

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 20, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-3046

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

AUBREY WALKER, JR., AND
IRMA J. WALKER,

PLAINTIFFS-APPELLANTS-
CROSS-RESPONDENTS,

v.

STEVEN E. O'BRIEN AND
AUDREY O'BRIEN,

DEFENDANTS-RESPONDENTS-
CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. Aubrey and Irma Walker appeal from a judgment, following a jury trial, awarding them damages but not attorney's fees. The

Walkers argue that the trial court was incorrect in ruling that WIS. STAT. § 100.18 (1999-2000)¹ does not apply to a private transaction and, therefore, that the trial court should have awarded attorney's fees pursuant to § 100.18, as the jury found the O'Briens liable for intentional misrepresentation. Steven and Audrey O'Brien cross-appeal. They seek dismissal of the Walkers' claim for intentional misrepresentation, alleging that the Walkers "failed to present sufficient, credible evidence to support a finding that they relied upon any misrepresentation made by the O'Briens." Alternatively, the O'Briens seek a new trial, based upon the trial court's allegedly erroneous preclusion of evidence.

¶2 We conclude that the Walkers did not prove that they justifiably relied on any misrepresentation made by the O'Briens. Accordingly, without addressing any other issue,² we reverse and remand for entry of a directed verdict for the O'Briens.

I. BACKGROUND

¶3 The Walkers purchased a home from the O'Briens in the fall of 1995. The O'Briens had signed a real estate condition report on May 16, 1995, indicating they were not "aware of defects in the basement or foundation (including cracks, seepage and bulges)." The report defined "defect" as a condition "that would have a significant adverse effect on the value of the property; that would significantly impair the health or safety of future occupants of the property; or that if not repaired, removed or replaced would significantly

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (When "one sufficient ground" allows for resolution of an appeal, "there is no need to discuss the others urged.").

shorten or adversely affect the expected normal life of the premises.” The report also stated that it was “not a warranty of any kind by the owner ... and is not a substitute for any inspections or warranties that the principals may wish to obtain.”

¶4 The Walkers’ offer to purchase, dated August 8, 1995, was “contingent upon a qualified independent inspector conducting an inspection of the [p]roperty ... which discloses no defects.” The inspection contingency clause of the offer to purchase defined “defect”:

For the purposes of this contingency, a defect is defined as a structural, mechanical or other condition that would have a significant adverse effect on the value of the Property; that would significantly impair the health or safety of future occupants of the Property; or that if not repaired, removed or replaced would significantly shorten or have a significant adverse effect on the expected normal life of the Property. Defects do not include structural, mechanical or other conditions the nature and extent of which Buyer had actual knowledge or written notice before signing this Offer.

Additionally, Addendum A of the Walkers’ residential offer to purchase contained a clause stating, in relevant part:

BUYERS RELIANCE: Buyer acknowledges that in purchasing this Property the Buyer has relied on Buyer’s independent inspection and analysis of the Property and upon the statements, disclosures and representations of the Seller contained in this Offer and in any Seller’s Property Condition Report Buyer further acknowledges that neither Seller nor Broker have [sic] made any representations other than stated in this Offer or incorporated into this Offer by reference Buyer agrees that Buyer has not requested Seller or Broker to verify the accuracy of any of Seller’s statements, disclosures and representations contained in this Offer

The O’Briens counteroffered on August 9, and the Walkers accepted on August 10, 1995.

¶5 The inspector retained by the Walkers inspected the property on August 16, 1995. His report noted items of concern regarding the foundation.

While indicating that the basement “foundation appear[ed] structurally satisfactory,” the report included the basement on a list of “some items requiring regular maintenance and possible repair or replacement within 5 years.” The report also listed “landscaping affecting foundation” as an item “not operating or suggesting immediate attention,” and it recommended trimming bushes and using dirt fill to raise the grade to pitch away from the house. The report recommended monitoring and adjusting grades annually, noting that “[m]aintaining positive grades can help keep basement dry.” Specifically, the report noted stains on the east wall of the basement and “old movement with interm[i]ttent seepage” in the foundation, and it advised that “[c]orrecting existing grade and down spout extensions may help to eliminate water seepage.”

¶6 Prior to closing, the Walkers submitted two proposed amendments to the contract of sale; neither, however, related to the basement or foundation.³ The O’Briens rejected one amendment and accepted the other, and the sale closed in the fall of 1995.

¶7 The following spring, the Walkers noted water seepage in the basement, which, according to Aubrey Walker’s trial testimony, occurred every time it rained. The Walkers hired Charles Weber, an independent foundation consultant, to inspect the premises in September 1996. Mr. Weber inspected the visible foundation walls and observed one horizontal and one shear crack on the exposed east wall of the basement and water seepage from several areas on the

³ The first proposed amendment revealed the Walkers’ awareness of the content of the independent inspector’s report, and it required the O’Briens either to repair some brickwork and replace the roof or to reduce the purchase price by \$5000; the O’Briens did not accept that amendment. The Walkers’ second proposed amendment stated: “Seller to have a professional contractor install new roof at seller’s expense prior to closing; additional inclusions are the lawn tractor and two electronic games in rec[.] room, in normal working order.” The O’Briens accepted that amendment.

north, east, and west walls. It was Mr. Weber's opinion that these problems were caused by "[s]ever[el]y [h]ampered or [n]on[-]existent water relief systems (Drain Tiles)." He recommended professional testing to determine the status of the interior and exterior drain tile systems, as well as removal of basement wall coverings, to identify necessary repairs.

¶8 The Walkers did not implement Mr. Weber's recommendation until August of 1998 when they contracted with McCoy Contractors. McCoy personnel removed about an eighteen-inch strip of concrete around the perimeter of the basement and inspected the interior drain tile system. Upon their recommendation, further excavation was done, which revealed problems with the drain tile systems that were not discovered during the initial inspection process.

¶9 The Walkers filed an action alleging breach of contract, intentional misrepresentation, negligent misrepresentation, fraudulent misrepresentation under WIS. STAT. § 100.18, and strict-responsibility misrepresentation, and they sought rescission/restitution. The O'Briens moved for summary judgment, asserting: (1) their factual representations to the Walkers were truthful; and (2) the Walkers did not rely on any alleged misrepresentation.⁴

⁴ After the O'Briens learned that the Small Business Administration had approved the Walkers for a \$24,500 disaster assistance loan, they moved to compel the Walkers to sign an authorization allowing the SBA to release confidential information related to the loan application. At the hearing on the motion, the O'Briens' attorney posited that the SBA file might contain representations regarding the cause of the water damage to the Walkers' basement. The trial court (Judge Diane Sykes) granted the motion, extended the summary judgment deadline, and subsequently adjourned the trial to give defense counsel an opportunity to depose the SBA's legal counsel.

The Walkers filed a *motion in limine*, alleging that evidence regarding the SBA loan would confuse the jury, and requesting that such evidence be excluded. The trial court (Judge Dominic S. Amato, to whom the case was transferred following Judge Sykes' appointment to the Wisconsin Supreme Court) determined that the SBA evidence was irrelevant and unfairly prejudicial, and granted the motion.

¶10 The jury found the O'Briens liable for intentional misrepresentation and awarded the Walkers \$5,875.25 to compensate them for their losses. In postverdict motions, the Walkers requested that the court increase the damages and award them attorney's fees, and the O'Briens asked for a directed verdict, judgment notwithstanding the verdict, or a new trial. The court denied the motions.

II. ANALYSIS

¶11 In their cross-appeal, the O'Briens argue that the trial court should have dismissed the Walkers' claim for intentional misrepresentation because the Walkers failed to meet their burden to prove that the Walkers relied on any misrepresentation. We agree.

¶12 To sustain a claim for intentional misrepresentation, a plaintiff must prove: (1) the defendant made a false representation of fact which the plaintiff "believed to be true and relied on to his or her detriment"; (2) the defendant knew that the representation was untrue or "made it recklessly without caring whether it was true or false"; and (3) the defendant "made the representation with intent to defraud and to induce another to act upon it." *Grube v. Daun*, 173 Wis. 2d 30, 53-54, 496 N.W.2d 106 (Ct. App. 1992). "The party alleging the fraud has the burden of proving the elements by clear and convincing evidence." *Lundin v. Shimanski*, 124 Wis. 2d 175, 184, 368 N.W.2d 676 (1985). Additionally, because we are reviewing a jury's verdict, "the test is whether there is *any* credible evidence in the record on which the jury could have based its decision." *Sumnicht v. Toyota Motor Sales*, 121 Wis. 2d 338, 360, 360 N.W.2d 2 (1984) (emphasis added). We

view the evidence “in the light most favorable to sustain the verdict.” *Id.*; WIS. STAT. § 805.14(1).⁵

¶13 In *Foss v. Madison Twentieth Century Theaters, Inc.*, 203 Wis. 2d 210, 551 N.W.2d 862 (Ct. App. 1996), Foss contracted to purchase a theater from Madison Twentieth Century Theaters, Inc. *Id.* at 214. The purchase offer, prepared by Twentieth Century’s real estate broker, Neviaser, contained a preprinted statement indicating that the seller had “no notice or knowledge of any ... underground storage tanks ... and the presence of any dangerous or toxic materials or conditions affecting the property.” *Id.* When Fitzgerald, Twentieth Century’s president, accepted the offer, he and Neviaser both knew that two underground heating oil storage tanks were located on the property. *Id.* Prior to closing, Foss also became aware of those tanks. *Id.* at 215. Foss closed on the property and later sued Twentieth Century, Fitzgerald, and Neviaser, claiming fraudulent misrepresentation and seeking contribution for expenses incurred in remediating the property’s contaminated soil. *Id.* at 213-17.

¶14 We held, as a matter of law, that because Foss knew, prior to taking title to the property, that the representation contained in the purchase offer was false, he “did not rely on the representation that no underground tanks existed” and therefore could not base a tort claim upon that representation. *Id.* at 218-19. In *Lambert v. Hein*, 218 Wis. 2d 712, 582 N.W.2d 84 (Ct. App. 1998), noting that the relevant facts were similar to those in *Foss*, and relying on our holding in that

⁵ WISCONSIN STAT. § 805.14(1) provides:

TEST OF SUFFICIENCY OF EVIDENCE. No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom 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 party.

case, we reiterated that “intentional misrepresentation requires that the buyer’s reliance be justifiable.” *Id.* at 731-32. In the instant case, the circumstances are comparable. *Foss* and *Lambert* control.

¶15 The record reveals no evidence on which the jury could have found that the Walkers justifiably relied on any misrepresentation. The Walkers hired an independent inspector pursuant to their offer to purchase. The inspector detected problems with the property’s foundation, including evidence of seepage in the basement, and reported the problems to the Walkers. The Walkers chose to ignore the information obtained from the inspector, and they closed on the property. Consistent with our decisions in *Foss* and *Lambert*, we conclude that the Walkers could not have justifiably relied on the O’Briens’ representation once they became aware of the independent inspector’s representation to the contrary. Accordingly, we reverse and remand for entry of a directed verdict for the O’Briens.

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

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

