

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 17, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 2005AP2852

Cir. Ct. No. 2004CV7209

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

CHAD NOVELL,

PLAINTIFF-APPELLANT,

v.

ANTHONY MIGLIACCIO AND ANDREA MIGLIACCIO,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL D. GUOLEE, Judge. *Affirmed in part; reversed in part and cause
remanded.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 WEDEMEYER, P.J. Chad Novell appeals from an order granting summary judgment dismissing his claims against Anthony and Andrea Migliaccio regarding the sale of a home. Novell claims the trial court erred in granting

summary judgment to the Migliaccios. Novell argues: (1) there are issues of material fact regarding the Migliaccios' knowledge of basement defects; (2) that he did not waive his right to bring these claims by proceeding to purchase the home even though the home inspection raised concerns about the basement; (3) there are issues of material fact about whether Novell's reliance on the Migliaccios' statement that they never painted the basement walls was justifiable; and (4) his WIS. STAT. § 100.18 (2003-04)¹ false advertising claim does not require proof of justifiable reliance. Because Novell waived his right to pursue all claims requiring proof of justifiable reliance, we affirm the trial court on the first three issues; however, because justifiable reliance is not required for a § 100.18 claim, we reverse and remand for a trial on that claim only.

BACKGROUND

¶2 In the fall of 2002, Novell was living with his parents. The Novells' cleaning lady mentioned that her relatives—the Migliaccios—were thinking about selling their home located at 8030 West Whitaker Avenue in Greenfield, Wisconsin. After viewing the home, Novell's father e-mailed the Migliaccios on October 7, 2002, stating that they had prepared an offer to purchase wherein Novell would buy the Migliaccios' home. The Migliaccios replied that they were not ready to sell due to Anthony's unemployment.

¶3 In January 2003, Novell again e-mailed the Migliaccios asking if they were ready to entertain his offer to purchase. The Migliaccios replied that

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

they would be ready to discuss the sale after they had secured financing for their new home. Novell replied asking for a timeline.

¶4 On April 19th, Andrea Migliaccio contacted Novell and advised that they would sell their home for \$168,000. Novell viewed the home for a second time in June 2003. The property condition report stated that the Migliaccios were not aware of any significant defects in their property. On June 26, 2003, Novell made an offer to purchase the home for \$172,500. The offer was accepted.

¶5 Novell hired a home inspector to inspect the home before closing. During the inspection, the inspector noticed step cracks and minor differential movement in the basement walls. The inspector asked Anthony if he had painted the basement walls or had had any water in the basement. Anthony responded negatively to both questions. The home inspector recommended that Novell hire a basement foundation specialist to assess the integrity of the foundation. Novell failed to follow that advice and proceeded to purchase the home in September 2003, and moved in on November 15, 2003.

¶6 Novell indicated that he first began to have water problems in the basement in the winter of 2004. The Novells recontacted the home inspector, who recounted his assessment of the basement—stating his concerns because the walls at the northwest corner of the basement were wet and that his moisture reading meter was receiving elevated levels in the basement. The home inspector also indicated to the Novells that he had recommended that they have a certified basement specialist assess the foundation before purchasing the home.

¶7 Novell hired Ben G. Olson, a professional engineer, who opined that water had been entering the northwest part of the basement for the past decade. Novell also hired Charles Weber, who evaluates foundations. Weber opined that

the basement walls had been recently painted to conceal the presence of cracks and that water had been coming into the basement for at least the three previous years.

¶8 In August 2004, Novell filed a complaint against the Migliaccios alleging six causes of action: (1) breach of contract; (2) intentional misrepresentation; (3) misrepresentation in violation of WIS. STAT. §§ 895.80 and 943.20(1)(d); (4) misrepresentation in violation of WIS. STAT. § 100.18; (5) strict responsibility misrepresentation; and (6) negligent misrepresentation. On July 5, 2005, the Migliaccios filed a motion seeking summary judgment. The trial court conducted a hearing on the motion on October 27, 2005, after which it granted the motion and dismissed Novell's complaint. Novell now appeals.

DISCUSSION

¶9 This appeal comes to us after a grant of summary judgment. In reviewing such a matter, we conduct an independent review, applying the same methodology as the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment will be granted when there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. WIS. STAT. RULE 802.08(2). Here, the trial court granted summary judgment on all the claims, ruling:

[B]uyer[s] of residential property [waive] their claim for breach of warranty when they close on a transaction after learning that the property is defected from their own inspection. Such a rule negates the issue of whether the defendant had knowledge of any basement defects and renders any such factual dispute immaterial.

....

[T]here is no uncertainty about the purpose of a contract's inspection disapproval procedure. These provisions are

intended to afford the buyer the opportunity to discover actual or potential defects in the property so the buyer can then make an informed choice whether to proceed with the transaction.

....

Given all this information [in Novell's inspection report], the plaintiff in this case, certainly could have opted for more testing as recommended or could have canceled the deal all together. Since he failed to do so, I think he should not be allowed to bring a breach of contract claim since he was on notice of the fact and decided to close anyway.

[A]ll the other claims ... strict responsibility, misrepresentation, intentional misrepresentation, these require the buyers' reliance be justified. In addition, negligent misrepresentation requires whether the buyer was negligent in relying upon the representation. When the buyer learned that the representation had been made prior to closing, the buyer no longer is deceived and as a matter of law can no longer rely on prior misrepresentation.

The Court will refuse to act for the relief of one claiming to have been misled by another's statement who blindly acts in disregard of knowledge of their falsity and with such opportunity that by exercise of ordinary observations, not necessarily by searching or by search he would have known. He may not, in other words ... close his eyes to what is obviously discoverable. And based upon the inspection report, these issues were obviously discernible or discoverable.

The plaintiff nonetheless chose to rely upon the defendant's comments and purchase the home without following the inspector's recommendation to call in a specialist.

The plaintiff was negligent in failing to obtain assistance of a specialist, and he relied upon the experience of defendant alone when there was strong indication that further examination was warranted.

As to strict liability, intentional misrepresentation, plaintiff was not justified in relying on defendant's representation of his ... experience with the basement, because of the home inspection both in his report and comments directly to the plaintiff and to his father.... There was some claim in the Complaint [about] statutory misrepresentation.

In reading the language of the statute, it appears the elements are similar to those in intentional misrepresentation, and absent justifiable reliance that would also bar that claim.

¶10 In reviewing this case, we conclude that the trial court reached the right conclusion with the exception of the WIS. STAT. § 100.18 claim, which we address first.

A. False advertising—WIS. STAT. § 100.18.

¶11 In order to establish a false advertising claim under WIS. STAT. § 100.18, Novell must prove: (1) the defendant made to the public an “advertisement, announcement, statement or representation ...” relating to the purchase of merchandise; (2) that the statement/representation was “untrue, deceptive or misleading”; and (3) the plaintiff sustained a pecuniary loss because of the statement/representation. *See Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶39, 270 Wis. 2d 146, 677 N.W.2d 233 (quoting § 100.18(1)); WIS JI—CIVIL 2418.

¶12 Clearly then, justifiable reliance is not an element of a false advertising claim. As we recently clarified in *Malzewski v. Rapkin*, 2006 WI App 183, ¶24, ___ Wis. 2d ___, ___ N.W.2d ___, reasonable reliance may “be considered by a jury in determining whether ‘the purchaser in fact relied’ on the seller’s representation,” *id.* (citation omitted), but it is not a statutory element. We also noted that under certain circumstances, “reasonable reliance *should* be an element of a claim for false advertising [when] that [claim] is decided as a matter of law.” *Id.*, ¶24 n.3 (emphasis and alteration in original).

¶13 Here, there is evidence presented from which a jury could conclude that the Migliaccios made an untrue representation which caused Novell to suffer a

pecuniary loss. The evidence here presents a disputed issue of material fact as to the false advertising claim and therefore should be presented to a fact-finder for resolution. Accordingly, on this claim, we conclude the trial court erred in granting summary judgment. We reverse only that portion of the order and remand for a trial on this claim.

B. The other five causes of action.

¶14 We address the other five causes of action together because we agree with the trial court's assessment of those claims and therefore affirm the grant of summary judgment with respect to Novell's breach of contract, intentional misrepresentation, misrepresentation in violation of WIS. STAT. §§ 895.80 and 943.20(1)(d), strict responsibility misrepresentation, and negligent misrepresentation claims.

Breach of Contract (Warranty)

¶15 Novell contends that the Migliaccios breached the warranty of the contract by stating they had no knowledge of any defects when, in fact, basement defects were known to them. The elements necessary to prove a breach of contract warranty claim are: (1) an affirmation of fact; (2) inducement to the buyer; and (3) reliance by the buyer. *Selzer v. Brunsell Bros., Ltd.*, 2002 WI App 232, ¶13, 257 Wis. 2d 809, 652 N.W.2d 806.

¶16 Novell argues that he relied on Anthony's statements that he had not recently painted the basement walls and that they never had water in the basement. If that was the only thing Novell had to rely on, he may have a case. The record, however, demonstrates that his home inspector reported signs of problems with the basement foundation, including cracks, elevated moisture readings and wet walls.

The home inspector advised Novell to hire a certified basement specialist. Novell failed to heed the caution or warning from the home inspector. Instead, he proceeded to closing despite the knowledge that problems may exist with the foundation. Accordingly, Novell's reliance on Anthony's statements was unreasonable as a matter of law. See *Lambert v. Hein*, 218 Wis. 2d 712, 726-30, 582 N.W.2d 84 (Ct. App. 1998).

[A] buyer aware of the "true nature" of defects, or who has the right to discover the "true nature" of defects *that are disclosed*, cannot later complain when he or she goes ahead with the purchase: (1) despite knowing about the defects, or (2) after giving up a right under the contract to discover their "true nature."

Malzewski, 2006 WI App 183, ¶15 (quoting *Lambert*, 218 Wis. 2d at 726-30).

¶17 Thus, because Novell's reliance under the circumstances presented here are unreasonable as a matter of law, summary judgment was appropriate on this cause of action.

Intentional Misrepresentation

¶18 Novell contends that the Migliaccios made the representations about the integrity of the basement with the intent to deceive and induce him into purchasing the home. In order to proceed on an intentional misrepresentation claim, Novell must prove five elements: (1) that the sellers made a representation of fact; (2) the representation was untrue; (3) the sellers made the representation either knowing it was untrue, or recklessly not caring whether it was true or false; (4) the sellers made the representation with the intent to deceive Novell or to induce him to act on it to his pecuniary damage; and (5) Novell believed the representation was true and relied on it. *Id.*, ¶17. Again, under the facts and circumstances here, Novell cannot satisfy the fifth element—that his reliance on

the misrepresentation was justifiable. For the same reasons that his reliance was not reasonable as a matter of law, Novell's reliance was not justifiable as a matter of law. Accordingly, the trial court did not err in granting summary judgment on the intentional misrepresentation claim.

Strict Responsibility Misrepresentation

¶19 The elements for this claim are similar to that of intentional misrepresentation: (1) the seller made a representation of fact; (2) the representation was untrue; (3) the seller made the representation based on personal knowledge, or was in a position such that he should have known the truth or untruth of the statement; (4) the seller had an economic interest in the transaction; and (5) the buyer believed the representation was true and relied on it. *Id.*, ¶19. Again, as above, Novell's reliance was not justifiable and, therefore, the trial court did not err in granting summary judgment on the strict responsibility misrepresentation claim.

Negligent Misrepresentation

¶20 In order to establish a negligent misrepresentation claim, Novell would need to show: (1) the seller made a representation of fact; (2) the representation was untrue; (3) the seller was negligent in making the representation; and (4) the buyer believed the representation was true and relied on it. *Id.*, ¶20. This claim also fails on the reliance element because, as the trial court determined, Novell was negligent as a matter of law in relying on the representation. Novell relied on Anthony's statement despite the objective evidence presented by the home inspector and despite the home inspector's suggestion that a basement expert be utilized. Under these circumstances, Novell cannot succeed on a negligent misrepresentation claim as a matter of law.

Accordingly, the trial court did not err in granting summary judgment on this cause of action.

Misrepresentation—WIS. STAT. §§ 895.80 and 943.20(1)(d)

¶21 Finally, Novell argues that the trial court should not have granted summary judgment on this statutory misrepresentation claim. The elements pertinent to proving this claim are the same as intentional misrepresentation plus the additional element that the misrepresentation occurred before contract formation. *See Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶30, 283 Wis. 2d 555, 699 N.W.2d 205. Accordingly, this claim fails for the same reason the intentional misrepresentation claim failed—there is no reasonable reliance established by Novell. His reliance on Anthony’s statements, despite the home inspector’s opinion/suggestion, is unreasonable as a matter of law. Thus, the trial court did not err in granting summary judgment on this cause of action.

CONCLUSION

¶22 Based on the foregoing, we conclude that the trial court correctly granted summary judgment on all of Novell’s claims against the Migliaccios with the exception of the false advertising—WIS. STAT. § 100.18—claim. Accordingly, we affirm the trial court order dismissing the claims for breach of contract, intentional misrepresentation, strict-responsibility misrepresentation, negligent misrepresentation, and misrepresentation based on WIS. STAT. §§ 895.80 and 943.20(1)(d). We reverse, however, that portion of the trial court’s order which granted summary judgment on the false advertising—§ 100.18—claim. We remand on that cause of action for a trial for a jury to consider whether Novell can establish the elements pertinent to that cause of action.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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