COURT OF APPEALS DECISION DATED AND FILED

May 2, 2007

David R. Schanker
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. 2005AP1584

Cir. Ct. No. 2003CV162

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

KURT KONITZER AND CYNTHIA J. KONITZER,

PLAINTIFFS-APPELLANTS,

V.

MICHAEL BATZLER, B & N DEVELOPMENT, LLC, AND SANDY HAEUSER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kurt Konitzer and Cynthia Konitzer appeal pro se from the judgment of the circuit court entered against them after a jury trial. They argue on appeal that the special verdict form was inadequate, and that the circuit court erred when it granted the respondent's motion in limine, when it refused to

address their pro se motions and letters, and when it granted costs against them without holding a hearing, and that it made other errors. We conclude that the circuit court did not err, and we affirm.

¶2 The Konitzers sued Michael Baltzer, B & N Development, LLC, and Sandy Haeuser for damages resulting from the purchase of a model home in a residential development. The Konitzers alleged that when they purchased the home, the developer and Haeuser, the real estate broker, made certain representations on which they relied and that were not enforced. These included representations about architectural control provisions for the homes built in the subdivision, lake access and easements, and that there was no home owner's association. As a result of these alleged misrepresentations, the Konitzers claimed that the home was not worth what it would have been had the representations been true. The Konitzers eventually dismissed the claims against the developer, leaving only Haeuser. Although the Konitzers stated a number of claims in their complaint, they went to trial only on the claims of misrepresentation. The jury found for Haeuser and against the Konitzers.

¶3 On appeal, the Konitzers raise a number of issues. First, we note that the Konitzers did not have prepared and filed a copy of the transcripts of the proceedings. In the absence of a trial transcript, this court will assume that the facts necessary to sustain the trial court's decision are supported by the record. ***Suburban State Bank v. Squires***, 145 Wis. 2d 445, 451, 427 N.W.2d 393 (Ct. App. 1988). Although we could decide the appeal on this basis alone, we will address the merits of the appellants' arguments to the extent it is possible to do so without a transcript.

¶4 The Konitzers assert that the trial court erred when it ruled on a motion in limine. The respondent sought to prevent the Konitzers' expert, Terry Carrick, from giving evidence about damages. The court allowed Carrick to testify based on a diminished value theory of damages. The Konitzers, however, sought to introduce a report from Carrick on a new theory of damages. The report was prepared after the close of discovery and the pretrial conference. The court would not allow Carrick's new theory to be offered into evidence. The Konitzers assert that it was improper to force Carrick to testify on what they claim was, in essence, the wrong damage theory.

¶5 "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citations omitted). Further, the circuit court has the inherent authority to control its own docket. *See* ***City of Sun Prairie v. Davis***, 226 Wis. 2d 738, 750, 595 N.W.2d 635 (1999). In this case, the court found that the report was unfairly prejudicial because it addressed a new theory of damages and that it violated the scheduling order. We conclude that the circuit court did not err when it precluded the Konitzers from introducing this testimony.

¶6 The Konitzers also complain about the form of the special verdict submitted to the jury. They assert that the special verdict did not ask specific questions about their complaints. Haueser responds that the Konitzers did not object at trial, and therefore have waived their right to contest the special verdict. Without a transcript, we cannot resolve the waiver issue. We will address the issue on the merits.

¶7 A special verdict must cover all material issues of ultimate fact. WIS. STAT. § 805.12(1) (2005-06).[1] The form of special verdict questions is within the discretion of the trial court. ***Meurer v. ITT Gen. Controls***, 90 Wis. 2d 438, 445-46, 280 N.W.2d 156 (1979). A trial court has wide discretion in framing the special verdict, ***Maci v. State Farm Fire & Cas. Co.***, 105 Wis. 2d 710, 719, 314 N.W.2d 914 (Ct. App. 1981), *overruled on other grounds by* ***Rockweit v. Senecal***, 197 Wis. 2d 409, 541 N.W.2d 742 (1995), and determining what jury instructions to give, ***Anderson v. Alfa-Laval Agri, Inc***., 209 Wis. 2d 337, 344, 564 N.W.2d 788 (Ct. App. 1997). We conclude that the special verdict inquired into the ultimate fact of whether Haeuser had made any representations. This was an appropriate inquiry and one approved by the law. We conclude that the circuit court did not err.

¶8 The Konitzers' brief appears at times to be raising both sufficiency of the evidence claims and claims of ineffective assistance of counsel. It is impossible to address whether there was sufficient evidence without a transcript and we must assume every fact essential to the verdict is supported by the absent transcript. *See* ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979). Further, to the extent the Konitzers are claiming ineffective assistance of counsel, the remedy for such a claim in a civil suit is to bring a malpractice action. ***Village of Big Bend v. Anderson***, 103 Wis. 2d 403, 404, 308 N.W.2d 887 (Ct. App. 1981).

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶9 The Konitzers also allege that the trial court and Haeuser's counsel improperly refused to address their pro se letters and motions. These items were submitted to the trial court while the Konitzers were still represented by counsel. It would have been a violation of the court's rules for Haeuser's counsel to have communicated directly with the Konitzers. *See* SCR 20:4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.") Similarly, the circuit court was not obligated to respond to pro se submissions while the Konitzers were represented by counsel.

¶10 The Konitzers also complain about the costs and disbursements taxed by the circuit court against them. The circuit court taxed costs against the Konitzers under WIS. STAT. §§ 814.03, 814.04 and 814.10. The Konitzers sent the court a Notice of Motion asking the court to review the taxation of costs. The court, without holding a hearing, reviewed the taxation of costs and entered an order denying the motion finding that the taxation of costs was appropriately determined by the clerk of court.

¶11 WISCONSIN STAT. § 814.01(1) provides that "costs shall be allowed of course to the plaintiff upon a recovery." WISCONSIN STAT. § 814.03(1) provides that if the plaintiff is not entitled to costs under § 814.01, "the defendant shall be allowed costs." Section 814.03 is mandatory. ***Taylor v. St. Croix Chippewa***, 229 Wis. 2d 688, 695-96, 599 N.W.2d 924 (Ct. App. 1999). The statute requires that the clerk of court tax costs against the losing party. WIS. STAT. § 814.10(1). The party opposing the taxation of costs may then "file with the clerk a particular statement of the party's objections." Sec. 814.10(3). The clerk shall then note all costs that are disallowed, or those that are allowed to

which an objection was made. Sec. 814.10(4). The party objecting to the costs may then move the court for review. ***Id.*** The court's review shall be based on the bill of costs, the objections, and the proof on file. ***Id.***

¶12 The award of costs is left to the discretion of the circuit court. *See* ***DeWitt Ross & Stevens, S.C. v. Galaxy Gaming and Racing Ltd. P'ship***, 2003 WI App 190, ¶¶49-50, 267 Wis. 2d 233, 670 N.W.2d 74, *rev'd in part on other grounds*, 2004 WI 92, 273 Wis. 2d 577, 682 N.W.2d 839. "The circuit court does not have the power to allow costs which are not explicitly authorized by statute." ***Id.***, ¶49. In this case, it appears from the record that Haeuser filed a bill of costs. The Konitzers then filed a notice of objection, and a brief in support of the motion. The Konitzers' objections were, in essence, to the amount of the various costs the circuit court awarded rather than the validity of any of the costs. For example, the Konitzers argued that the defendants conducted more depositions than they did, and should not be allowed to recover for that. The circuit court reviewed the award and found that the clerk's award of costs was appropriate. All of the costs awarded by the circuit court are allowed under the statute. Based on this record, we conclude that the circuit court acted appropriately. For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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