

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 27, 2004

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.

**Appeal No. 03-2036
STATE OF WISCONSIN**

Cir. Ct. No. 02CV109

**IN COURT OF APPEALS
DISTRICT III**

IW ENTERPRISES,

**PLAINTIFF-APPELLANT-CROSS-
RESPONDENT,**

v.

**RONALD A. KOPAS, MARILYN J. WILLANDER, AND
DENTON WILLANDER,**

**DEFENDANTS-RESPONDENTS-CROSS-
APPELLANTS.**

APPEAL and CROSS-APPEAL from judgments of the circuit court for Dunn County: WILLIAM C. STEWART, JR., Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. This appeal involves a contract by which IW Enterprises sold land to Ronald Kopas and Marilyn Willander. The contract contains a provision that Kopas and Willander would be responsible for a land

survey in the event one was “desired or required.” IW filed a foreclosure action claiming breach of contract because Kopas and Willander failed to order and pay for a required survey. Kopas and Willander counterclaimed, alleging that IW knew the survey would be required but misrepresented that the survey might be optional.

¶2 IW appeals an order denying its summary judgment motion. It argues the circuit court erroneously concluded that there were questions of material fact regarding whether there was a breach. We disagree and affirm the denial of summary judgment.

¶3 IW also appeals a judgment resulting from a jury trial. IW disputes the jury findings that (1) Kopas and Willander did not breach the land contract by failing to order and pay for the survey and (2) Kopas and Willander suffered damages as a result of the misrepresentation. IW also claims the trial court erred when it awarded Kopas and Willander actual costs and attorney fees.

¶4 First, IW argues the contract clearly states that Kopas and Willander were responsible for ordering and paying for the survey. Since they did not, it argues they breached the contract. We disagree and affirm the judgment that Kopas and Willander did not breach the contract. Second, IW argues Kopas and Willander have suffered no damages because they retain title to the land. We agree that at least a portion of the damage award was erroneous and reverse that portion of the award. However, we remand for a determination whether Kopas and Willander are entitled to further damages. Third, IW argues the court’s award of costs and attorney fees to Kopas and Willander is erroneous because it is not allowed by statute. We agree and reverse that portion of the judgment.

¶5 Kopas and Willander cross-appeal arguing the circuit court erred by failing to award them treble damages. Kopas and Willander also contend they should be awarded attorney fees associated with this appeal. We disagree with both these arguments.

BACKGROUND

¶6 On April 11, 2002, Kopas and Willander entered into a land contract with Four Star Properties, Inc., to purchase a ten-acre parcel of land in Dunn County. The contract stated:

Purchaser agrees, in the event it is desired or required that the subject parcel be surveyed, that the purchaser shall order and pay for said survey solely as purchaser's expense.

¶7 On April 19, the Dunn County surveyor's office sent Four Star a letter stating that a certified survey map was required, should have been performed before entering into the contract, and must be completed within thirty days. Four Star sent letters to Kopas and Willander notifying them of the requirement. The letter sent to Kopas was returned and a follow-up letter was sent to Willander. Willander received both the original notification and the follow-up letter.

¶8 On May 7, Four Star transferred its interest in the contract to IW Enterprises. IW sent another letter to Kopas and Willander demanding they survey the property. That letter also stated they must provide written proof by May 14 that they had contracted with a surveyor "to have the property immediately surveyed." When neither Kopas nor Willander responded, IW commenced this foreclosure suit on May 15, 2002. Kopas and Willander counterclaimed alleging misrepresentation. They argued that IW made it appear that a survey might be optional when in fact it knew a survey was required.

¶9 IW moved for summary judgment on its foreclosure claim, arguing that Kopas and Willander were in default for not performing the survey. The court denied the motion because it concluded, “Factually, there are issues relating to the knowledge of the parties, prior to and during negotiations of the land contract, questions regarding the adequacy of notice of alleged default prior to the filing of this action”

¶10 The jury found that Kopas and Willander did not breach the contract. It also found IW made intentional misrepresentations upon which Kopas and Willander relied to their damage. The jury awarded Kopas and Willander \$2,794, which consisted of the down payment on the land contract, the first installment payment under the contract and mileage expenses. The trial court ordered Kopas and Willander to pay for a survey and they retained title to the land.

¶11 At a hearing on motions after the verdict, the court awarded Kopas and Willander costs and attorney fees under WIS. STAT. § 895.80(3)(b).¹ Kopas and Willander also requested treble damages under WIS. STAT. § 895.80(3)(a). The court denied this request.

DISCUSSION

I. IW’s Appeal

A. Breach of Contract—Summary judgment motion

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶12 IW argues the circuit court erroneously denied its motion for summary judgment. We review an order denying summary judgment independently using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08(2). Any doubt as to the existence of a genuine issue of material fact should be resolved against the party seeking summary judgment. *Grams v. Boss*, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980).

¶13 In its summary judgment motion, IW argued the contract spoke for itself. The contract stated that if a survey was required, as one was here, Kopas and Willander were responsible to order and pay for it. IW maintains Kopas and Willander do not dispute that this is true, so there is no issue of material fact and IW is entitled to summary judgment.

¶14 Kopas and Willander responded that the misrepresentation regarding whether a survey was required “creates an issue of fact precluding Summary Judgment.” In its order denying summary judgment, the court also discussed Kopas’ and Willander’s misrepresentation counterclaims. The court noted that there was a dispute regarding who knew what at the time of the closing on the contract. Further, the court stated that there were “arguable questions of material fact with regard to the defendants’ counterclaims based on misrepresentation.”

¶15 We fail to see the connection between the breach of contract claim and the misrepresentation. We do not understand how IW’s misrepresentation

creates a question of fact regarding the breach of contract claim. Nevertheless, our independent review of the record shows that the court correctly denied the summary judgment motion.

¶16 The contract does not establish a date by which the survey needed to be completed. It simply stated that if a survey was desired or required, Kopas and Willander would have to order and pay for it. IW's use of May 14, 2002 as a deadline is a seemingly arbitrary date set by IW for when it would unilaterally determine Kopas and Willander were in breach. However, nothing in the contract supports IW's position in this regard.

¶17 Because the contract is silent as to any deadline for ordering and paying for a survey, there were genuine issues of material fact regarding whether Kopas and Willander had breached the contract as of May 15, 2002, when the foreclosure action was filed. The trial court did not err in denying summary judgment.

B. Breach of contract – Sufficiency of the evidence

¶18 The jury determined that Kopas and Willander did not breach the land contract by failing to order and pay for a land survey. IW argues that the terms of the contract clearly state that Kopas and Willander were responsible for any survey that might be required. Thus, IW contends Kopas and Willander breached the contract.

¶19 When reviewing whether there is sufficient evidence to sustain a jury verdict, we must review the evidence in a light most favorable to the verdict. *Nieuwendorp v. American Fam. Ins. Co.*, 191 Wis. 2d 462, 472, 529 N.W.2d 594 (1995). When more than one inference may be drawn from the evidence presented

at trial, we are bound to accept the inference drawn by the jury. *Id.* This standard is even more appropriate when the jury's verdict has the approval of the circuit court. *Id.*

¶20 IW's breach of contract argument is based solely on the lack of a completed land survey. The jury determined Kopas and Willander did not breach the contract, and the court agreed with the jury's determination. On motions after the verdict, the court stated:

[IW] was painfully aware that there was in no way, any possibility that [Kopas and Willander] would have any discretion as to whether or not to have a survey performed, despite the clear suggestion in the land contract. Further, the time periods given to [Kopas and Willander] to complete the necessary land survey and pay for the same were clearly of too short a duration, and thus, in this Court's opinion, did not constitute a breach at the time the action was filed.

¶21 IW sent Kopas and Willander a letter on May 7, indicating IW would foreclose if they did not "contract with a surveyor to have the property immediately surveyed" The letter imposed a deadline of May 14 for providing proof that the survey arrangements had been made. IW filed its foreclosure action the next day—May 15—claiming breach of contract. However, Leon Herrick, the Dunn County Surveyor, testified that at that time of year it would be three to six months before a survey could have been completed. Therefore, the jury reasonably could conclude it would have been impossible for Kopas and Willander to order and pay for a survey within the seven-day period IW gave them before it would foreclose.

¶22 Further, as we noted in the previous section, the contract is silent as to any deadline for ordering and paying for a survey. Instead, IW created an arbitrary date by which it determined Kopas and Willander breached the contract.

The jury easily could have concluded that there was insufficient evidence to show that Kopas and Willander were in default as of May 15. Thus, we affirm the jury's determination that Kopas and Willander did not breach the contract.

C. Misrepresentation

¶23 In the parties' portions of their briefs regarding the trial court's denial of summary judgment, they devote much of their discussion to whether IW misrepresented whether a survey was required. As we have noted, the misrepresentation claim is wholly separate from the breach of contract claim. Thus, we are unsure whether IW is challenging the circuit court's denial of its summary judgment motion based in part on IW's misrepresentation or whether it is challenging the jury's verdict that there was misrepresentation. Having already determined that the court properly denied summary judgment, we proceed to determine whether there was sufficient evidence to support the jury's finding of misrepresentation.

¶24 IW contends it made no representation of fact to Kopas and Willander regarding whether a survey would be required. In interpreting the land contract provision regarding a survey, IW argues we cannot ignore the word "required" in the phrase "desired or required." IW argues the contract states that if a survey was either desired or required, Kopas and Willander would have to pay for it. Here, a survey was required and thus IW claims it made no misrepresentation.

¶25 However, we must read the phrase "desired or required" as a whole. The contract implied that "in the event" a survey was required, Kopas and Willander would be responsible for it. If one was not required, Kopas and Willander could have one done at their expense if they desired. Thus, Kopas and

Willander were left with the impression that a survey might or might not be required. Yet, IW knew the survey was required and failed to inform Kopas and Willander of this fact.

¶26 IW further argues that it had no duty to disclose that a survey was required and that Kopas and Willander failed to plead any special duty to disclose. Thus, it contends it cannot be liable for intentional misrepresentation. However, this is not a duty to disclose situation. Instead, it is a situation where IW negotiated a contract that included language that was contrary to what it knew to be true regarding the survey requirement. We conclude that there was sufficient evidence for the jury to find misrepresentation by IW.

D. Damages

¶27 IW claims the jury's award of damages was erroneous. "The general rule for appellate review of damage awards, as for other factual questions, is that any credible evidence of the damage claimed is sufficient to sustain the jury's award." *Gyldenvand v. Schroeder*, 90 Wis. 2d 690, 697, 280 N.W.2d 235 (1979).

¶28 The jury awarded Kopas and Willander \$2,794. This represented an amount refunding Kopas' and Willander's down payment on the land, the first installment under the contract and mileage expenses. IW argues the refund of the down payment and the installment payment was erroneous because Kopas and Willander retained title to the land. Since Kopas and Willander remain purchasers under the contract, IW maintains they are responsible for the down payment and all installment payments. Kopas and Willander concede they are not entitled to a refund of their down payment and first installment payment. Therefore, we reverse that portion of the damage award.

¶29 IW further argues that awarding Kopas and Willander mileage expenses is an improper measure of damages. We conclude that the issue of damages resulting from the misrepresentation was not fully tried and therefore remand for a new trial on damages. *See Vollmer v. Luety*, 156 Wis. 2d 1, 16, 456 N.W.2d 797 (1990) (a new trial may be ordered “whenever the real controversy has not been fully tried.”); *see also* WIS. STAT. § 752.35.

¶30 The court instructed the jury regarding consequential damages for breach of contract. *See* WIS JI—CIVIL 3710. However, it did not instruct the jury how to calculate damages on the misrepresentation claim. The applicable instruction, which was not given, is WIS JI—CIVIL 2405. That instruction states, “A person, injured by intentional misrepresentation in the sale of property, is entitled to be fairly and reasonably compensated for any damages the person sustained as a result of the intentional misrepresentation.” The comments to the instruction state, “Consequential damages, such as ... travel expenses necessitated because of the purchase, may also be awarded” *Id.* The jury found that Kopas and Willander were entitled to damages as a result of misrepresentation, but the jury was not properly instructed on how it should calculate the amount of damages.

¶31 At trial, Kopas testified regarding the mileage for which he wished to be compensated. It appears that some of the instances for which he requested mileage are unrelated to the misrepresentation and are not recoverable. However, there is not sufficient information in the record to allow us to determine what mileage Kopas and Willander are entitled to be compensated for and what they are not. We conclude the real issue was not fully tried and remand for a new trial on damages. *See Vollmer*, 156 Wis. 2d at 16; *see also* WIS. STAT. § 752.35.

E. Costs and fees

¶32 The circuit court awarded Kopas and Willander costs and fees totaling \$9,018.25 under WIS. STAT. § 895.80(3)(b).² IW argues the award was erroneous because the statute does not apply in this case. We agree.

¶33 WISCONSIN STAT. § 895.80 states:

(1) 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. 943.01, 943.20, 943.21, 943.24, 943.26, 943.34, 943.395, 943.41, 943.50, 943.61, 943.74, or 943.76, or by reason of intentional conduct that occurs on or after April 28, 1998, and that is prohibited under s. 943.201 or 943.203, has a cause of action against the person who caused the damage or loss.

....

(3) 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.

For this statute to be applicable, the case must fall under one of the enumerated statutory sections in sub. (1). Kopas and Willander argue this case falls under WIS. STAT. § 943.20(1)(d), which states, in part:

Whoever does any of the following may be penalized as provided in sub. (3):

² We note that the record does not make clear whether the circuit court in fact awarded costs and fees based on WIS. STAT. § 895.80(3)(b). For example, the court seemed to make IW's conduct a basis for the award. The court noted that, "at certain periods of time [IW's agent] engaged counsel to represent his interest, causing confusion and delay, which precluded concluding this case more efficiently and more quickly." However, the parties' conduct has nothing to do with an award of damages under § 895.80 and this appeal regards that statute only.

....

(d) Obtains 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.

However, IW did not obtain title to any of Kopas' or Willander's property. IW was entitled to the down payment and first installment payment, as Kopas and Willander concede, so that money was not obtained in violation of WIS. STAT. § 943.20(1)(d). Further, IW did not receive any of the money that Kopas and Willander expended in mileage. Thus, there is no violation of § 943.20(1)(d) that would support a damage award under § 895.80. We therefore reverse the award of costs and fees to Kopas and Willander.

II. Kopas' and Willander's Cross-Appeal

A. Treble damages

¶34 Kopas and Willander argue they are entitled to treble damages under WIS. STAT. § 895.80(3)(a). They cite our decision in *Stratus v. Horst*, 2003 WI App 28, 260 Wis. 2d 166, 659 N.W.2d 165, as support for their position. That case also involved a misrepresentation and we upheld an award of treble damages under § 895.80(3)(a). *Id.*, ¶5. However, no one in *Stratus* questioned the trial court's authority to award treble damages under the statute. Instead, the issue was limited to whether the trial court had sufficiently explained its reasons for awarding the damages. Here we are faced with the preliminary question of whether § 895.80(3)(a) even applies to the misrepresentation. As we concluded in the previous section, the statute does not apply. Thus, notwithstanding the holding in *Stratus*, Kopas and Willander are not entitled to treble damages.

B. Attorney fees on appeal

¶35 Kopas and Willander argue they are entitled to actual attorney fees associated with this appeal, again based on WIS. STAT. § 895.80. Because we have concluded that the statute does not apply, as explained earlier, they are not entitled to costs and attorney fees on appeal.

By the Court.—Judgments affirmed in part; reversed in part and cause remanded with directions. No costs awarded.

Not recommended for publication in the official reports.