COURT OF APPEALS
DECISION
DATED AND RELEASED

NOVEMBER 12, 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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0263

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

RANDALL J. WILSON and
MIRIAM I. WILSON,

Plaintiffs-Appellants,

v.

THE ESTATE OF ELSIE L. WOODFORD,
C/O DONALD WOODFORD,
PERSONAL REPRESENTATIVE, and
THE ESTATE OF ALVIN L. WOODFORD,
C/O DONALD WOODFORD,
PERSONAL REPRESENTATIVE,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed.*

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

PER CURIAM. This dispute arises out of a 1983 real estate transaction. Randall and Miriam Wilson appeal a judgment dismissing their claims against the estates of Elsie Woodford and Alvin Woodford, both

deceased. The Wilsons claim breach of warranty and strict responsibility, intentional, and negligent misrepresentation in failing to disclose defects in the property. They seek compensatory and punitive damages. They argue that the trial court erroneously (1) found that there was no evidence that the Woodfords knew or should have known about defects in the septic system; (2) concluded that the evidence failed to support the legal theory of strict responsibility misrepresentation; and (3) determined damages. Because the record supports the trial court's findings with respect to liability, we do not reach the issue of damages and affirm the judgment of dismissal.

In 1983, the parties entered into an offer to purchase the Woodford's 222-acre dairy farm for $160,000. The farm included a farm house built in the 1920s, a ranch style home built in 1958, a barn and outbuildings. The offer was signed by the Wilsons, Elsie Woodford and Donald Woodford, the personal representative of his late father's, Alvin Woodford's, estate. The offer stated:

> Seller warrants and represents to Buyer that Seller has no notice or knowledge of: ... AND STRUCTURAL OR MECHANICAL DEFECTS OF MATERIAL SIGNIFICANCE IN PROPERTY, INCLUDING ADEQUACY AND QUALITY OF WELL AND SANITARY DISPOSAL SYSTEMS.

Elsie, who was in her sixties at the time of the transaction, had lived on the farm for over forty years. The Wilsons moved onto the farm in 1983. In 1990, after living on the property for seven years, Randall Wilson, a lawyer and certified public accountant, discovered defects in the foundation of the ranch home and that the sanitary system was not in compliance with certain code requirements. Also discovered were that the footings for the garage and bedroom addition were not built below the forty-eight-inch frost line. The Wilsons also discovered that the septic system for the farmhouse drained into an open drain field; the septic tank for the ranch was not set back at least five feet from the foundation wall as current code required; and the garage floor was cracked and lacked a sand lift and reinforcements.

The Wilsons initiated this action in 1993. At the trial to the court, the Wilsons relied on the representations contained in the written offer to

purchase agreement. Alvin Woodward had died prior to the 1983 transaction. Randall did not recall any conversations with Donald Woodward, Alvin's son, until after deal was closed. Randall negotiated the transaction with Elsie but did not testify to any specific conversations they had. The trial court ruled that the record failed to support a finding that Elsie knew or should have known of any defects and ordered the complaint dismissed. The Wilsons appeal.

The Wilsons argue that the trial court erred when it concluded there was insufficient evidence to find that the Woodfords knew or should have known of the septic system defects. We disagree. Appellate courts do not reverse trial court findings of fact unless they are clearly erroneous. ***Fryer v. Conant,*** 159 Wis.2d 739, 744, 465 N.W.2d 517, 520 (Ct. App. 1990). When there is conflicting testimony, the trial court is the ultimate arbiter of the credibility of the witnesses. ***Noll v. Dimiceli's, Inc.,*** 115 Wis.2d 641, 644, 340 N.W.2d 575, 577 (Ct. App. 1983). Appellate courts defer to the trial court's superior opportunity to observe witness demeanor. ***In re Estate of Dejmal,*** 95 Wis.2d 141, 152, 289 N.W.2d 813, 818 (1980). We do not substitute our judgment for that of the trial court on issues of weight and credibility of the evidence unless the evidence is inherently incredible. ***In re Estate of Jones,*** 74 Wis.2d 607, 613, 247 N.W.2d 168, 171 (1976). Inherently incredible means to be in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State,*** 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975).

The Wilsons rely on the following testimony to demonstrate Elsie's knowledge. Elsie customarily gardened near the farmhouse septic system drain. A plumber testified that he worked on the ranch-style farmhouse septic system, and his inspection indicated the farm's system was illegal. In such circumstances he customarily told the owners that their system was illegal and needed replacement. As Wilson testified: "Circumstantial evidence tells me she knew."

However, it was undisputed that Elsie maintained the property in near immaculate condition. If there was a problem on the property, she or her husband hired well-reputed contractors and plumbers to fix the problem. The septic system never gave them a problem. Twice a year, state inspectors inspected their entire farm operation, including the septic system, and gave them a Grade A rating. The plumber never testified that he told Elsie that her septic system was defective or illegal. Her system was a typical system for

older farms in that area. There was testimony that plumbing codes changed and evolved over the years, and there is no indication that Elsie had any familiarity with them.

The Wilsons, with two children, moved onto the property in 1983, but no problems were noticed until 1990. A state soil expert testified that the Wilsons are not required to replace the system in absence of a health hazard. The record discloses no evidence of a present health hazard that requires replacement. When circumstantial evidence permits more than one reasonable inference, we must accept the inference drawn by the trial court. ***Voigt v. Riesterer,*** 187 Wis.2d 459, 467, 523 N.W.2d 133, 136 (Ct. App. 1994). The record supports the trial court's finding that Elsie had no knowledge of any defect or illegality in the septic system.

Next, the Wilsons argue that the trial court erroneously determined that the record was insufficient to support a claim of strict responsibility. We disagree. A claim for strict responsibility requires proof of five elements: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant made the representation based on his own personal knowledge or in circumstances in which he necessarily ought to have known the truth or falsity of the statement; (4) the defendant had an economic interest in the transaction; and (5) the plaintiff believed such representation to be true and relied on it. ***Reda v. Sincaban,*** 145 Wis.2d 266, 269, 426 N.W.2d 100, 102 (Ct. App. 1988). The record supports the trial court's conclusion that there was insufficient evidence to find that Elsie knew or necessarily should have known that the representations made in the offer to purchase were untrue.

Next, the Wilsons argue that because Elsie was a farm wife who lived on the property for forty years, and contracted for the construction of the garage and bedroom addition to the ranch house, she should have possessed personal knowledge of the property's foundation defects.[1] The trial court heard conflicting testimony with respect to the alleged foundation defects. The court heard testimony from which it could find that the problems in the foundation

[1] Our prior discussion disposes of the issue of Elsie's knowledge with respect to the septic system.

were caused by the Wilsons leaving the ranch house unheated for several winters, causing the foundation to heave and crack.

The Wilsons did not notice any cracks in the garage floor until after 1990. There is no indication that Elsie had any knowledge of the construction techniques used on the property because she and her husband hired well known contractors to do the work. Appellate courts search the record for evidence to support findings that the trial court made, not for findings the trial court could have but did not make. ***In re Estate of Becker,*** 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977). The trial court correctly determined that the record failed to support a claim of strict responsibility misrepresentation.

In their reply brief, the Wilsons argue that a law of agency should be applied to impute Elsie's contractors' knowledge to her. They further argue that the written warranty in the offer to purchase implies personal knowledge of the nature and condition of the property, and therefore Elsie should be charged with that knowledge as a matter of law. Also, they contend that a "reasonable person" standard applies, rendering her subjective knowledge irrelevant and charging her with the knowledge that her system was illegal and defective per se. They further argue: "There are no excuses or defenses to nondisclosure or misrepresentation."

Because these arguments are not supported by citation to legal authority, we do not address them. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980). [T]he Court of Appeals ... is a fast-paced, high volume court. There are limits beyond which we cannot go in overlooking these kinds of failings. [F]or us to decide [their] issues, we would first have to develop them. We cannot serve as both advocate and judge." ***State v. Pettit,*** 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992). Also, because the liability issue disposes of the appeal, we need not address the issue of damages. We note, however, that the court's judicial notice of the probate file's $177,000 appraisal of the farm was taken without objection.

By the Court.—Judgment affirmed.

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