarantor against defects in the structure, items, components or systems inspected. INSPECTOR MAKES NO WARRANTY, EXPRESS OR IMPLIED, AS TO THE FITNESS FOR USE, CONDITION, PERFORMANCE OR ADEQUACY OF ANY INSPECTED STRUCTURE, ITEM, COMPONENT, OR SYSTEM.

The incorporated Standards of Practice further provided, in part, that "inspections done in accordance with these Standards are visual and are not technically exhaustive," and, "**Inspectors are NOT required to:** offer warranties or guarantees of any kind." *See also* WIS. STAT. § 440.975 (codified version of the incorporated Standards of Practice).

¶5 Patnode's inspection report noted: "SOUTH[]WEST[] CORNER HAS OLD MOVEMENT THAT HAS STOP[PED] S[I]NCE REMORTERED." The report also provided "additional comments" stating: (1) "D[i]vert down spouts AWAY from HOUSE[.] Back fill CORNERS OF FRONT PORCH AREA AWAY FROM HOUSE."; (2) "Remorter cracks for maint[e]n[a]nce."; (3) "NO MAJOR PROBLEMS FOUND."; and (4) "STEP CRACK IN SOUTH WEST CORNER HAS NO app[]arent MOVEMENT AT THIS TIME."

¶6 The Badzinskis purchased the home. Approximately ten months after Patnode's inspection, and after experiencing problems with seepage in the basement, they had Charles Weber, a specialist in foundation inspections, inspect the foundation. Weber concluded that Patnode's advice to them had been inadequate to deal with the underlying drainage problems affecting the foundation.

¶7 On June 29, 2001, Badzinski brought a small claims action against Patnode alleging: "Suing for basement repairs which are need[ed,] and Home Inspector[] M[] Patnode was not qualified to give the advice he did [.]" A court commissioner, concluding that Badzinski had failed to prove her case, dismissed her action; Badzinski appealed to the circuit court. Following a bench trial, the circuit court found for Badzinski.

¶8 At the trial, Weber testified that Patnode had failed to detect "blatant defects with the foundation" that should have led him to advise the Badzinskis to seek specialized foundation services. He testified that Patnode incorrectly concluded that the base-plate channeling/sump pump system, already in place, would be sufficient to address the seepage problem once the Badzinskis took care of the gutters, downspouts, and grading as he recommended. Weber emphasized that the problem was far more serious, requiring thorough analysis with attention to the drain tile system. He also clarified that the home had an "ongoing long-term seepage problem" that was "blatantly obvious," and that it had not just developed since the time of Patnode's inspection (regardless of the fact that, in the interim, the Badzinskis had cut a substantial section from the base-plate channeling system, leaving it inoperative).

¶9 Mrs. Badzinski also testified. She acknowledged that, regarding the agreement with Patnode, "I guess there was nothing that was warrantied or promised." She also conceded that Patnode performed the inspection for which he was hired, but maintained that he was "negligent." She testified:

> He did not fully report any -- if he says that he's doing his job and he knows foundations, well then why didn't he see these obvious problems? And these aren't like they [had] to drill up the concrete to see these problems. These were obvious problems when you walked into that basement. If

> you know basements you know there's a problem. I would not have purchased that house period.

¶10 Patnode disputed much of what Weber and Mrs. Badzinski said. He maintained that his inspection was accurate, given the condition of the basement at the time he viewed it, and that the Badzinskis' modifications of the property accounted for the more serious seepage problems they were experiencing.

¶11 The trial court expressed some sympathy for Patnode's plight, stating that "southeastern Wisconsin is a swamp and wet basements are the norm," and "a home inspector isn't a prophet." Nevertheless, the court concluded:

> However, I have a problem with the way you wrote up your report, Mr. Patnode. It's in that additional comment's [sic] page that I have my basic problem. You put in caps set off in the center, "no major problems found." And you went too far when you wrote that, and that's what in my judgment puts you on the hook in this case. You need to be more prudent, more cautious, when you write these up.
>
> I have just read your agency standards.… [W]hen you go as far as you did in this case[,] you put yourself on the hook with a warranty because you went so far as to lead these homebuyers to believe no major problem existed. And, indeed, there was a major problem.
>
> ….
>
> There was an iron ocher buildup that choked off the drain tile and floor drain system. There was a remedial attempt in this base system, however, given the cracks that you had seen and given the seepage that you were able to recreate in your demonstration in June of 2000 with Mr. Badzinski, and given these additional factors, you should have known better than to warranty to these folks that there were no major problems found. And so because you wrote that, I find you liable for repair of those major problems.

¶12 On review, a trial court's factual findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." WIS. STAT. § 805.17(2).

However, the application of a set of facts to the terms of an agreement and the determination of the parties' rights under that agreement present issues of law this court reviews independently. *See* ***Bence v. Spinato***, 196 Wis. 2d 398, 408, 538 N.W.2d 614, 617 (Ct. App. 1995).

¶13 Here, this court accepts the trial court's assessment of the facts and, therefore, assumes, for purposes of this appeal, that Patnode negligently advised the Badzinskis that no major problems had been found. Nevertheless, the trial court's conclusion is flawed.

¶14 As the supreme court has recognized:

> A "warranty" is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended to relieve the promisee of any duty to ascertain the fact for himself, and amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue.

Dittman v. Nagel, 43 Wis. 2d 155, 160, 168 N.W.2d 190 (1969) (citations omitted). Moreover, the party relying on a breach of warranty has the burden of proof "'to show the warranty, the breach thereof, and that his [or her] loss resulted from the breach of such warranty.'" ***Dittman***, 43 Wis. 2d at 165 (citations omitted). Here, however, the trial court determined that, notwithstanding the explicit contract provisions specifying that Patnode was not providing any warranty with his inspection, he somehow created a warranty by commenting in his report, "NO MAJOR PROBLEMS FOUND."

¶15 Neither the trial court, in its decision, nor Badzinski, on appeal, offers any legal authority suggesting that an inspector's inspection-report statement that no major problems were found can somehow constitute a warranty, thus erasing the explicit no-warranty terms of a contract. And how could it be

otherwise? If a home inspector, hired for $75 to identify apparent problems through a visual inspection of a basement and foundation, could be liable for thousands of dollars of costs connected to undetected problems, inspectors, to protect themselves, would either refuse to inspect basements and foundations, or they would refer all their customers to foundation specialists, even when they had discovered no problems.[2]

¶16 Therefore, this court concludes that Badzinski did not carry her burden of proof to establish the existence of any warranty; indeed, her testimony, together with the Badzinski-Patnode contract, conclusively proved otherwise. Accordingly, this court concludes that the trial court erred in determining that Patnode provided a warranty to the Badzinskis, and in awarding damages based on a breach of that warranty.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[2] Additionally, this court notes, no evidence suggests that Patnode's statement was false or that he was attempting to deceive or defraud the Badzinskis. Patnode was hired to provide a "visual" inspection and report on "apparent" problems. Indeed, the Badzinskis implicitly concede that Patnode was candid; the heart of their claim is the contention that Patnode truly (albeit negligently) failed to find the major problem producing the seepage.