

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 1, 2012

Diane M. Fremgen
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. 2011AP1451

Cir. Ct. No. 2009CV13848

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

AMJAD T. TUFAIL,

PLAINTIFF-RESPONDENT,

v.

**MIDWEST HOSPITALITY, LLC, D/B/A MIDWEST HOSPITALITY (WI),
LLC,**

DEFENDANT-APPELLANT,

ASLAM KHAN, D/B/A MIDWEST HOSPITALITY,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM S. POCAN, Judge. *Reversed and cause remanded.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Midwest Hospitality, LLC (hereafter MH), appeals from an order granting Amjad Tufail damages for MH’s breach of a commercial lease. MH argues that the undisputed evidence is that Tufail materially breached the lease because his representation that no zoning laws restricting MH’s operation of a Church’s Chicken fast-food restaurant on the leased premises was false. We reverse the order and conclude that MH’s early termination of the lease was justified by Tufail’s misrepresentation. We remand for disposition of MH’s counterclaims.¹

¶2 Tufail purchased a “New York Chicken” fast-food restaurant. He operated the restaurant under a special use permit granted by the City of Milwaukee Board of Zoning Appeals in November 2000. Tufail was permitted to operate his business in compliance with a submitted plan of operation which included a drive through and being open until 4:00 a.m., seven days a week. The special use was granted for ten years.

¶3 In March 2008, MH leased the restaurant building from Tufail for five years. The intended use of the building was to operate a Church’s Chicken. Paragraph five of the lease provides:

Use of Premises. Tenant may use and occupy the Premises for any lawful purpose, but not limited to, the retail sales, consumption, and delivery of food and beverages which shall include, but not be limited to, Chicken products, Fish products, bread products, salads, sandwiches, dessert items, promotional items, and any other items sold by any Church’s Chicken store.

¹ MH counterclaimed for breach of contract, deceptive advertising, and unjust enrichment. It was not necessary to address those counterclaims once Tufail prevailed.

Under “Representations and Warranties,” the lease provides: “Landlord represents and warrants to Tenant that: ...(g) no existing restrictions, building and zoning ordinances, or other laws or requirements of any governmental authority prevent the use of the Premises for the purposes set forth in Paragraph 5.” The lease includes the acknowledgement that MH could rely on Tufail’s representations and warranties, that the matters represented and warranted were material, and that “any misrepresentation or breach of such warranty will be reason for the Tenant to terminate” the lease.

¶4 When MH sought a building permit to make renovations to the building, it was told it would have to apply for a special use permit to operate a fast-food restaurant in a free standing building and with a drive-thru within 150 feet of a residential use. The application was made and opposed by parts of the community. The Milwaukee Board of Zoning Appeals granted MH a special use permit for one year. The permit included signage restrictions, landscaping requirements, garbage pick-up within a one block radius, and prohibited operation past 9:00 p.m. After the permit was granted, MH informed Tufail that it would not be occupying the building or paying rent.

¶5 The case was tried to the court. The court found that the City of Milwaukee required a special use permit to operate the restaurant with a drive-thru. It found the lease unambiguous and that it does not set forth any intended use to include a drive-thru. The court laid fault on MH for not performing proper due diligence before entering into the lease. It found incredible the testimony of MH’s senior executive about reliance on and trust in Tufail’s assurances. It also determined that because the zoning board had approved MH’s operation with a drive-thru, albeit with other restrictions, MH was not prevented from opening its restaurant. It concluded that MH had not established its claim that Tufail made

misrepresentations. Tufail was awarded damages for MH's breach of the lease by the failure to pay rent and breach of the duty of good faith and fair dealing by starting but not completing renovations of the building.

¶6 On appeal MH explains that its desire to have a drive-thru has no bearing on whether a special use permit was required or Tufail's representation that there were no zoning restrictions for use of the building as a Church's Chicken.² It argues that the trial court ignored undisputed evidence that a free standing, fast-food restaurant was not permitted under the existing zoning regulation, regardless of a drive-thru. The parties agree that the appellate issues present questions of law regarding the meaning of the lease and therefore are subject to de novo review. See *Omernick v. Lepak*, 112 Wis. 2d 285, 290, 332 N.W.2d 307 (1983) (where the court's decision has an implicit conclusion of law the reviewing court need not afford the decision deference afforded factual findings); *Jones v. Jenkins*, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979) (construction of an unambiguous contract is subject to independent review).

¶7 The undisputed evidence at trial was that the building was subject to the LB-2 zoning regulations. A "fast-food/carry-out" restaurant is listed as a limited use in an LB-2 area. See MILWAUKEE, WIS., ZONING CODE Table 295-603-1 (2012). A limited use is permitted only if it meets the limited use standard set forth in subsection two of § 295-603-2. *Id.*, § 295-603-1-b. If subsection two is not satisfied, a special use permit is required. *Id.* With respect to a "Fast-

² The trial court found that the special use permit was required because of the drive-thru request. The trial court focused on the drive-thru as the reason requiring the special use permit and that the lease did not warrant an unrestricted ability to operate a drive-thru. It did not address whether a special use permit was required for any other reason.

food/Carry-out Restaurant,” subsection two of the limited use standards states: “The use shall be located in a building containing at least one other principal use listed as a permitted use in the zoning district in which it is located.” *Id.*, § 295-603-2-o. A plan examiner for the City of Milwaukee Development Center explained the above quoted zoning provisions. She testified that the building permit was denied because “by definition the Church’s Chicken is a fast-food restaurant and a free-standing building. It’s not a permitted use, it’s a special use under the zoning code.” She confirmed that the restaurant was not a permitted use and a special use permit was required “regardless of any drive-thru.” She characterized her denial of the building permit for two different reasons: it is a free standing fast-food restaurant and it has a drive-thru within 150 feet of a residential use. The evidence established that to operate a fast-food restaurant in the free standing building leased by Tufail a special use permit was required.

¶8 Tufail argues that he did not make a false representation of a zoning restriction because the lease does not set forth intended use of the building as a fast-food restaurant. He points out that MH was free to operate a sit-down type of restaurant without obtaining a special use permit and therefore, MH was not prevented from using the building for the “retail sale[], consumption, and delivery of food and beverages ... and any other items sold by any Church’s Chicken store” as set forth in paragraph five of the lease. We reject Tufail’s narrow construction of the use provision in the lease. By reference to “Church’s Chicken,” the use provision allowed the operation as a Church’s Chicken. It is undisputed here that a Church’s Chicken is a fast-food restaurant. It was not necessary for the use provision in the lease to include additional words allowing operation of a fast-food restaurant. A Church’s Chicken is a fast-food restaurant.

¶9 Tufail’s representation and warranty that there were no existing restrictions or zoning ordinances preventing the use of the building for a Church’s Chicken, a fast-food restaurant, was false. It was false from the moment the parties signed the lease. That MH was granted a one-year special use permit does not change the falsity of the representation.

¶10 We accept the trial court’s determination that the testimony of MH’s senior executive that he relied on the Tufail’s assurances was incredible. The trial court is the ultimate arbiter of the credibility of the witnesses. *Noll v. Dimiceli’s, Inc.*, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983). But the testimony about reliance makes no difference. The parties specifically agreed in the lease that MH could rely on Tufail’s representations and warranties contained in the lease. The lease also declared those matters represented and warranted as material and that “any misrepresentation or breach of such warranty will be reason for the Tenant to terminate” the lease.

¶11 MH was entitled to terminate the lease because Tufail’s misrepresentation that there were no zoning restrictions was false. We reverse the order granting Tufail damages and statutory costs and remand for necessary proceedings to address MH’s counterclaims.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2009-10).

