

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 5, 1999

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. 99-1237-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

RUSSELL W. WEBER AND NOREEN WEBER,

PLAINTIFFS-APPELLANTS,

v.

TERRENCE M. CROSSIN AND PATRICIA CROSSIN,

DEFENDANTS-RESPONDENTS.

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

¶1 HOOVER, P.J. Russell and Noreen Weber appeal a judgment entered in favor of Terrence and Patricia Crossin after a bench trial.¹ The Webers contend that the trial court erred by failing to hold the Crossins strictly responsible for misrepresenting the type of septic tank on the property the Webers purchased

¹ This is an expedited appeal under RULE 809.17, STATS.

from the Crossins. Because the trial court's finding that the Crossins never expressed or implied personal knowledge about the septic tank is not clearly erroneous, the judgment is affirmed.

¶2 The Webers offered to purchase a house with a septic system from the Crossins. The offer contained a contingency that provided for a septic system inspection at the Webers' expense within thirty days of the offer's acceptance. The Crossins accepted the offer on August 28, 1997. The Webers did not have the septic system inspected before the October 4 closing.

¶3 Before the closing and expiration of the thirty-day septic inspection period, Russell Weber asked Terrance Crossin about the type and construction of the septic tank. The Crossins' listing contract contained no representations as to the septic tank's type; the boxes indicating whether the tank was concrete or steel were left unchecked. Weber wanted a concrete tank because they "do not rot out like a steel tank." Crossin indicated that he believed he had a concrete septic tank, but was not sure. Approximately one week before the closing, Crossin informed Weber that he had found a twenty-year-old proposal for installation of a 1,000-gallon concrete septic tank and brought that proposal to the closing.

¶4 The Webers had the septic tank pumped out in 1998. At that time, they discovered that the tank was made of steel, had a capacity of 750 gallons and was in need of replacement. The Webers subsequently initiated this action against the Crossins, claiming that the latter were strictly responsible for misrepresenting the status of the septic tank.

¶5 The court found that although the Crossins informed the Webers of their belief of the septic tank's construction, their belief was not based upon

personal knowledge. As a result, the court determined that strict responsibility for misrepresentation did not apply and entered judgment in favor of the Crossins.

¶6 This appeal concerns the Webers' allegation that the Crossins expressed or implied personal knowledge when they made representations about the septic tank. This case presents a mixed question of law and fact. An appellate court must determine whether the undisputed and properly found facts fulfill the correct legal standard. *DOR v. Exxon Corp.*, 90 Wis.2d 700, 713, 281 N.W.2d 94, 101 (1979). A trial court's findings of fact will not be set aside unless they are clearly erroneous. Section 805.17(2), STATS.; *Mentzel v. City of Oshkosh*, 146 Wis.2d 804, 808, 432 N.W.2d 609, 611 (Ct. App. 1988). When more than one inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact. *Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979). The appellate court will search the record for evidence to support the trial court's findings of fact. *In re Estate of Becker*, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977). Whether those facts fulfill the applicable legal standard is a question of law. *Exxon*, 90 Wis.2d at 713, 281 N.W.2d at 101.

¶7 The Webers contend that the Crossins are strictly responsible for misrepresenting that the septic tank was made of concrete and had a 1,000-gallon capacity. They assert that the trial court erred by finding that the Crossins never represented upon personal knowledge the septic tank's type or capacity. The Webers claim that the information contained in the proposal that the Crossins conveyed to the Webers constitutes their false representation of fact as to the type and capacity of the septic tank.

¶8 The elements for a claim of strict responsibility misrepresentation are: (1) the defendant made an untrue factual representation, (2) that the plaintiff believed to be true and relied upon, (3) when the representation is either based on the defendant's own personal knowledge or in circumstances in which the defendant necessarily ought to have known the truth or untruth of the statement, and (4) the defendant has an economic interest in the transaction. *Reda v. Sincaban*, 145 Wis.2d 266, 268-69, 426 N.W.2d 100, 102 (Ct. App. 1988). The dispute here concerns the third element: whether representations were made based upon the Crossins' personal knowledge or in circumstances in which the Crossins ought to have known the truth of their statement.

¶9 The trial court's finding that the Crossins never indicated, implied or professed personal knowledge about the septic tank is not clearly erroneous. Russell testified that Terrence indicated that he believed the tank was made of concrete, but was unsure. Later, after finding the proposal, Terrence indicated to Russell that *the proposal* showed that a 1000-gallon concrete septic tank was to be installed, and gave Weber a copy of the proposal.² The proposal did not give the Crossins personal knowledge that the septic tank was actually a 1,000-gallon concrete tank, nor did they represent that it did.

¶10 The Webers nonetheless claim that under *Gauerke v. Rozga*, 112 Wis.2d 271, 280, 332 N.W.2d 804, 808-09 (1983), conveying the information in

² There is no explanation in the record why a concrete septic tank was not installed. The contractor who installed the tank was not made a party to the action. The Crossins assert that the Webers should have impleaded the contractor, the Webers claim they could not because they lack privity and contend that the Crossins should have impleaded the contractor.

This court does not concern itself with these hypothetical questions regarding the septic tank installer; rather it must deal with the issues and record before it.

the proposal was adequate to fulfill the personal knowledge element of strict liability for misrepresentation. In *Gauerke*, the supreme court stated that the doctrine of strict liability for misrepresentation does not depend upon the actual source of the speaker's knowledge, rather it is satisfied if the speaker professes or implies personal knowledge. *Id.* at 280-81, 332 N.W.2d at 809. In essence, the Webers contend that they are entitled to rely upon any information provided by the Crossins.

¶11 The Webers' argument is misguided. The speaker must profess or imply personal knowledge for strict responsibility misrepresentation to apply. *See Merrill Lynch, Pierce, Fenner & Smith v. Boeck*, 127 Wis.2d 127, 138, 377 N.W.2d 605, 610 (1985). The Crossins never communicated certainty based on personal knowledge of the septic tank's type and capacity. To the contrary, they stated that they were unsure of those facts and later searched their records. They informed the Webers of the search results, i.e., the proposal. At that point the Crossins only made the representation that the proposal indicated that the septic tank had a 1,000-gallon capacity and was constructed of concrete. It is undisputed that the Crossins' representations about the information contained in the proposal itself were true. The Crossins' representations were not about the septic tank actually in the ground.

¶12 The Crossins provided the proposal to the Webers. The Webers were thus in the same position as the Crossins to evaluate the proposal's contents. That the Webers may have relied on the proposal to forego an inspection and infer that the septic tank was actually a 1,000-gallon concrete tank cannot be attributed to any representation by the Crossins based on their apparent personal knowledge

as to the actual construction of the tank.³ The only representation about the septic tank the Crossins made based on apparent or actual personal knowledge was uncertainty as to the septic tank's type and capacity. The elements necessary for strict responsibility misrepresentation do not exist here.

¶13 The Crossins request we impose costs and fees pursuant to § 809.25(3), STATS., on the grounds that the appeal is frivolous. The Crossins offer no real argument why the appeal is frivolous. This court determines it is not. Although this court rejects the Webers' arguments, there is nothing to suggest that they could not be made in good faith. An appeal is not frivolous merely because the appellant is wrong. *See Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis.2d 605, 614, 345 N.W.2d 874, 879 (1984). The motion is denied.

¶14 Because the Crossins made no untrue representation of fact or any representation about the septic tank based upon apparent personal knowledge, strict responsibility for representation does not apply. Accordingly, the judgment is affirmed.

By the Court.—Judgment affirmed. Costs denied.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

³ It is not clear from the record whether the information regarding the proposal was communicated to the Webers before the expiration of the 30-day inspection period. The trial court made no findings in this regard because it decided the matter on different grounds.

