COURT OF APPEALS DECISION DATED AND FILED

February 1, 2012

A. John Voelker
Acting 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. 2011AP1175

Cir. Ct. No. 2010CV2775

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

MICHAEL D. DILLHYON AND ILENE L. DILLHYON,

PLAINTIFFS-APPELLANTS,

V.

PATRICIA A. DUNN, A/K/A PATRICIA A. WIESNER AND KENNETH L. WIESNER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Neal Nettesheim, Reserve Judge.

¶1 PER CURIAM. In this defective-basement case, Michael D. and Ilene L. Dillhyon appeal a judgment dismissing their misrepresentation, breach-of-contract and theft-by-fraud claims against Patricia A. Dunn, a/k/a Patricia A. Wiesner, and Kenneth L. Wiesner (the Wiesners), who sold the Dillhyons a house. The common thread in the claims is the reasonableness of the Dillhyons' reliance on the Real Estate Condition Report the Wiesners prepared. We conclude that the information the Dillhyons had in hand should have signaled the prudence of the further investigation the contract permitted, such that their reliance was not reasonable. We affirm.

¶2 The facts are undisputed.[1] The Dillhyons bought the Wiesners' forty-year-old house in December 2005. Prior to the sale, the Wiesners prepared a Real Estate Condition Report (Condition Report) that indicated they were aware of defects in the basement or foundation, specifically: "East wall of basement was corrected due to tree roots by installing steel rods in concrete block & concrete in block. Backfilled area with gravel & tree & stump removal."

¶3 The Condition Report advised the Dillhyons that the report was neither a warranty by the owner nor a substitute for any inspections or warranties they might wish to obtain. It also prominently advised: "THE PROSPECTIVE BUYER AND THE OWNER MAY WISH TO OBTAIN PROFESSIONAL ADVICE OR INSPECTIONS OF THE PROPERTY AND TO PROVIDE FOR APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN THEM WITH RESPECT TO ANY ADVICE, INSPECTIONS, DEFECTS OR WARRANTIES."

[1] We remind the Dillhyons' counsel that an appellate brief's fact section should recite the historical and procedural facts objectively; it is no place for argument or "spin." ***Arents v. ANR Pipeline Co.***, 2005 WI App 61, ¶5 n.2, 281 Wis. 2d 173, 696 N.W.2d 194.

¶4 The inspection contingency of the Offer to Purchase provided that the offer was "contingent upon a Wisconsin registered home inspector performing a home inspection of the Property, and an inspection, by a qualified independent inspector, and any contractors deemed necessary by home inspector which discloses no defects as defined below." The Dillhyons commissioned a home inspection. The Inspection Agreement advised the Dillhyons that the inspection was limited to "the apparent condition" of the premises and did not cover latent or concealed defects. The inspector's report cited "no major defects" but made note of some signs of basement dampness and some localized stains at the base of the basement's south wall. The Dillhyons did not arrange a second inspection "by a qualified independent inspector," as the inspection contingency allowed, to further investigate the identified dampness, stains and east wall repairs.

¶5 The inspection contingency gave the Dillhyons the right to provide the Wiesners "a written notice listing the defect(s) identified in the inspection report(s) to which Buyer objects," and the right to rescind based upon the identified defect; it gave the Wiesners no right to cure any defects. The Dillhyons gave no notice of defect. Instead, they executed an Amendment to the Offer to Purchase that waived the home inspection contingency and the duty to bring the basement wall to code. The sale went forth.

¶6 In May 2010, the Dillhyons noticed two cracks in the south wall of the basement. They engaged a professional engineer who found that the wall tilted inward a half to seven-eighths of an inch and advised reinforcing the wall with steel braces. The engineer opined that, based on the amount of patching found along the base of the south wall, the Wiesners had been aware of the structural problems but concealed them. The Dillhyons filed suit against the Wiesners, alleging false advertising, in violation of WIS. STAT. § 100.18; breach of warranty;

intentional misrepresentation; and statutory fraud, in violation of WIS. STAT. §895.446, which provides a civil remedy for a violation of WIS. STAT. §943.20(1)(d). The § 100.18 claim later was dismissed by stipulation and order.

¶7 The Wiesners successfully moved for summary judgment on the basis that the Dillhyons' reliance was not reasonable because they could have investigated their inspector's findings. The court then denied the Dillhyons' motion for reconsideration on the basis that they could have discovered the "true nature" of the allegedly concealed defect by exercising the inspection rights the contract afforded them. The Dillhyons appeal.

¶8 We review the grant of summary judgment independently, applying the same methodology as the circuit court. *See* ***Novell v. Migliaccio***, 2008 WI 44, ¶23, 309 Wis. 2d 132, 749 N.W.2d 544. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***; *see also* WIS. STAT. § 802.08(2). We assess summary judgment materials in the light most favorable to the nonmoving party. ***Smaxwell v. Bayard***, 2004 WI 101, ¶12, 274 Wis. 2d 278, 682 N.W.2d 923.

¶9 The Dillhyons argue that they were contractually bound to close on the purchase since their home inspector identified no defects as defined in the contract, such that the inspection contingency was deemed satisfied. We disagree.

¶10 They direct us to ***Novell***, where, they contend, the supreme court "reaffirmed that the reasonableness of a buyer's reliance on a seller's representations presents a question of fact." *See* ***Novell***, 309 Wis. 2d 132, ¶55. We disagree that ***Novell*** stands for so unequivocal a proposition. Indeed, the ***Novell*** court expressly stated that in some cases a circuit court may determine, as a matter of law that a plaintiff's belief about a defendant's representation is

unreasonable, such that the plaintiff's reliance on that representation also is unreasonable. ***Id.***, ¶61. "In such cases the circuit court may determine that the representation did not materially induce (cause) the plaintiff's decision to act as a matter of law. This, however, is not such a case." ***Id.***

¶11 What distinguishes this case from ***Novell*** is that, there, the buyer, Novell, did not have the forewarning of defects that the Dillhyons did. Rather, the sellers, the Migliaccios, denied awareness of any defects in the basement. Further, in response to the inspector's direct questions, the Migliaccios affirmatively represented that in the nine years they owned the house there never had been water in the basement nor had they painted the basement walls.

¶12 Here, by contrast, the Wiesners disclosed that they were aware of basement or foundation defects and that they had fortified the wall adjoining the ultimately problematic south wall. The inspector's report, which advised the Dillhyons of its limitations, noted no "major" defects but reported basement dampness and stains on the south wall. The Dillhyons submitted nothing to show that they questioned the inspector further about the significance of the stains in terms of the south wall's integrity, given the Wiesners' disclosure of basement/foundation defects and repair of the adjoining east wall.

¶13 We reject the Dillhyons' assertion that they "used the inspection rights that they had under the contract to the fullest." The contract contemplated that more than one inspection could be undertaken because it was contingent upon a "home inspector performing a home inspection of the property, and an inspection, by a qualified independent inspector." Instead, the Dillhyons opted to waive the home inspection contingency and the duty to bring the basement wall to

code. We interpret their waiver as a recognition that they had the right to another inspection.

¶14 Where the facts are undisputed, whether reliance is justifiable may be decided as matter of law. *See* ***Hennig v. Ahearn***, 230 Wis. 2d 149, 170, 601 N.W.2d 14 (Ct. App. 1999). A buyer who has the right to discover the "true nature" of a disclosed defect cannot later complain when he or she goes ahead with the purchase after giving up a right under the contract to discover the defect's "true nature." ***Malzewski v. Rapkin***, 2006 WI App 183, ¶15, 296 Wis. 2d 98, 723 N.W.2d 156. Buyers are required to exercise reasonable diligence and cannot close their eyes to means of information readily accessible to ascertain the facts. ***Kanack v. Kremski***, 96 Wis. 2d 426, 432, 291 N.W.2d 864 (1980).

¶15 We are mindful that we must view the summary judgment materials in the light most favorable to the Dillhyons as the nonmoving party. Nonetheless, we conclude that it was not reasonable for the Dillhyons to rely on the Condition Report and a single inspector's opinion when they were contractually armed with the right to an additional inspection. *See* ***Malzewski***, 296 Wis. 2d 98, ¶18. As the trial court noted, the Dillhyons, having failed to exercise their full rights under the contract, gave up their right to discover the defect's true nature.

By the Court.—Judgment affirmed.

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