

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

October 2, 1997

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.

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

No. 96-2154

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BRUCE W. WILLIAMSON AND JEANNE G. WILLIAMSON,

PLAINTIFFS-APPELLANTS,

V.

JERRY H. FIRNSTAHL, AND LUCILLE M. FIRNSTAHL,

DEFENDANTS,

TRACY & SONS, INC.,

DEFENDANT-RESPONDENT,

**KEN HELBING, D/B/A NATIONAL PROPERTY
INSPECTIONS, LINDA WIEDENFELD, RICHARD L. RAPP,
JUDY A. RAPP AND MARY B. CRAIN,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Jefferson County:
JACQUELINE R. ERWIN, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Deininger, JJ.

PER CURIAM. Bruce and Jeanne Williamson appeal from a summary judgment dismissing their cause of action against Tracy & Sons, Inc. The Williamsons bought a residential property with an allegedly defective septic system, that Tracy & Sons inspected before the sale. Their claim is based on the inspection report's conclusion that on the date of inspection, the system was in working condition. After reviewing the parties' submissions on summary judgment, the trial court concluded that Tracy & Sons had established facts necessary to a defense as a matter of law, and that the Williamsons failed to make a sufficient showing to bring any element of that defense into dispute. We agree and therefore affirm.

The Williamsons' offer to purchase required the sellers to provide a septic system inspection report. The sellers engaged Tracy & Sons who submitted the following report on October 6, 1993:

RE: Septic Evaluation - N3437 Schmidt Rd., Jefferson, WI

At the time of service and inspection, 9-22-93, the septic system was in working condition.

This premise is served by a conventional system, with a 1,000 gallon concrete tank, with baffels [sic]. Tank level was normal and the baffels [sic] were in good condition. There was a vent visible on the system and had a small amount of water in it. This could be due to the abundance of rainfall we have had this year.

This system should be maintained on a six month basis, depending on the weather and number of occupants. This will add to the life of the current system.

This evaluation does not give any life expectancy to any system, it only gives its findings at the time of the inspection. If the system would fail, replacement would be an alternate system. To help assist you in any decisions concerning this system, please contact our office.

The Williamsons commenced this action in 1995, alleging that the representations contained in the letter quoted above were untrue.

Tracy & Sons moved for summary judgment and submitted evidence that the septic system continued to operate for two years after the inspection. The Williamsons opposed summary judgment with the affidavit of Jerry Schwarten, a professional home inspector. Schwarten stated that in his opinion “at the time the Williamsons purchased their property, there were serious questions regarding the adequacy of the septic system and whether it had failed or was getting close to failure.” He further stated that “Tracy & Sons, Inc. was negligent in failing to notify the Williamsons or any prospective buyer that the septic system had failed or was on the verge of failing.” Schwarten also inspected the system’s pumping record and concluded that its frequency would have caused a reasonable inspector to report a failing system. Bruce Williamson also submitted an affidavit attaching a copy of that pumping record, and reporting an unidentified county representative’s opinion that the system had failed or was close to failing shortly after the Williamsons purchased the house.

We independently review summary judgments without deference to the trial court. *Schaller v. Marine Nat’l Bank*, 131 Wis.2d 389, 394, 388 N.W.2d 645, 648 (Ct. App. 1986). Where, as here, the moving party has made a prima facie case for summary judgment, the opposing party must submit evidence showing that a genuine issue exists as to any material fact, or that reasonable conflicting inferences can be drawn from the undisputed facts. *Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980).

The Williamsons did not produce facts disputing the truth of the inspection report. Their expert concluded, on the basis of a 1996 inspection, that

serious questions existed about the adequacy of the septic system at the time the Williamsons purchased their property. This conclusion does not place in dispute the truth of the statement that the septic system was working on September 22, 1993, several weeks before the Williamsons bought the property. Nor is the expert's conclusion necessarily inconsistent with the report. Tracy & Sons expressly reserved any opinion as to the future functioning of the system, noted the possibility of system failure, and recommended frequent maintenance. These statements are all consistent with the possibility of "serious questions" about the septic system. Schwarten's affidavit also states that Tracy & Sons negligently failed to warn the Williamsons of future problems. That, however, is not proof of misrepresentation that the system was working on the day of inspection. The same is true of Schwarten's conclusion that a reasonable inspector might have filed a different kind of report.

As for Williamson's affidavit, his report of the county representative's conclusion is inadmissible hearsay and we therefore do not consider it. *See* § 802.08(3), STATS. The attached system maintenance record also fails to create any material disputes because it is unclear which system the record pertains to, as there were two on the property, and the claim against Tracy & Sons concerns only one of them. In any event, a record of frequent maintenance is consistent with Tracy & Sons' recommendation for frequent maintenance in the future, and is not proof of a non-working system on September 22, 1993.

The Williamsons also contend that Tracy & Sons should be liable for negligently limiting the scope of their report, and that by doing so they violated a duty to fully inform the Williamsons, even though the sellers employed them. This contention of misrepresentation by omission is raised for the first time on

appeal. We therefore do not address it. *See Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

By the Court.—Judgment affirmed.

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

