COURT OF APPEALS DECISION DATED AND FILED	NOTICE
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Cornelia G. Clark Clerk, Court of Appeals of Wisconsin	A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0933

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

GEORGE T. STATHUS AND JILL J. STATHUS,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

JAMES H. HORST AND GEORGIA J. EDWARDS,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Judgment affirmed in part, reversed in part, and cause remanded.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. This is an appeal and cross-appeal from a judgment entered on a misrepresentation claim brought by George T. and Jill J. Stathus against James H. Horst and Georgia J. Edwards in connection with the sale

by Horst and Edwards of their house to the Stathuses. After a bench trial, the trial court entered judgment in favor of the Stathuses and against Horst and Edwards for $5,000 in compensatory damages, and $3,000 in attorney's fees.[1] The trial court determined that Horst and Edwards intentionally misrepresented the house's condition.

¶2 The crux of the Stathuses's action against Horst and Edwards was that Horst and Edwards did not disclose either in the required Real Estate Condition Report or otherwise the water problems in the basement and in connection with an underground spring running through the property that resulted in a flow of water across the sidewalk in front of the house.

¶3 Many of the issues raised by the parties are intertwined and for ease of analysis we address the issues raised by the cross-appeal first. For reasons we explain below, we affirm on the cross-appeal, reverse on the appeal, and remand to the trial court for further proceedings.

A. The Cross-Appeal.

1. *Assertion by Horst and Edwards that the sole remedy available to the Stathuses was recision, rather than damages.*

¶4 As noted, the trial court found in favor of the Stathuses. Horst and Edwards contend that even if they did misrepresent the house's condition, the sole remedy available to the Stathuses was recision, which Horst and Edwards claim is the exclusive remedy provided by WIS. STAT. § 709.05(4). We disagree.

[1] The judgment mistakenly represents that this was a jury trial.

¶5 WISCONSIN STAT. ch. 709 requires sellers of certain real property to disclose the property's condition *via* a Real Estate Condition Report specified by WIS. STAT. § 709.03. WISCONSIN STAT. § 709.05 gives to a "prospective buyer" of certain real property the right to rescind where, among other things, that buyer "receives a report that is incomplete or that contains an inaccurate assertion that an item is not applicable and who is not aware of the defects that the owner failed to disclose." WIS. STAT. § 709.05(1). Section 709.05(4) provides: "The right to rescind under this section is the only remedy under this chapter."

¶6 The trial court awarded damages to the Stathuses under WIS. STAT. § 895.80, which gives a civil remedy to those suffering damages as a result of another's violation of WIS. STAT. § 943.20. Section 895.80(1) provides, as material here: "Any person who suffers damage or loss by reason of intentional conduct that occurs on or after November 1, 1995, and that is prohibited under s. ... 943.20 ... has a cause of action against the person who caused the damage or loss." Section 943.20(1)(d) makes it illegal for anyone to: "Obtain[] title to property of another person by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made." The trial court found that Horst and Edwards "obtained title to the Stathas's [*sic*] property within the meaning of § 943.20(1)(d)."

¶7 Statutes should be applied consistent with their plain meaning. ***DNR v. Wisconsin Power & Light Co.*** 108 Wis. 2d 403, 408, 321 N.W.2d 286, 288 (1982). WISCONSIN STAT. § 709.05(4) limits the recision-remedy restriction to remedies sought under "this chapter." As noted, the trial court based its award on WIS. STAT. § 895.80(1), not on chapter WIS. STAT. ch. 709. It would make no sense to preserve to all defrauded buyers—except home buyers—a right to

damages sustained as a result of the violation of WIS. STAT. § 943.20(1)(d). Indeed, Horst and Edwards give us no authority that either requires or recommends that result, other than their *ipse dixit* that "clearly an inaccurate statement in a Real Estate Condition Report is not actionable in a misrepresentation claim for a money judgment." We are not persuaded. *See* ***Barakat v. Department of Health & Soc. Services***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments).

2. *Assertion by Horst and Edwards that there is no evidence to support the trial court's alleged finding that the basement was defective.*

¶8 In the brief filed in support of their cross-appeal, Horst and Edwards contend that the trial court made an "implicit finding of a defect in the basement or foundation," and that this finding is "clearly erroneous." *See* WIS. STAT. RULE 805.17(2) (trial court's findings of fact may not be set aside on appeal unless they are "clearly erroneous."). This is a straw man; the trial court found that Horst and Edwards intentionally did not fully disclose the nature of: 1) water problems in the basement; and 2) water problems caused by an underground spring. Specifically, the trial court found that after a real estate salesman who listed the property for them was unable to sell the house because of those water problems, Horst and Edwards listed the property with another broker and filled out a new Real Estate Condition Report on the property. The trial court found that "[t]he new condition report contained no disclosures relating to either a basement seepage problem, or a spring problem." This finding is an accurate reading of the Real Estate Condition Report. Additionally, the trial court found that the failure by Horst and Edwards to disclose the basement and spring water problems was a false representation that they made with the intent to deceive the Stathuses, and that Horst and Edwards,

aware of the problems, knew that the representations were false. In light of evidence that the problems had been disclosed to buyers prior to the creation of the new Real Estate Condition Report, and that Horst and Edwards had trouble selling the house in light of those disclosures, and giving to the trial court's findings all reasonable inferences in support of these findings, *see* ***State v. Friday***, 147 Wis. 2d 359, 370-371, 434 N.W.2d 85, 89 (1989), we cannot say that the trial court's findings that underlie its conclusion that Horst and Edwards intentionally misrepresented the water problems in the basement and in connection with the spring are clearly erroneous.

3. Assertion by Horst and Edwards that the Stathuses did not justifiably rely on the Real Estate Condition Report.

¶9 Relying on ***Lambert v. Hein***, 218 Wis. 2d 712, 582 N.W.2d 84 (Ct. App. 1998), Horst and Edwards argue that because the Stathuses knew about some water damage in the basement before they closed on the house, the Stathuses's reliance on the Real Estate Condition Report was not justifiable. Horst and Edwards note correctly that justifiable reliance is an element of a claim for misrepresentation. ***Ollerman v. O'Rourke Co., Inc.***, 94 Wis. 2d 17, 25, 43, 288 N.W.2d 95, 99, 108 (1980). But Horst and Edwards ignore Mr. Stathus's testimony that when he asked about the water damage he was told by his broker that the problem was not inherent in the basement but, rather, was caused by a one-time diversion of water from a neighbor's sump-pump. Thus, this case is different from the general and unremarkable proposition in ***Lambert*** that "when a buyer learns that a misrepresentation has been made prior to closing, the buyer is no longer deceived and, as a matter of law, can no longer rely upon the prior representation." ***Lambert***, 218 Wis. 2d at 732, 582 N.W.2d at 92. Here, looking at the evidence in a light most favorable to the trial court's findings, which we

must, the sump-pump explanation reinforced the Real Estate Condition Report's representation that the basement did not have a water problem. Moreover, there is no evidence—and Horst and Edwards do not argue—that the Stathuses knew about the underground spring problem, which, despite the argument by Horst and Edwards to the contrary, the Stathuses's expert testified was inter-related with the water problems in the basement:

> The spring, which allows water to be continually introduced to the subject property, keeps the soils around the spring saturated, and when the subject area experiences precipitation, that amount of water added to the spring supersaturates the subject property, which then allows more water to be along the foundation area and enter the subject basement.

The argument that the trial court's implicit finding that the Stathuses's reliance on the misrepresentations was justifiable (the trial court found that the Stathuses were "deceived" and "defrauded" by the misrepresentations) was unsupported by the evidence is without merit.

4. *Assertion by Horst and Edwards that the Stathuses did not prove damages.*

¶10 Damages in a misrepresentation case may be based either on the difference in value between the property as it is and the property as it was represented, or the cost to repair the property to its represented condition. ***Ollerman***, 94 Wis. 2d at 53, 288 N.W.2d at 112–113; ***D'Huyvetter v. A.O. Smith Harvestore Prods.***, 164 Wis. 2d 306, 322–323, 475 N.W.2d 587, 593 (Ct. App. 1991). In an essentially undeveloped argument, Horst and Edwards argue that the trial court's finding that the Stathuses's damages were $5,000 is clearly erroneous. They ask us to disregard Mr. Stathus's testimony that he estimated that, given the water problems, the property was only worth $130,000 rather than the $162,500 he

paid, and that he estimated it would cost $30,000 to fully repair the problems. In Wisconsin, however, a non-expert owner of property may testify as to value. ***Trible v. Tower Ins. Co.***, 43 Wis. 2d 172, 187, 168 N.W.2d 148, 156 (1969). Additionally, the trial court received evidence from the Stathuses's expert, Jerry C. Schwarten, that indicated that the cost to repair the water problems exceeded $30,000, and referred to that evidence in its findings of fact. Further, Schwarten estimated that the property's water problems "will have a negative value impact of some 30%."

¶11 In setting a value for damages sustained by a party, a fact-finder is not limited to the dollar figures given by the witnesses, ***Milwaukee Rescue Mission, Inc. v. Redevelopment Authority***, 161 Wis. 2d 472, 485, 468 N.W.2d 663, 669 (1991) (condemnation valuation); rather, it may assess the credibility of that evidence against all of the circumstances in the case and arrive at a figure it believes is warranted by the evidence. The following from ***Cutler Cranberry Co., Inc. v. Oakdale Electric Cooperative***, 78 Wis. 2d 222, 234–235, 254 N.W.2d 234, 240–241 (1977) is instructive: "[W]here the fact of damage is clear and certain, but the amount is a matter of uncertainty, the trial court has discretion to fix a reasonable amount. Simply because the amount is uncertain, the trial court should not deny recovery altogether." (Internal citations omitted.) Horst and Edwards have not demonstrated how or why the trial court's assessment of damages in the amount of $5,000 is clearly erroneous.

5. *Assertion by Horst and Edwards that Mr. Stathus should not have been permitted to testify as to how much it would cost to remediate the water problem.*

¶12 The trial court received into evidence Mr. Stathus's estimate that it would cost some $30,000 to remediate the water problem. On cross-examination, he admitted, however, that he had no basis for the opinion. The trial court's findings of fact did not mention Mr. Stathus's estimate of the cost to repair, and, as we have seen, it set the Stathuses's damages at only $5,000. If receipt of Mr. Stathus's estimate of the cost to repair was error, on which we express no opinion, it was certainly *de minimis* and not one requiring a new trial.

6. *Assertion by Horst and Edwards that Mr. Stathus should not have been permitted to testify about the value of his home—both with and without the water problems about which he was complaining.*

¶13 As we have seen in part 4, above, a non-expert owner in Wisconsin is permitted to testify as to value of the owned property. The argument that the trial court erred in permitting this testimony by Mr. Stathus is without merit.

7. *Assertion by Horst and Edwards that the trial court erred in receiving testimony by the Stathuses's expert witness, Jerry Schwarten.*

¶14 Horst and Edwards aim a shot gun at the testimony of Schwarten, an expert witness retained by the Stathuses and whose testimony was presented by deposition. First, they complain that receipt of his testimony on the cost to remediate the underground-spring problem violated the scheduling order. Second, they argue that his opinions had no foundation. Third, they contend that he was insufficiently qualified to give the opinions.

¶15 A trial court's decision to admit or exclude evidence is a discretionary determination and will not be upset on appeal if it has "a reasonable basis" and was made "'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983) (citation omitted). Additionally, whether to relieve a party of a scheduling-order deadline is a matter left to the trial court's discretion. ***Carlson Heating, Inc. v. Onchuck***, 104 Wis. 2d 175, 180–182, 311 N.W.2d 673, 676–677 (Ct. App. 1981).

¶16 The first complaint that Horst and Edwards have is that Schwarten's opinion on the cost to remediate the underground spring was not disclosed either in his pre-trial report or in his discovery deposition. Counsel for Horst and Edwards argues that he was taken by surprise and unduly prejudiced when ten months after he took Schwarten's discovery deposition, Schwarten gave an opinion in that area at his evidentiary deposition. But Schwarten did opine in his discovery deposition that the problem caused by the underground spring could be fixed by "excavat[ing] a drainageway [*sic*] in that area of the high groundwater or spring, fill that area with gravel and then have it directed to a place that can transport it away from the improvement or the subject property," and that this could cost as much as $40,000 to $45,000.

¶17 The second and third complaints by Horst and Edwards are that Schwarten was not qualified to give the opinions in connection with the remediation of the underground-spring problem and the value of the home. Moreover, they argue that Schwarten's admission that he did not devise a formal plan for remediation made the opinions that he did give in that area inadmissible.

¶18 Schwarten testified that he was a real-estate consultant, working "in the areas of real estate appraisal, home inspection, [and] construction supervision." He said that he had been a real-estate appraiser since "late 1969" and had appraised "well in excess of 1,500" homes. He also testified that he had inspected homes for ten years.

¶19 The trial court accepted Schwarten's testimony as qualifying him sufficiently to give his opinions. Given Schwarten's testimony, this was an appropriate exercise of discretion. *See* WIS. STAT. RULE 907.02 (qualifications for expert testimony). Moreover, the trial court noted that it would take into account the matters raised by Horst and Edwards in assessing the weight and credit it would give to Schwarten's testimony. In light of the trial court's determination that the Stathuses's damages were far less than either Schwarten's estimated costs to remediate or the diminished value of the property as a consequence of the water problems, we do not see how the trial court erroneously exercised its discretion in taking Schwarten's opinions for what it believed they were worth and, accordingly, we are not persuaded that any substantial right of Horst and Edwards was affected. *See* WIS. STAT. RULE 901.03(1) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.")

¶20 For the foregoing reasons, we affirm on the cross-appeal taken by Horst and Edwards.

B. The Appeal.

¶21 The Stathuses contend that the trial court erroneously exercised its discretion when it did not give a reason: 1) for reducing their claim for attorney's

fees from $16,350 to $3,000, and 2) when it refused to treble the damage award.[2] We agree and remand to the trial court for further proceedings.

1. Attorney's Fees.

¶22 As we have seen, the trial court awarded damages to the Stathuses under WIS. STAT. § 895.80. A plaintiff prevailing under that section is entitled to, if the trial court in the exercise of its discretion so finds: "All costs of investigation and litigation that were reasonably incurred." WIS. STAT. § 895.80(3)(b). The Stathuses contend that their attorneys expended 109 hours and that the trial court's reduction relegated the fees to an hourly rate of $27.50, rather than the $150 hourly rate that their attorney's affidavit submitted to the trial court represented was his "hourly fee for representation" in the case.

¶23 A trial court's award of attorney's fees is vested in that court's discretion. ***Standard Theatres, Inc. v. State Dept. of Transp.***, 118 Wis. 2d 730, 747, 349 N.W.2d 661, 671 (1984). But that discretion must, in fact, be exercised. ***Howard v. Duersten***, 81 Wis. 2d 301, 305, 260 N.W.2d 274, 276 (1977). An exercise of discretion requires "a reasonable inquiry and examination of the facts." ***Id.*** Among the factors to be considered are:

> (a) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
>
> (b) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

[2] WISCONSIN STAT. § 895.80 permits, but does not require either an award of attorney's fees or treble damages to the prevailing plaintiff. Section 895.80(3) provides: "If the plaintiff prevails in a civil action under sub. (1), he or she may recover all of the following: (a) Treble damages. (b) All costs of investigation and litigation that were reasonably incurred."

> (c) The fee customarily charged in the locality for similar legal services.
>
> (d) The amount involved and the results obtained.
>
> (e) The time limitations imposed by the client or by the circumstances.
>
> (f) The nature and length of the professional relationship with the client.
>
> (g) The experience, reputation and ability of the lawyer or lawyers performing the services.
>
> (h) Whether the fee is fixed or contingent.

Standard Theatres, 118 Wis. 2d at 749 n.9, 349 N.W.2d at 672 n.9 (quoting with approval the ethical standards governing the attorney-client relationship as to the reasonableness of fees). Rather than analyze the pertinent factors, the trial court offered this brief statement on the amount of attorney's fees it believed was warranted:

> As to the matter of attorney's fees, it seems to the Court that the plaintiff in this matter has argued in its brief is entitled to I believe the statute reads reasonable attorney's fees. The Court is setting reasonable attorney's fees in this matter to be three thousand dollars.

When the lawyer for the Stathuses immediately asked for reconsideration, arguing that such an award "doesn't begin to cover the Stathus' [*sic*] costs," the trial court replied, in toto: "That's the figure that this Court finds to be reasonable after having heard the evidence in this case at trial. It stands."

¶24 Although we "need not defer" to a trial court's determination as to what is a reasonable attorney's fee, we do give "some weight" to the trial court's determination. ***First Wisconsin Nat'l Bank v. Nicolaou***, 113 Wis. 2d 524, 537, 335 N.W.2d 390, 396 (1983). Indeed, "the trial court is in an advantageous position to make a determination as to the reasonableness" of attorney's fees and we value its judgment. ***Standard Theatres***, 118 Wis. 2d at 747, 349 N.W.2d at

671. Unfortunately, we have no way of delving into the trial court's mind to determine whether its assessment is appropriate. Accordingly, we remand this matter to Judge Miller for reconsideration of the fee award and an explanation of the basis for the exercise of his discretion. This case should go to Judge Miller on remand, and not any successor judge who might have inherited his calendar under the rules of judicial rotation, because Judge Miller is in the best position to assess what would be reasonable attorney's fees and, equally important, to give us a reason for that assessment.[3] *See* WIS. STAT. § 752.02 (Court of Appeals has supervisory authority over "all courts except the Supreme Court").

2. Treble damages.

¶25 A plaintiff prevailing under WIS. STAT. § 895.80(1) is entitled to, in the trial court's discretion, an award of "[t]reble damages." WIS. STAT. § 895.80(3)(a). As with the award of attorney's fees, the trial court's determination to not treble the Stathuses's damages did not reflect any exercise of discretion. This is what the trial court said on the issue:

> I would agree with [the lawyer for Horst and Edwards] in regards to tripling of damages. This is not an appropriate case that the Court heard of the facts at trial and that is denied. The damages are to remain as are and not to increase in any way.

Here again, we have no way to gauge the trial court's rationale, and accordingly, as we did in connection with the attorney's fees issue, we remand this matter to

[3] In response to the Stathuses's appeal on the attorney's fee issue, Horst and Edwards argue that the phrase "costs of ... litigation" as used in WIS. STAT. § 895.80(3)(b) does not encompass attorney's fees at all. We disagree—routinely, the most expensive costs of litigation *are* attorney's fees.

Judge Miller for reconsideration of the damage award and an explanation of the basis for the exercise of his discretion.

By the Court.—Judgment affirmed in part, reversed in part, and cause remanded.

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