COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 20, 1996

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(1), STATS.

NOTICE

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No. 95-1808

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

DAVID KNEER and ELAINE KNEER,

Plaintiff-Appellants,

v.

JAMES M. SARKAUSKAS and KEMPER SECURITIES, INC.,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Affirmed.*

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

PER CURIAM. David Kneer and Elaine Kneer appeal a summary judgment dismissing their complaint against James Sarkauskas, a securities broker, and Kemper Securities, Inc. The Kneers sued for damages arising out of alleged negligent misrepresentation, intentional misrepresentation and negligence with respect to investments the Kneers made in UBS mortgage trust bonds. The Kneers argue that because the undisputed facts establish a prima facie case for misrepresentation and negligence, the trial court erroneously

entered summary judgment of dismissal.[1] They also argue that the Kneers justifiably relied on Sarkauskas' representation of fact; the trial court erroneously held that David acted as an agent for Elaine; and that there are material issues of fact with respect to Sarkauskas' negligence. We affirm the judgment of dismissal.

The Kneers claim that in 1990 they were induced to purchase bonds in reliance on Sarkauskas' false written and oral representations that "these bonds would pay monthly interest for eight years at the rate of 9.85%." On May 10, 1990, David Kneer purchased $500,000 UBS bonds for his account. Elaine Kneer purchased $200,000 of the bonds. Three years later, in May and June of 1993, the bonds were paid off 100 cents on the dollar and the Kneers had received monthly interest at the rate of 9.5% per annum for the three years the bonds were held. The Kneers have no complaints regarding their return on their investment for the three years that they had the bonds, but would have liked the investment to continue longer.

At his deposition, David Kneer testified that he was a college graduate with a degree in business and a master's degree in management and personnel administration. He had previously owned and operated a car dealership, as well as other businesses. He testified that he had several conversations with Sarkauskas about the investments. The record contains the following excerpt from David Kneer's deposition:

Q. You know that mortgages prepay, don't you?

A. Yes.

Q: You know that the UBS was a trust of mortgages backed by Gennie Mae certificates, didn't you?

A. Yes.

[1] The Kneers' complaint also alleges §§ 551.41 and 551.43, STATS., violations. The trial court dismissed the §§ 551.41 and 551.43 claims on statute of limitations grounds. The Kneers do not challenge the court's ruling.

Q. You received confirmation of that purchase that identified the due date as occurring in June of 2020, didn't you?

A. Yes.

....

Q. Did you know at the time what a collateralized mortgage obligation was?

A. I was not that familiar with—with that instrument. Jim [Sarkauskas] really explained it to me.

....

Q. Did you ask, Well how is it possible that if they're thirty-year bonds that they might only go eight years?

A. I didn't question that.

....

Q. You knew that they might be as short as at least eight years, did you not?

A. Yes.

....

Q. Didn't you also understand that prepayments could also occur in less than eight years?

A. Well, yes.

When reviewing summary judgment, we apply the standard set forth in § 802.08(2), Stats., in the same manner as the circuit court. ***Kreinz v. NDII Secs. Corp.,*** 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). Summary judgment is appropriate when material facts are undisputed and inferences that may be reasonably drawn lead only to one conclusion. ***Radlein v. Industrial Fire & Cas. Ins. Co.,*** 117 Wis.2d 605, 609, 345 N.W.2d 874, 877 (1984).

A claim for misrepresentation can be based upon intent, negligence or strict responsibility. ***Gauerke v. Rozga,*** 112 Wis.2d 271, 277, 332

N.W.2d 804, 807 (1983). Common elements required for any misrepresentation claim are: (1) the defendant must make a representation of fact; (2) the representation of fact must be untrue; (3) the plaintiff must have believed the representation and (4) relied on it to his detriment. ***Grube v. Daun,*** 173 Wis.2d 30, 53-54, 496 N.W.2d 106, 114 (Ct. App. 1992).

The reliance must be "justifiable." ***Ritchie v. Clappier,*** 109 Wis.2d 399, 404, 326 N.W.2d 131, 134 (Ct. App. 1982). Courts will refuse to grant relief to one claiming to have been misled by another's statements who disregard knowledge of their falsity or the opportunity that by the exercise of ordinary observation he would have discovered their falsity. ***Id.*** He may not close his eyes to what is obvious. ***Id.*** "If the facts are undisputed, whether the party claiming fraud was justified in relying on misrepresentation is a question of law." ***Id.*** at 406, 326 N.W.2d at 134.

Here, by Kneer's own admission, there is no basis from which to find that Kneer justifiably relied on Sarkauskas' alleged representation that the bonds would not be prepaid in less than eight years. At deposition, Kneer conceded that he was aware that prepayment could be made in less than eight years. We recognize that under a strict responsibility analysis, the plaintiff is not required before relying upon the representation of fact to make an independent investigation. ***Gauerke,*** 112 Wis.2d at 281-82, 332 N.W.2d at 809. Kneer, however, testified that he already knew that prepayments could occur in less than eight years. Because we conclude as a matter of law that Kneer's claim lacks the essential element of justifiable reliance, the trial court properly entered summary judgment of dismissal.

Next, the Kneers argue that David's deposition discloses only what he knew, and not what Elaine knew, so that the trial court wrongly imputed David's knowledge to Elaine on a theory of agency. We disagree for two reasons. First, we observe that the Kneers have not developed this argument by citation to legal authority. *See* ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987). Second, the record establishes that the trial court correctly applied an agency theory.

At her deposition, Elaine testified that she was a widow and relied upon her son David in making her investment decision. Elaine's undisputed testimony establishes an implied agency for the purpose of investigating an

investment opportunity. "Agency is a consensual, fiduciary relation between two persons, created by law by which one, the principal, has a right to control the conduct of the agent, and the agent has a power to affect the legal relations of the principal." ***Skrupky v. Elbert***, 189 Wis.2d 31, 43, 526 N.W.2d 264, 269 (Ct. App. 1994) (quoting WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 3 at 3 (1964)). Agency may be express or implied. ***Id.*** To the extent that the principal specifies minutely the agent's authorities, it is express. ***Id.*** at 44 n.5, 526 N.W.2d at 269 n.5. "But most authority is created by implication. ... These powers are all implied or inferred from the words used, from customs and from the relation of the parties." ***Id.***

The trial court was entitled to conclude as a matter of law that Elaine gave David the authority to investigate the investment opportunity and to report his findings and make a recommendation. As a result, his knowledge of the investment's duration is notice to Elaine. "A person has notice of a fact if his agent has knowledge of the fact, reason to know it or should know it ... under [the] circumstances ...." RESTATEMENT (SECOND) OF AGENCY § 9(3) at 45 (1958). Because Elaine is charged with knowledge of the indeterminate and potentially abbreviated term of the investment, the element of justifiable reliance is not satisfied.

The Kneers argue that in a letter dated May 10, 1990, Sarkauskas stated that the bonds "will pay monthly interest for 8 years at 9.85%." This letter thanked Elaine for her $200,000 bond order. It fails to support the element of reliance because it was written after the order had been placed. Although the letter is evidence supporting the Kneers' allegation that Sarkauskas made a factual representation, the letter does not supply proof of the element of justifiable reliance.

Next, the Kneers allege that Sarkauskas negligently breached his professional duty. A successful negligence claim requires proof of a duty of care, a breach of that duty, a causal connection between the breach and the injury. ***La Chance v. Thermogas Co.,*** 120 Wis.2d 569, 574, 357 N.W.2d 1, 3 (Ct. App. 1984).

The Kneers argue that factual issues exist with respect to Sarkauskas' duty and the resulting injuries. We disagree. To establish a prima facie case for summary judgment, a moving party, here the defendant, must

present evidentiary facts establishing a defense that would defeat the plaintiff's claim. ***Grams v. Boss,*** 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980). Once a prima facie defense is presented, § 802.08, STATS., places the burden on the opposing party to set forth specific facts showing that there is a genuine factual issue for trial. ***Bank of Two Rivers v. Zimmer,*** 112 Wis.2d 624, 632, 334 N.W.2d 230, 234 (1983).

We conclude that Kneer's deposition testimony established a prima facie defense. Kneer testified that after investigating the investment for himself and on behalf of his mother, he knew that the term of the investment could be less than eight years. Kneer's testimony provides an affirmative defense to the claim that Sarkauskas' negligence caused them damages. Because the Kneers fail to present specific facts to rebut the affirmative defense, no genuine issue of disputed material fact is raised. The trial court properly entered a summary judgment of dismissal.

By the Court. – Judgment affirmed.

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