COURT OF APPEALS
DECISION
DATED AND RELEASED

October 25, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 94-2684

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

KENDALL JOHN THISTLE
and CARLA G. THISTLE,

Plaintiffs-Appellants,

v.

ALAN SCHMITZ and
CINDY SCHMITZ,

Defendants-Respondents,

R.W. REALTY, INC.,
a Wisconsin corporation,
ROBERT L. WORTH,
HENRY EGERER, JR.,
SYLVIA ANSAY and
DICK ANSAY REALTY, INC.,

Defendants.

APPEAL from a judgment of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

BROWN, J. About four years after Kendall and Carla Thistle purchased their house, they discovered significant problems with the septic system. They sought damages from the sellers Alan and Cindy Schmitz and two realty companies who are not parties to this appeal. The Thistles argued claims of negligent and strict responsibility for misrepresentation in a bench trial. After several days of testimony, however, the trial court concluded that they had failed to meet their burden on either claim and granted the Schmitzes' motion for a directed verdict. We affirm.

Before purchasing this house in December 1986, the Thistles had rented it from the Schmitzes for about three years. While the Schmitzes owned the property for eight years before the sale, they never lived on the premises. Visits were limited to maintenance and repairs. These duties included having the septic system pumped out, although no other repairs of the system took place while the Thistles were tenants.

Four years after they bought the house, the Thistles began thinking about a possible addition. During the planning stages, however, they uncovered problems with the septic system. Extensive professional testing during May 1992 confirmed that the system leaked into an open ditch on adjacent property. An official from the county's sewer department concluded that the system violated local codes.

The standard-form purchase agreement between the Schmitzes and the Thistles dated September 25, 1986, contained the following provisions:

> Seller warrants and represents to Buyer that Seller has no notice or knowledge of any:
>
> ….
>
> (c) structural or mechanical defect of material significance in property, including inadequacy for normal residential use of mechanical systems, *sanitary disposal systems* and well, and unsafe well water according to state standards. [Emphasis added.]

Accordingly, prior to closing the deal, the Schmitzes retained an inspector who informed them that the "septic system appears to be in working condition as of 11-21-86."[1]

At trial, the Thistles challenged the quality of this inspection and professional opinion. They presented testimony which showed that the system would not have met the health codes in effect at that time. They tried to cast doubt on whether the Schmitzes should have warranted the "fitness" of the septic system.

Nonetheless, the trial court concluded that the Schmitzes acted reasonably when they relied on this report. Moreover, it concluded that the Thistles failed to present any evidence which showed how the Schmitzes had knowledge of specific problems with the septic system. It therefore reasoned

[1] The purchase agreement specifically required the Schmitzes to have an inspection performed and to provide the Thistles with a copy of the results.

that there was no remaining dispute over material facts and granted the Schmitzes' motion for a directed verdict.

The Thistles raise two basic arguments in this appeal. In regard to their negligence claim, they contend that the trial court placed too much emphasis on the 1986 inspection report. They argue that a reasonably prudent seller who was "unacquainted with the structure of the disposal system" would not simply rely on a positive test that it was in "working order" before warranting its fitness. Rather, this seller would "alert buyers by insisting in the buy-sell agreement that the buyers take the septic disposal system 'as-is'" or would takes steps to ensure that the system was "legal."

Next, they challenge the trial court's decision to dismiss their claim of strict responsibility for misrepresentation. They argue that Wisconsin law in this area encompasses this class of transactions, and therefore the Schmitzes, as sellers who made assurances of quality, are responsible for the damages associated with the faulty system as a matter of law regardless of the efforts they took to ensure that it was free of defects.

Turning to the negligence issue, we first note that when reviewing whether the trial court erred in directing a verdict, we view the evidence most favorably to the party against whom the verdict was directed. *See* ***K.G.R. v. Town of East Troy***, 182 Wis.2d 215, 230, 513 N.W.2d 622, 629 (Ct. App. 1994), *rev'd on other grounds*, 191 Wis.2d 447, 529 N.W.2d 231 (1995). We gauge if there is any evidence to support a contrary verdict or to sustain the action. ***Id***. The

judgment will be upheld only when there is no dispute over material issues. *See* ***id.***

The Thistles stress three points to support their argument that a dispute exists over the Schmitzes' knowledge of the problems in the system. First, the Schmitzes ordered the necessary, periodic maintenance of the system (*i.e.*, the pumping out) while they owned the property. Next, there was expert testimony which showed that the system was not up to code during this period. Third, the most recent examinations reveal that much of the system's underground structure was not even located on the property. They seem to argue that a reasonably prudent seller would have known about its flaws, or at least would have suspected something was awry and thus should not be able to defend liability on grounds that a single inspection verified that it was in working order.

In response, the Schmitzes note that the Thistles had occupied the house for three years before they bought it. During this time, however, they never informed their landlords (the Schmitzes) that there were problems with the system. Moreover, they put a different slant on the inspection report. They argue that it shows that they *did* act as reasonably prudent sellers, who were indeed not confident of their personal appraisal of the septic system.

We conclude that the trial court did not err in directing the verdict for the Schmitzes. The Thistles' negligence claim rests on the duty created by the purchase contract. Here, the Schmitzes represented that they had "no notice or knowledge" of any "defects" in the septic system. While the Thistles'

evidence showed that the system was defective (*i.e.*, physically flawed or not up to code) at the time of sale, the evidence of the Schmitzes' legal ownership and periodic ordering of maintenance is not enough to support an inference that they actually knew the system was defective. More importantly, by securing a professional inspection, they fulfilled their duty to learn about any existing defects. That the study may in fact have been flawed does not defeat the legal significance of the Schmitzes' effort to fulfill their obligations.[2]

Next, we address the Thistles' argument regarding their claim of strict responsibility for misrepresentation. They assert that this area of Wisconsin law has been slowly developing and should include their claim. Although the trial court did not provide a very detailed statement of its reasons for directing a verdict on this claim, our review is not affected because this issue presents a question of law and we owe no deference to the trial court. *See* ***Rolph v. EBI Cos.***, 159 Wis.2d 518, 528, 464 N.W.2d 667, 670 (1991).

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[2] Our review of the record revealed that the purchase agreement contained the following clause:

> Within 10 working days of the acceptance date hereof the buyer shall be deemed to have accepted the septic system. The seller will have and pay for it to be checked at his expense by a certified plumber or septic co. and give a report to Buyer. If an objection is given to the seller in writing within the 5 working days from receipt of report seller at his option shall agree to satisfy the objection within thirty (30) days or buyer may cancel this contract.

We further add that the inspection was performed and revealed that the system was in "working condition." Although the parties have not presented any arguments addressing the effect of this clause, it would nonetheless seem to act as a bar to the Thistles' claim that the Schmitzes acted negligently since these contractual obligations were fulfilled.

In support of their argument, the Thistles recite the five elements of this claim which when applied to this case would require showing (1) that the Schmitzes made a representation of the fitness of the septic system, (2) that the system was defective, (3) that the Schmitzes knew of the defects or were in a position to obtain this information, (4) that the Schmitzes stood to benefit from this misrepresentation and (5) that the Thistles believed the statements about the system to be true and justifiably relied on them. *See* ***Green Spring Farms v. Kersten***, 128 Wis.2d 221, 225-26, 381 N.W.2d 582, 584 (Ct. App. 1985), *rev'd on other grounds*, 136 Wis.2d 304, 401 N.W.2d 816 (1987); *see generally* WIS J I—CIVIL 2402.

The Thistles further support their argument with a lengthy and muddled attempt to quote from ***Gauerke v. Rozga***, 112 Wis.2d 271, 332 N.W.2d 804 (1983), and seem to suggest that in all circumstances where a hidden defect causes a loss between two otherwise innocent parties in a transaction, the seller should bear the loss. *See* ***id.*** at 280, 332 N.W.2d at 808-09.

Their argument, however, overlooks important aspects of the policies underlying this tort. The court did explain in ***Gauerke*** that the law of strict responsibility for misrepresentation was couched on a judicial conclusion that in "certain situations" losses resulting from hidden defects may be properly allocated to the otherwise innocent seller. *See* ***id.*** at 280-81, 332 N.W.2d at 809

(holding that the doctrine does not depend on seller's actual knowledge). Still, we do not conclude that the facts before us present such a situation. We acknowledge that the ***Gauerke*** decision emphasizes how the seller is in the better position to learn of defects, but it also cautions that:

> The other key element is the buyer's justifiable reliance on the statement. If the fact represented is something that one would not expect the speaker to know without an investigation, this might be a factor in determining whether there was justifiable reliance on the part of the buyer.

Id. at 281, 332 N.W.2d at 809. Here, the Thistles implicitly assert that they could "justifiably rely" on the Schmitzes' warranty that the septic system was without defects. However, this overlooks the evidence that the Thistles physically occupied the home for three years prior to the sale. Unlike the buyer in a typical real estate transaction, the Thistles were very familiar with the house they purchased because they had lived there for three years. They could not justifiably have relied on the statements of the Schmitzes, when they had actual knowledge that the Schmitzes spent only a limited amount of time on the property. As the Schmitzes suggest, they needed to have somebody else inspect the septic system because they had no personal experience with the property. We thus hold that the claim of strict responsibility for misrepresentation is not applicable given the circumstances of this case.

By the Court.—*Judgment affirmed.*

Not recommended for publication in the official reports.