

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 13, 2008

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. 2007AP1950

Cir. Ct. No. 2006CV1877

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

MICHAEL ARMSTRONG,

PLAINTIFF-APPELLANT,

V.

STEVE ZIMA AND ELLIE ZIMA,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Reversed and cause remanded.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Michael Armstrong appeals from a summary judgment dismissing his claims against Steve and Ellie Zima for an alleged misrepresentation in the real estate condition report (RECR) the Zimas provided Armstrong when he purchased their home. We conclude that factual issues exist

on all of Armstrong's claims which preclude summary judgment. We reverse the judgment and remand the action for further proceedings.

¶2 Armstrong purchased the Zima home in September 2004. As required by law, the Zimas completed a RECR. It indicated that they were unaware of "defects in the basement or foundation (including cracks, seepage and bulges)." A home inspection was done by Tom Dempsey. He noted typical foundation wall cracks, typical foundation seepage or dampness in the basement, and water stains and efflorescence as a sign of leakage. He also noted signs of leakage that required correction of grading and exterior drainage. The report did not make any recommendation for repair of the foundation or any testing of drain tiles. It included the caveat that "it is impossible to predict the severity or frequency of moisture penetration on one inspection visit." It further indicated that "People who live in a house for a period of time are in the best position to provide information about the basement. They have seen the basement under various circumstances over a length of time. Buyers should be concerned with evidence of recent paint, repairs or remodeling in the basement."

¶3 In the spring and September of 2005 Armstrong experienced water seepage in the northwest corner of the basement. Armstrong had repairs done to stop the seepage at the cost of approximately \$14,000. With the belief that the water seepage was a preexisting condition which the Zimas failed to disclose, he commenced this action against the Zimas alleging breach of the contract warranty, intentional misrepresentation, misrepresentation in violation of WIS. STAT.

§§ 895.446 and 943.20(1)(d) (2005-06),¹ and false advertising in violation of WIS. STAT. § 100.18.²

¶4 The Zimas moved for summary judgment on the ground that Armstrong had knowledge of the condition of the basement and therefore, had no right to maintain any of his claims.³ The circuit court concluded that there was no genuine issue of material fact that Armstrong waived or released the Zimas from any and all adverse conditions noted in the home inspection report completed before closing the sale and that Armstrong could not have reasonably relied on the RECR because of the disclosure of water stains in the basement during the home inspection. On reconsideration the circuit court acknowledged that reasonable reliance was not an element of a WIS. STAT. § 100.18 claim but concluded that as a matter of law the RECR was not a material inducement or significant factor contributing to Armstrong's purchase of the property since the adverse condition had been disclosed to him during the home inspection. All of Armstrong's claims were dismissed.

¶5 When reviewing a grant of summary judgment, we apply the same methodology as the circuit court and decide de novo whether summary judgment was appropriate. *Novell v. Migliaccio*, 2008 WI 44, ¶23, ___ Wis. 2d ___, 749 N.W.2d 544. Summary judgment is warranted when “the pleadings, depositions,

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

² An action for rescission was also stated but not pursued.

³ The Zimas also moved for dismissal based on spoliation of evidence and to exclude an expert witness not properly identified. The circuit court denied the motion to dismiss based on spoliation and refused to allow Armstrong to redesignate an expert witness. Those rulings are not challenged on appeal.

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08(2). The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion and any reasonable doubt regarding the existence of a genuine issue of material fact must be resolved in favor of that party. *Novell*, 2008 WI 44, ¶23.

¶6 We first address Armstrong’s WIS. STAT. § 100.18 claim, which has three elements: “(1) the defendant made a representation to the public with the intent to induce an obligation, (2) the representation was ‘untrue, deceptive or misleading,’ and (3) the representation materially induced (caused) a pecuniary loss to the plaintiff.” *Novell*, 2008 WI 44, ¶49 (quoted source omitted). The reasonableness of a person’s reliance on a misrepresentation is not an element of the claim but is a consideration in determining whether there had been a material inducement. *Id.*, ¶50. *Novell* recognizes that there may be cases in which a circuit court may determine as a matter of law that “a plaintiff’s belief of a defendant’s representation is unreasonable,” and consequently the representation did not materially induce the plaintiff’s decision to act. *Id.*, ¶51. We conclude this is not such a case.

¶7 In opposition to the motion for summary judgment Armstrong’s affidavit states that he relied on the representation in the RECR that there were no known defects in the basement or foundation. He was not concerned about the water stains on the basement walls because the Zimas had told him that they never

had water in the basement.⁴ The inspection report characterized the stains as “typical,” indicated that signs of moisture may have been caused by a condition that no longer exists, and did not make any recommendation for repair of the foundation or further testing of the drain tiles. The report indicated that the best information about the basement would come from people who lived in the house for a period of time and observed it under various circumstances. The very report the circuit court found to have given Armstrong notice of the potential adverse condition simultaneously urged Armstrong to rely on the information from the sellers regarding the condition of the basement. The report is ambiguous as to the condition of the basement and creates factual issues as to whether Armstrong should have relied on the information from the Zimas. *See Novell*, 2008 WI 44, ¶55 (evidence is equivocal as to whether buyer’s reliance on sellers’ representation was unreasonable). It cannot be determined as a matter of law that Armstrong’s reliance was unreasonable and therefore the allegedly false representation was not a material inducement for the purchase and pecuniary loss. The circuit court erred in granting summary judgment dismissing Armstrong’s WIS. STAT. § 100.18 claim.

¶8 The circuit court also dismissed Armstrong’s claims on the ground that he “waived and/or released the Zimas from any and all adverse conditions

⁴ Although it is not clear whether the Zimas made representations to Armstrong other than that in the RECR, Armstrong’s assertion that the Zimas told him they never had water in the basement is not disputed. We need only acknowledge but not address the existence of disputed facts concerning the preexisting nature of water seepage in the basement and whether the Zimas’s representation was in fact false. Those factual disputes did not preclude summary judgment on the grounds the circuit court relied on.

identified in the inspection report.”⁵ The conclusion is based on the undisputed fact that after the home inspection report, Armstrong negotiated a \$3,900 reduction in the purchase price of the home and signed an amendment to the offer to purchase indicating “If seller agrees w[ith] the above [price reduction] buyer removes inspection contingency.” The circuit court concluded, “It’s undisputed in this case that Mr. Armstrong sought a reduction in this purchase price by means of this amendment because of the conditions that he saw in the inspection report....”

¶19 There are two problems with the circuit court’s conclusion that a waiver of potential defects in the basement occurred. The first is the notion that the inspection report and Armstrong’s own observations of water stains put Armstrong on notice that the Zimas’s representation in the RECR was false. As we have noted the inspection report indicated the water stains and dampness were typical. Although seepage reparable by grading was noted, the report did not disclose a known defect that directly contradicted the RECR. In this regard this is not a case like *Lambert v. Hein*, 218 Wis. 2d 712, 582 N.W.2d 84 (Ct. App.

⁵ Since we have concluded that neither causation/material inducement nor reasonable reliance can be determined as a matter of law in this case, to the extent Armstrong’s other claims were dismissed on the ground that there was no justifiable reliance, it was error. See *Malzewski v. Rapkin*, 2006 WI App 183, ¶¶12, 14, 18, 22, 296 Wis. 2d 98, 723 N.W.2d 156 (for claims of breach of warranty, intentional misrepresentation and theft by fraud under WIS. STAT. §§ 895.446, 943.20(1)(d), the buyer must show reasonable reliance on the seller’s warranty or representation) *review denied*, 2007 WI 16, 298 Wis. 2d 95, 727 N.W.2d 34. The parties have not raised and we do not address whether the economic loss doctrine requires dismissal of the intentional misrepresentation claim. See *Below v. Norton*, 2008 WI 77, ¶4, ___ Wis. 2d ___, ___ N.W.2d ___, (July 1, 2008) (No. 2005AP2855). In addressing the alternative ground for dismissal, we need not decide whether the confirmation in *K&S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 2007 WI 70, ¶36, 301 Wis. 2d 109, 732 N.W.2d 792, that reasonable reliance is not an element of a WIS. STAT. § 100.18 cause of action effectively overrules *Malzewski*’s holding that reasonable reliance is an element of a theft by fraud claim. We observe that the court of appeals may not overrule, modify or withdraw language from a published opinion of the court of appeals. See *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

1998), where a previously undisclosed defect was disclosed by the reports of three experts before the sale and the buyers sought to complete the sale despite knowing that the condition report was false. Questions of fact remain about whether the inspection report and observations of water stains provided notice that the Zimas's representations were false and unreliable.

¶10 The second problem with concluding that Armstrong waived the potential defect with the basement is that a dispute exists as to the purpose of the price reduction and the meaning of the waiver of the inspection contingency. Armstrong's deposition testimony was that the price was reduced because the inspection report's summary suggested that front and back sidewalks be mud jacked to improve exterior drainage.⁶ The Zimas's joint affidavit states that they were not told that the price reduction related solely to mud jacking at any location. A question of fact exists whether the price reduction was to compensate for the suggested mud jacking or, as the circuit court found as an undisputed fact, for a waiver of all adverse conditions noted in the report. The inspection report did not relate the mud jacking of front and back sidewalks to the basement water stains. If Armstrong's testimony is believed, the price reduction was not directly related to water problems in the basement. The credibility of Armstrong's testimony is not to be resolved on summary judgment. See *Independence Bank v. Equity Livestock*, 141 Wis. 2d 776, 784, 417 N.W.2d 32 (Ct. App. 1987) (on summary

⁶ Armstrong's affidavit in opposition to the motion for summary judgment indicated that because the home inspector noted the end of the driveway would need to be mud jacked, he negotiated the price reduction. An affidavit that directly contradicts prior deposition testimony of the same witness is insufficient to create a genuine issue of fact for trial, unless the contradiction is adequately explained. See *Yahnke v. Carson*, 2000 WI 74, ¶21, 236 Wis. 2d 257, 613 N.W.2d 102. The circuit court rejected Armstrong's contention that mud jacking of the driveway was a basis for the price reduction.

judgment the circuit court is not entitled to weigh conflicting evidence as it would at a trial).

¶11 Further, waiver of the inspection contingency is ambiguous in light of the fact that the inspection had already been completed. The meaning of a waiver depends on the parties' intent and is a question of fact. *Royster-Clark, Inc. v. Olsen's Mill, Inc.*, 2006 WI 46, ¶21, 290 Wis. 2d 264, 714 N.W.2d 530. "Credibility of a person with respect to his [or her] subjective intent does not lend itself to be determined by affidavit." *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis. 2d 183, 190, 260 N.W.2d 241 (1977). Moreover, waiver is the voluntary and intentional relinquishment of a known right. *Hanz Trucking, Inc. v. Harris Bros. Co.*, 29 Wis. 2d 254, 264, 138 N.W.2d 238 (1965). We have already noted that questions of fact exist whether the inspection report and observation of water stains was enough to charge Armstrong with a known defect and the falsity of the Zimas's RECR. If Armstrong did not have knowledge of his legal rights respecting the falsity of the representation or a preexisting defect, he cannot be found to have waived them by waiver of the inspection contingency. In short, the case presents a question of interrelated facts that must be determined by the trier of fact.

¶12 As a final matter, we are offended by the tone utilized by Armstrong's appellate attorneys, Attorneys Daniel W. Stevens and Rudolph J. Kuss, in the appellant's brief. In the statement of the case, the brief accuses the circuit court judge of putting an "imprimatur on residential real estate fraud," by allowing sellers to lie on the statutorily mandated RECR. The statement of the case and fact section of an appellate brief should objectively recite the history of the case; "it is no place for argument or 'spin.'" *Dawson v. Goldammer*, 2006 WI App 158, ¶1 n.3, 295 Wis. 2d 728, 722 N.W.2d 106. The sarcastic approach

taken in the appellant's brief not only makes argumentative accusations but is an affront to the circuit court judge's ethics. The filing of documents in court questioning the circuit court's integrity will not be countenanced. *Cf. Gates v. Parmly*, 113 Wis. 147, 153-54, 87 N.W. 1096 (1902); *A.J.N. v. W.L.D.*, 167 Wis. 2d 315, 344, 481 N.W.2d 672 (Ct. App. 1992), *aff'd*, 174 Wis. 2d 745, 498 N.W.2d 235 (1993). We do not impose a sanction in this instance. However, Attorneys Stevens and Kuss are forewarned that we will not tolerate further accusations and dramatics of this nature in future appeals.

By the Court.—Judgment reversed and cause remanded.

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

