COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 3, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-0169

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

HOWARD R. BOLDUC,

Plaintiff-Appellant,

v.

JAMES ALBERT and
PATRICIA A. ALBERT,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Howard Bolduc appeals a judgment, after a trial by jury, that awarded James and Patricia Albert $30,000 of real estate sale proceeds held in escrow by a title company. Bolduc, the buyer, and the Alberts, the sellers, placed the money in escrow while they resolved the final details of their 197 acre real estate transaction. Under the escrow agreement, Bolduc could keep the last $30,000 of the purchase price if his architect and engineering firms determined that the real estate would not support at least two buildable lots, defined as having minimum lake frontage of 150 feet and supporting

conventional septic systems. After Bolduc's engineers found two buildable lots not possible and the Alberts refused to accept their judgment, Bolduc sued to recover the escrowed $30,000, alleging breach of contract. He also accused the Alberts of misrepresenting the real estate's access to local roads. Bolduc submits two basic arguments on appeal: (1) the trial court should have granted him summary judgment and a directed verdict on the escrow agreement's lake frontage and septic system issues; and (2) he deserved judgment notwithstanding the verdict (n.o.v.) on the road access, misrepresentation issue. We reject these arguments and therefore affirm the judgment.

We first decline to review Bolduc's claim that the trial court should have granted him summary judgment under the escrow agreement. The record does not contain the affidavits that the parties may have submitted to the trial court on summary judgment. It contains the one page summary judgment motion, the order denying the motion, a brief transcript of the summary judgment hearing, and some exhibits that Bolduc submitted at trial and apparently earlier submitted with his summary judgment motion. As the appellant, Bolduc had the obligation to ensure that the record was sufficient to permit appellate review. ***State Bank of Hartford v. Arndt***, 129 Wis.2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986). Appellate courts confine their review to the material in the record. *See* ***In re Guardianship of Eberhardy***, 102 Wis.2d 539, 571, 307 N.W.2d 881, 895 (1981). We see no reason to depart from these rules in this appeal. Although Bolduc's appendix contains some or maybe all of the material that the parties submitted to the trial court on summary judgment, his appendix is no substitute for the original trial court documents. In any event, if we did consider the material in Bolduc's appendix and review the trial court's summary judgment ruling, we would nonetheless reject Bolduc's arguments. We now discuss the trial court's summary judgment ruling arguendo, in conjunction with our review of its directed verdict ruling; Bolduc raises the same basic arguments concerning both.

Bolduc first argues that the escrow agreement's lake frontage and septic system issues did not belong in court. He claims that the agreement gave his engineers peremptory authority to determine the property's lake frontage and septic system suitability, their judgment becoming binding, conclusive, and indisputable as to the Alberts. Bolduc is incorrect. Such third party "satisfaction" or arbitration clauses do not make the third party's judgment the last word. *See* ***Ekstrom v. State***, 45 Wis.2d 218, 223-24, 172 N.W.2d 660, 662-63 (1969). Rather, the Alberts retained limited rights to challenge such findings on

the basis of fraud, mistake, unjustness, oppressiveness, gross and palpable perversity, or implicit bad faith and dishonesty. ***Id***. If the Alberts produced material factual disputes or credible evidence on such questions, then the trial court properly denied Bolduc's summary judgment and directed verdict motions. ***Powalka v. State Mut. Life Assur. Co.***, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972) (summary judgment); ***Hale v. Stoughton Hosp. Ass'n, Inc.***, 126 Wis.2d 267, 276, 376 N.W.2d 89, 94 (Ct. App. 1985) (directed verdict). Here, the Alberts supplied facts directly contradicting the engineers' findings, implying in essence that they were unjust, perverse, oppressive, and based on bad faith. Under such circumstances, the trial court correctly denied Bolduc a summary judgment and directed verdict holding that his engineers had peremptory decision making authority.

The trial court also correctly denied Bolduc a summary judgment and directed verdict holding that the real estate's lake frontage and septic system characteristics met the terms of the escrow agreement. Under the agreement, a buildable lot was one having minimum lake frontage of 150 feet and supporting a conventional septic system. The lakeshore contained swampy and boggy land; the trial court held the agreement ambiguous on whether such terrain qualified as lake frontage. Although the escrow agreement purported to give Bolduc's engineers the power to determine what constituted lake frontage, we agree with the trial court that the lake frontage provision was ambiguous. Rational people could give the provision more than one reasonable interpretation. ***Meyer v. City of Amery***, 185 Wis.2d 537, 543, 518 N.W.2d 296, 298 (Ct. App. 1994). Courts resolve such ambiguities by resort to the parties' intent. ***Energy Complexes, Inc. v. Eau Claire County***, 152 Wis.2d 453, 468, 449 N.W.2d 35, 41 (1989). Here, neither the summary judgment material nor the trial evidence definitively showed that the parties intended swampy and boggy terrain to disqualify the lakeshore as lake frontage and thereby to disqualify the real estate from allowing two buildable lots; the affidavits and the testimony furnished directly conflicting facts on the issue. Likewise, neither definitively showed that the real estate would yield less than two conventional septic systems; in fact, Bolduc's engineers did not initiate soil tests until after the trial court denied summary judgment. The trial court properly left these questions for a jury.

Bolduc argues that the trial court should have granted him judgment n.o.v. on the misrepresentation issue. The jury found that the Alberts had not misrepresented any facts regarding the real estate's access to local

roads. The trial court could grant Bolduc judgment n.o.v. only if the trial sustained Bolduc's misrepresentation claim as a matter of law. ***Logterman v. Dawson***, 190 Wis.2d 90, 101-02, 526 N.W.2d 768, 771 (Ct. App. 1994). Such was not the case. Both of the Alberts denied assuring Bolduc that the real estate had access to local roads, and Mrs. Albert's February 12, 1992 letter mentioned access from the other side of the lake, not road access. Although other witnesses directly contradicted their testimony, the jury had the institutional obligation to resolve such conflicts and to weigh the relative credibility of the various witnesses. ***Hauer v. Union State Bank of Wautoma***, 192 Wis.2d 576, 589, 532 N.W.2d 456, 461 (Ct. App. 1995). We see nothing that compelled the trial court to grant judgment n.o.v. holding the Alberts' proof wanting as a matter of law. Further, even if the jury had found that the Alberts made a misrepresentation, either by oral communication or by Mrs. Albert's February 12, 1992 letter, the jury could have still denied Bolduc a recovery. The evidence would have permitted a finding that Bolduc had no right to reasonably rely on the falsehood; his own observations should have revealed the lack of access, and the Alberts' son had informed him that no access existed.

Finally, Bolduc argues that the reasonableness or justifiability of his reliance was not an element of his claim for negligent misrepresentation. Citing ***Imark Ind., Inc. v. Arthur Young & Co.***, 141 Wis.2d 114, 130, 414 N.W.2d 57, 64 (Ct. App. 1987), he maintains that he needed to show nothing more than actual reliance and that his unrefuted testimony on this issue warranted judgment n.o.v. Bolduc correctly describes our holding in ***Imark***, and the jury instructions adhered to it. They commented on reasonable reliance when reviewing the elements of Bolduc's strict responsibility for misrepresentation claim; however, they took up the elements of his negligent misrepresentation claim solely in terms of actual reliance. At any rate, none of this required judgment n.o.v. Reasonableness of reliance remained pertinent to the negligent misrepresentation claim, despite its disqualification as an element of that claim; ***Imark*** did not bar its examination for other purposes. If Bolduc's reliance seemed unreasonable, the jury could have used this as a means to disbelieve the truthfulness of his claim that he experienced actual reliance. As we noted above, the evidence would have allowed the jury to find his reliance unreasonable. We also note that ***Imark*** is not universally accepted. The Seventh Circuit United States Court of Appeals has expressed reservations about it and called Wisconsin's law on justifiable reliance vague, complex, and apparently conflicting. *See* ***Wentzka v. Gellman***, 991 F.2d 423, 425-26 (7th Cir. 1993). In sum, Bolduc has given us no basis to reverse the judgment.

By the Court.—Judgment affirmed.

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