

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-1309

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**LORI BUTTERIS, SALLY KITELINGER,
JOE L. KITELINGER, KELSI ROBERTS,
JEFF LINDNER, TOM BANFIELD, AND
JULIA C. LARMORE,**

PLAINTIFFS,

**CAROL KITELINGER, LAVERNE KITELINGER,
EDWARD KITELINGER, JASON KITELINGER,
KIM LINDNER, MARGARET LINDNER,
BARBARA FAULKNER, TAMELA S. FAULKNER,
MARY A. NEISIUS, AND ROBERT A. NEISIUS,**

PLAINTIFFS-APPELLANTS,

v.

**STAN CHRISTIANSEN, D/B/A THE SILENT WOMAN
RESTAURANT, STACEY CHRISTIANSEN, AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF STAN
CHRISTIANSEN, EUGENE E. BRASSFIELD,
AS PERSONAL REPRESENTATIVE OF THE ESTATE OF
STAN CHRISTIANSEN, AND MILWAUKEE
MUTUAL INSURANCE CO.,**

DEFENDANTS-RESPONDENTS,

**METROPOLITAN LIFE INSURANCE COMPANY,
GROUP HEALTH COOPERATIVE HMO, AND
DEAN HEALTH PLAN, INC.,**

SUBROGATED DEFENDANTS.

APPEAL from a judgment of the circuit court for Grant County:
GEORGE S. CURRY, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. Carol Kitelinger, Laverne Kitelinger, Edward Kitelinger, Jason Kitelinger, Kim Linder, Margaret Linder, Barbara Faulkner, Tamela Faulkner, Mary Neisius and Robert Neisius (the guests),¹ appeal the portion of the order and judgment of the circuit court which dismissed their claims under § 100.18, STATS., and limited the amount of certain costs. The issues on appeal are whether the guests established a claim for fraudulent misrepresentation under § 100.18, whether each appellant is entitled to recover the statutory expert witness fee, and whether the circuit court awarded the correct amount of costs for playing videotaped testimony at trial. Because we conclude that the guests did not establish a claim for fraudulent misrepresentation, that they are not each entitled to the fee for one expert witness, and that the circuit court determined the proper amount of costs for the playing of the video tape, we affirm.

The guests all attended a wedding reception held at The Silent Woman Restaurant in Fennimore. A few weeks prior to the wedding reception,

¹ More parties were named as plaintiffs in the action before the circuit court than are parties to this appeal. When discussing the events in the circuit court, we do not make a distinction between those plaintiffs who participate in the appeal and those who do not.

but apparently after the invitations had already been sent out, the bride and her family met with the owner of the restaurant, Stan Christiansen, to discuss the menu and other things relating to the reception. The father of the bride testified that Christiansen told them that he would serve good turkey sandwiches. He also testified that Christiansen stated that even though they had sent out three hundred invitations, only about half the people would attend. They then agreed that one hundred seventy-five people would attend. He also testified that Christiansen said that if more than one hundred seventy-five people attended, the restaurant could handle it.

About two hundred twenty-four people actually attended the reception. After the reception, some of them became ill. It was later determined that they suffered from salmonella poisoning caused by turkey served at the reception which had not been properly cooked.

The guests brought suit against Christiansen, who had since died, his personal representatives, and some insurance companies (collectively, the restaurant). The restaurant admitted liability for the guests' illnesses. The issues at trial, therefore, were only the amount of damages suffered by the individual plaintiffs and whether the guests could recover under § 100.18, STATS.

At the close of the plaintiffs' case, the circuit court dismissed the claim under § 100.18, STATS., finding that there was no evidence that Christiansen had made misrepresentations of fact, or that the statements he made had induced

the bride's mother to enter into the contract.² The court concluded that the statements attributed to Christiansen simply established a breach of contract.

The guests requested \$1,600 in costs for the expert witness who testified at the trial. The guests asserted that they were entitled to the witness fee for each of the sixteen plaintiffs even though only one expert witness testified. The circuit court rejected their claim and awarded them one fee under § 814.04, STATS., for a total of \$116.³ In addition, the guests requested \$313.34 in costs for the playback of the video-taped evidentiary deposition of their expert witness. Again the court awarded \$116, under § 885.45(3), STATS.

Standard of Review

We will set aside a trial court's decision to dismiss after the plaintiff has rested because of insufficient evidence only if the record reveals that, "considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party." Section 805.14(1), STATS.; see *Weiss v. United Fire & Cas. Co.*, 197 Wis.2d 365, 388, 541 N.W.2d 753, 761 (1995). This standard applies both to the circuit court and to "an appellate court on review of the trial court's determination" of the motion. See *id.* (citation omitted). But because a circuit court is better positioned to decide the weight and relevancy of the testimony, an appellate court "must also give substantial deference to the trial court's better ability to assess the evidence," and we should not overturn a circuit

² The contract for the wedding reception was between the restaurant and the bride's mother.

³ The expert witness fee of \$100 plus the standard witness fee of \$16. See §§ 814.67 and 814.04, STATS.

court's decision to dismiss for insufficient evidence unless the record reveals that the circuit court was "clearly wrong." *See id.* at 388-89, 541 N.W.2d at 761 (citations omitted).

The guests assert that the statements Christiansen made about the quality of the restaurant's food, his estimate of the number of guests who would actually attend and the ability of the restaurant to serve that number of people, induced the bride's mother to enter into the contract. The guests argue that these were false statements of fact because the restaurant only had the capacity to cook turkey safely for two hundred people.

Section 100.18, STATS., establishes a cause of action for fraudulent representations, also known as false advertising. It provides in relevant part:

(1) No person, firm, corporation or association, or agent or employe thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by such person, firm, corporation or association, or agent or employe thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

Statements that reflect opinion or something that would likely occur in the future, are not actionable because they are not representations of fact. *See Consolidated Papers, Inc. v. Dorr-Oliver, Inc.*, 153 Wis.2d 589, 594, 451 N.W.2d 456, 459 (Ct. App. 1989). “A representation is one of opinion if it expresses only the maker’s judgment as to quality, value, authenticity, or other matters of judgment.” *Id.* Further, a statement of fact must relate “to present or pre-existing facts, not something to occur in the future.” *Id.*

Christiansen’s statements that the sandwiches would be good, about the number of guests who would attend, and the ability of the restaurant to serve more, were statements of his opinion and his judgment. These statements did not relate to any present or pre-existing facts. The guests did not establish a cause of action for fraudulent representation under § 100.18, STATS.

The guests also argue that the circuit court erred when it refused to grant each of plaintiffs the \$100 statutory expert fee. Only one expert testified for the guests. Section 814.04(2), STATS. provides for costs including: “an expert witness fee not exceeding \$100 for each expert who testifies.” Since only one expert testified, the guests are only entitled to one expert witness fee.

The guests also argue that they are entitled to a greater amount of costs for playing a videotape recording at trial. It is not clear from the guests’ brief why they assert that the amount the circuit court awarded was incorrect. The statutes, however, support the circuit court’s award. *See* §§ 885.45(3) and 814.04(2), STATS.

By the Court.—Judgment affirmed.

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

