COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1656

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

RUBIDELL RESORT CONDOMINIUM ASSOCIATION, INC.,
D/B/A RIVER BEND RESORT, A DOMESTIC CORPORATION,

PLAINTIFF-APPELLANT,

V.

JAMES WELCH AND JUDITH WELCH,

DEFENDANTS-RESPONDENTS.

APPEAL from judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Reversed and cause remanded with directions.*

¶1 CURLEY, J.[1] The Rubidell Resort Condominium Association (condo association) appeals the trial court's ruling, in its action seeking unpaid monthly maintenance fees from James and Judith Welch, that in 1985 the Welches

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

were fraudulently induced into purchasing an undivided property interest in the resort. As a consequence, the trial court rescinded the contract. The condominium association argues that the trial court erred in several respects. This court addresses only one issue, whether the trial court relied on inadmissible evidence in finding that a misrepresentation occurred, as it is dispositive. This court reverses because, contrary to WIS. STAT. § 799.209(2), the trial court relied on inadmissible hearsay testimony in making an essential finding regarding the misrepresentation claim.[2]

I. BACKGROUND.

¶2 In 1985, the Welches purchased what later turned out to be an undivided interest in River Bend Resort and a preferred membership in the Rubidell Camping Club located at the resort from the original developer of the resort. At the time of the purchase they signed several legal documents, but they did not receive a deed until approximately one year later. Several years later, the developer defaulted on his loans, a foreclosure action was commenced, and the lender took over operation of the resort. After running the resort for a couple of years, the lender sold the resort's assets to the condo association. The condo association's rules obligate every owner, including those like the Welches with an undivided interest in the property, to pay a monthly maintenance fee. The Welches paid these fees until January 1996, when they stopped making the payments.

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶3 In May 1999, the condo association sued the Welches seeking $1,198.86 in unpaid maintenance fees. The Welches filed an answer questioning the exact nature of their purchase and asserting certain affirmative defenses. They claimed, among other things, that the membership agreement was breached or was unconscionable because many of the activities and amenities present at the resort in 1985 were now gone. Later, they amended their complaint to include several counterclaims for tortious interference with contract.

¶4 After various motions were heard and a court commissioner conducted a trial, according to the small claims procedure in use in Milwaukee County, a *de novo* trial was held in the circuit court. At this trial, the Welches contended that a sales person named "Sue," who worked for the developer, told them that they could stop paying their monthly maintenance fees at any time if they stopped using the campground. As a consequence, the Welches testified that they did not have a clear understanding of what they were purchasing in 1985. They did admit, however, that they eventually learned they had a property interest in the resort and that they unsuccessfully tried to sell their interest. After the testimony was completed, the Welches requested that they be allowed to amend their pleadings to include a charge of fraudulent inducement. The trial court granted their motion.

¶5 The trial court found that the condo association had proved up its claim that the Welches were owners of an individual interest in the property and, as such, they were obligated to pay monthly maintenance fees that had not been paid. However, the trial court also found that the Welches were fraudulently induced into the sale. In making this finding, the trial court relied on the Welches' testimony that "Sue" misrepresented the agreement when she told the Welches that they could stop paying their monthly fees at any time, and incur no additional

expense, if they simply stopped using the resort. The trial court then determined that the proper remedy for this misrepresentation was to rescind the contract. The condo association appeals.

II. ANALYSIS.

¶6 Following a court trial, this court must accept the trial court's findings unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). This court, however, reviews the trial court's conclusions of law *de novo*. *See* ***First Nat'l Leasing Corp. v. City of Madison***, 81 Wis. 2d 205, 208, 260 N.W.2d 251 (1977).

¶7 The condo association first argues that the trial court's finding, that "Sue" misrepresented the contract terms to the Welches, was improper because it was based upon inadmissible hearsay testimony. The condo association also argues that the trial court's finding that the Welches did not know until 1997 or early 1998 that they owed monthly maintenance fees, regardless of whether they used the resort, is clearly erroneous. Finally, the condo association claims that the trial court erred as a matter of law in ordering the rescission of the contract to buy an undivided interest in the resort because rescission is only available as a remedy to a party if it is requested within a reasonable time. The condo association claims that, even if one accepts the trial court's finding that the Welches did not know of their obligation to pay monthly maintenance fees regardless of resort use until 1997 or 1998, the Welches' request for rescission was still not made in a reasonable period of time.

¶8 This court addresses only the first issue raised by the condo association because it is dispositive.[3] The court agrees with the condo association's claim that the trial court erred in relying on the Welches' hearsay testimony concerning "Sue's" statements.

¶9 The application of a statute to the undisputed facts creates a question of law that this court analyzes *de novo*. ***Tenpas v. DNR***, 148 Wis. 2d 579, 582, 436 N.W.2d 297 (1989); *see also* ***Scholten Pattern Works, Inc. v. Roadway Exp., Inc.***, 152 Wis. 2d 253, 257, 448 N.W.2d 670 (Ct. App. 1989).

¶10 The small claims procedure, which differs significantly from the large claim procedure, can be found in WIS. STAT. § 799.209(2). It reads:

> **Procedure.**
>
> ….
>
> **(2)** The proceedings shall not be governed by the common law or statutory rules of evidence except those relating to privileges under ch. 905 or to admissibility under s. 901.05. The court or court commissioner shall admit all other evidence having reasonable probative value, but may exclude irrelevant or repetitious evidence or arguments. An essential finding of fact may not be based solely on a declarant's oral hearsay statement unless it would be admissible under the rules of evidence.

Thus, the small claims procedure does not permit hearsay statements to be the basis for essential findings of fact unless they are admissible under our rules of evidence. Here, "Sue's" hearsay statement was not admissible under our rules of

[3] Because of our decision in this first issue, it is not necessary for us to address the remaining arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

evidence, and the trial court erred when it based its misrepresentation finding on her statement.

¶11 Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). Hearsay is generally inadmissible under the rules of evidence. WIS. STAT. § 908.02. "Sue" did not testify at the trial. Therefore, her statement was not "made by the declarant while testifying." Moreover, her statement was offered in evidence to prove the truth of the matter asserted; that is, it was admitted to show that "Sue" actually misrepresented the terms of the Welches' contract. Therefore, under WIS. STAT. § 908.01(3): "Sue's" statement to the Welches was hearsay.

¶12 The trial court's finding, based upon "Sue's" misrepresentation, was also an "essential finding of fact." The term "essential finding of fact" is not defined in the statute, but BLACK'S LAW DICTIONARY defines "essential" as meaning: "Indispensably necessary; important in the highest degree; requisite. That which is required for the continued existence of a thing." BLACK'S LAW DICTIONARY (5th ed.) at 490. Here, "Sue's" statement was essential to the Welches' misrepresentation claim. Without it, the misrepresentation claim was not proved. Thus, the pivotal issue is whether "Sue's" statement was admissible under our rules of evidence. This court is satisfied that it was not.

¶13 The Welches argue that her statement was admissible, relying principally on WIS. STAT. § 908.01(4)(b)4. (a party's agent's statements are admissible evidence). They submit that "Sue's" statement was admissible because she was an agent of the condo association. Section 908.01(4)(b)4. reads:

> (b) *Admission by party opponent*.
>
> ….
>
> 4. A statement by the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship….

The condo association disagrees. They argue that "Sue" was not its agent. More importantly, they accurately note that the trial court never made a finding that "Sue" was the condo association's agent. Further, the condo association claims that the trial court could not have made such a finding given the facts presented here. This court is satisfied that had the trial court made a finding that "Sue" was an agent of the condo association, such a finding would have been erroneous.

¶14 "Sue" worked for the developer. It is undisputed that she was never employed by the condo association. In order to fall within the agency definition, the Welches had to "establish that [Sue] was the *opposing party's* agent or employee *at the time the statement was made*…." FINE'S WISCONSIN EVIDENCE, 238 (Issue 9 1997). "Sue" was not an agent or an employee of the condo association at the time the statement was made. In fact, there is only circumstantial proof in the record that "Sue" was even the developer's authorized agent.[4] Therefore, "Sue" was not the condo association's agent.

¶15 Next, the Welches submit that "Sue's" statements were admissible because the condo association was the successor in interest to the developer's business. As noted, the condo association obtained the property only after the lender took over when the developer could no longer meet its obligations to the

[4] The condo association also points out that WIS. STAT. § 706.03(1m) requires an agent to be expressly authorized when conveying real property.

bank. The Welches cite no cases to support their position that a statement of an earlier owner's agent can be attributed to a subsequent owner. Instead, the Welches borrow from tort law and analogize that since successors in interest are sometimes held responsible for the liabilities of the original company, the condo association should be held responsible for "Sue's" statements. This court is not persuaded.

¶16 While the general rule is that a corporation which purchases the assets of another corporation does not succeed to the liabilities of the selling corporation, there exist four well-recognized exceptions to this rule:

> "(1) when the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability; (2) when the transaction amounts to a consolidation or merger of the purchaser and seller corporations; (3) when the purchaser corporation is merely a continuation of the seller corporation; or (4) when the transaction is entered into fraudulently to escape liability for such obligations."

Tift v. Forage King Industries, Inc., 108 Wis. 2d 72, 75-76, 322 N.W.2d 14 (1982) (quoting ***Leannais v. Cincinnati, Inc.***, 565 F.2d 437, 439 (7th Cir. 1977)). The Welches rely on the third exception—that is, that the condo association is a continuation of the original developer's business. *See* ***Tift***, 108 Wis. 2d at 76.

¶17 First, it does not appear that the condo association was the successor in interest to the developer. The parties who currently constitute the membership in the condo association differ significantly from the original developer and the lending bank. Unlike the developer and the lender, who were outside owners, the condo association is made up of fellow purchasers of the resort. Thus, this is not a situation where there is a corporate transformation or change in form only. Consequently, it would seem unfair to hold the condo association responsible for

"Sue's" statements when the members of the condo association were the very parties who may have been victims of "Sue's" misrepresentations if, indeed, any misrepresentations were made. As a result, unlike the facts in ***Tift***, where it was determined that "the present [ownership] is for the practical purposes relevant to consumer protection, the continuation of the same entity as that operated [earlier]," here the present owner is a different entity. ***Id.*** at 80.

¶18 Moreover, even if this court assumes that the condo association was a successor in interest, the condo association is still not responsible for "Sue's" misrepresentations because the policy reasons behind the exception requiring successors in interest to assume the liabilities of the earlier business are not present here. The policy reasons for the exception are articulated in ***Tift***:

> The court of appeals, however, recognized the paramount policy reasons for imposing liability on a business which succeeds another because:
>
> > "[N]o corporation should be permitted to place into the stream of commerce a defective product and avoid liability through corporate transformations or changes in form only."

Id. at 77 (citation omitted). Here, there is no product, defective or otherwise, that has been introduced into the stream of commerce. This case deals with a real estate transaction in which the Welches elected to buy an undivided interest in a resort and a membership in the campground located there. Thus, the exception to the general rule does not apply.

¶19 Finally, the Welches argue that there is additional evidence supporting the trial court's misrepresentation findings. This court disagrees. No other testimony or documents satisfy the elements of the misrepresentation claim.

Many of the documents evince ambiguity as to what the Welches were buying, but none contain misrepresentations.

¶20 Having not been persuaded by the Welches' contention that the condo association was a successor in interest to the developer, or their claim that "Sue" was the condo association's agent, this court concludes that the trial court erred in basing an essential fact on an inadmissible hearsay statement. Therefore, this court reverses the trial court and remands this matter to the trial court for entry of judgment in favor of the condo association's claim for monthly maintenance payments.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.