COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2833 **Cir. Ct. No. 2005CV225**

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

JOHN M. MACIOLEK AND JANET A. MACIOLEK,

PLAINTIFFS-RESPONDENTS,

V.

PATRICK L. ROSS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waupaca County: RAYMOND S. HUBER, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. Patrick Ross appeals a judgment ordering him to specifically perform a contract to sell his home to John and Janet Maciolek. The circuit court entered judgment after a jury found an enforceable contract between Ross and the Macioleks. Ross challenges the sufficiency of the evidence

supporting the verdict, and several circuit court rulings during and after the trial. We affirm.

BACKGROUND

¶2 When the Macioleks first expressed interest in purchasing Ross's home, he gave them a $650,000 asking price. Shortly thereafter he told them he was asking $675,000 because he had another interested buyer. There was, in fact, no other buyer. Ross simply decided he wanted more for the property, and made up the story about another buyer to save himself embarrassment.

¶3 The Macioleks subsequently presented Ross with an offer to purchase the property, using a standard WB-11 Residential Offer to Purchase form. The "Delivery of Documents and Written Notices" section of the form which they presented to Ross appeared as follows:

> DELIVERY OF WRITTEN NOTICES. Unless otherwise stated in this Offer, delivery of documents and written notices to a Party shall be effective only when accomplished by one of the methods specified in lines 24 - 33.
>
> [Lines 24-26] (1) By depositing the document or written notice postage or fees prepaid in the U.S. Mail or fees prepaid or charged to an account with a commercial delivery service, addressed either to the Party, or to the Party's recipient for delivery designated at lines 27 or 29 (if any) for delivery to the Party's delivery address at lines 28 or 30.
>
> [Line 27] Seller's recipient for delivery (optional):_____.
>
> [Line 28] Seller's delivery address:_____.
>
> [Line 29] Buyer's recipient for delivery (optional): *James R. Eilman*.
>
> [Line 30] Buyer's delivery address: *933 N. Mayfair Road, Suite 311, Milwaukee, WI 53226*.

> [Line 31] (2) By giving the document or written notice personally to the Party, or the Party's recipient for delivery if an individual is designated at lines 27 or 29.
>
> [Line 32] (3) By fax transmission of the document or written notice to the following telephone number:
>
> [Line 33] Buyer: *(414) 771-6337* Seller: __(__)_____.

¶4 Ross presented the Macioleks with a counteroffer, the terms of which required that the Macioleks' acceptance be delivered to Ross on or before April 4, 2005. The counteroffer did not provide any other manner of delivery for the Macioleks' acceptance, leaving the provisions of the offer to purchase in effect. The Macioleks accepted the counteroffer, signed it, and mailed it to Ross, who received it before the April 4, 2005 deadline.

¶5 The Macioleks commenced this litigation to enforce the contract after Ross refused to go forward with the sale of the property. The circuit court granted summary judgment to Ross, concluding that the unambiguous terms of the offer to purchase required that the Macioleks personally deliver their acceptance of the counteroffer to Ross. The Macioleks appealed, and we reversed, holding that the Macioleks' offer to purchase was ambiguous as to whether it permitted delivery of documents by mail. We concluded that a fact finder could reasonably adopt the circuit court's interpretation, because the offer gave no address or fax number for delivery to Ross, but could also reasonably construe an intent to permit delivery by mail because the Macioleks crossed out other provisions of the offer but not the delivery by mail provisions, and because a buyer might not know the seller's preferred address for delivery, or might simply not care about the means or place of delivery to the seller. Additionally, we concluded that even if personal delivery was required, a dispute remained whether Ross waived personal delivery.

¶6 Before the trial on remand, Ross moved to bar evidence that he lied to the Macioleks when he told them he had another buyer for the property. In his view, the unfair prejudice of revealing his lie outweighed the probative value. He also moved to bar testimony from a real estate agent, Nancy Meeks, who the Macioleks intended to call as an expert on delivery of documents in real estate transactions. He contended that her testimony was irrelevant. Additionally, he moved to bar evidence or argument concerning his belief for several weeks after receiving the offer that it was enforceable. The court denied the motions.

¶7 At the subsequent jury trial, the special verdict form included three questions: (1) whether the Macioleks properly delivered their acceptance by mail; (2) whether Ross waived personal delivery of the counteroffer; and (3) whether the parties had an enforceable contract. The jury found that the Macioleks properly delivered the counteroffer by mail, and therefore did not decide whether Ross waived personal delivery. The jury also found that the parties created an enforceable contract. On motions after verdict, the circuit court refused to set aside the finding of proper delivery upon concluding that it was supported by sufficient evidence. Ross also moved to set aside the second finding, based on his contention that a condition in the offer to purchase—that Ross provide a "safe well water test prior to closing"—was so indefinite as to render the offer to purchase illusory and unenforceable as a matter of law. The court disagreed and held as a matter of law that the water test clause did not render the offer illusory.

DISCUSSION

¶8 Ross raises the following claims on appeal: (1) the evidence was insufficient to support the jury's finding of proper delivery of the acceptance by mail; (2) the Macioleks' offer was illusory because it contained the "safe well

water test provision"; (3) he is entitled to a new trial in the interest of justice because the jury's findings were contrary to the great weight and clear preponderance of the evidence; (4) the circuit court erred in refusing to give a spoliation instruction regarding notes Janet prepared summarizing conversations she had with Ross; and (5) the circuit court erroneously exercised its discretion in denying Ross's motions in limine. We address each in turn.

SUFFICIENCY OF THE EVIDENCE

¶9 Courts must search the record for credible evidence that sustains the jury's verdict. ***Heikkinen v. United Servs. Auto. Ass'n***, 2006 WI App 207, ¶42, 296 Wis. 2d 438, 724 N.W.2d 243, *aff'd*, 2007 WI 124, 305 Wis. 2d 68, 739 N.W.2d 489. We will not overturn the jury's verdict if we find such support. *See* ***Coryell v. Conn***, 88 Wis. 2d 310, 315, 276 N.W.2d 723 (1979). This is particularly true where, as here, the circuit court upheld the jury's verdict on postverdict motions. *See* ***Kenwood Equip., Inc. v. Aetna Ins. Co.***, 48 Wis. 2d 472, 478, 180 N.W.2d 750 (1970).

¶10 The evidence was sufficient to support the jury's finding of proper delivery of the acceptance by mail. The circuit court instructed the jury that the parties must have a mutual assent, or meeting of the minds, to contract. The fact finder applies an objective standard to the question of mutual assent, by examining the wording of the contract as well as the surrounding circumstances to discern the parties' intent. *See* ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 178-79, 557 N.W.2d 67 (1996). If the parties evidently intended to enter into a contract, the trier of fact should give effect to that intent by attaching a sufficiently definite meaning to the contract language if possible. ***Id.*** at 179. "Even though the parties have expressed an agreement in terms so vague

and indefinite as to be incapable of interpretation with a reasonable degree of certainty, they may cure this defect by their subsequent conduct and by their own practical interpretation." ***Id.*** (quoting ***Nelsen v. Farmers Mut. Auto. Ins. Co.***, 4 Wis. 2d 36, 51, 90 N.W.2d 123 (1958)).

¶11 Here, the evidence included: (1) the fact that the Macioleks crossed out other provisions of their offer to purchase, but did not cross out the lines regarding delivery by mail; (2) expert testimony that it is a common practice in Wisconsin for buyers to intend delivery by mail but leave the lines blank for the seller's address and fax number; (3) testimony from the Macioleks' real estate attorney that when he drafted the offer he intended that delivery could be by mail but left Ross's address line blank because the only address he had for Ross, his home address, already appeared on line three of the offer; and (4) evidence that Ross did not object or otherwise raise the mailing issue until he changed his mind about selling his home for entirely unrelated reasons. From this evidence the jury could have reasonably found an intent to contract, and an agreement from the circumstances that mailing was an acceptable means of delivering documents.

THE SAFE WELL WATER CONTINGENCY

¶12 A contract is illusory and therefore unenforceable when the contract is "conditional on some fact or event that is wholly under the promisor's control and his [or her] bringing it about is left wholly to his [or her] own will and discretion…." ***Nodolf v. Nelson***, 103 Wis. 2d 656, 660, 309 N.W.2d 397 (Ct. App. 1981) (quoting 1 CORBIN ON CONTRACTS § 149, at 656-59 (2d ed. 1963)). Ross contends that the Macioleks' offer was illusory because it contained the "safe well water test" provision without any definition of the term that would avoid leaving "it up to the sole discretion of the Macioleks whether any test results

produced by Mr. Ross would satisfy the contingency." We disagree. Beyond any reasonable dispute the reference to safe water in the offer to purchase meant "safe to drink." As the Macioleks note, there are readily available governmental standards for safe drinking water. *See* WIS. ADMIN. CODE CH. NR 809 (Jan. 2008). Those standards were effectively incorporated into the offer, rendered it sufficiently definite, and consequently removed the Macioleks' "sole discretion" to determine whether Ross satisfied the contingency. *See* ***Dairyland Greyhound Park, Inc. v. Doyle***, 2006 WI 107, ¶60, 295 Wis. 2d 1, 719 N.W.2d 408 (laws in effect at time of contract are incorporated into the contract). We therefore agree with the circuit court's resolution of this issue as a matter of law, making it unnecessary to determine if there was sufficient evidence for the jury to resolve it as a factual matter.

NEW TRIAL IN THE INTEREST OF JUSTICE

¶13 The circuit court may grant a new trial in the interest of justice when the jury findings are contrary to the great weight and clear preponderance of the evidence, even though the findings are supported by credible evidence. ***Krolikowski v. Chicago & Nw. Transp. Co., Inc.***, 89 Wis. 2d 573, 580, 278 N.W.2d 865 (1979). Ross contends that the circuit court applied the wrong standard here. In his view, the court denied his motion for a new trial based solely on its finding that credible evidence supported the verdict, without determining whether the verdict was against the great weight and clear preponderance of the evidence. However, Ross misconstrues the court's decision. In its oral decision on the motion the court began its remarks by citing the "great[] weight and clear preponderance" standard as the basis for the motion, and then explained immediately thereafter that it was denying the motion because the evidence was

sufficient to support the verdict. Ross gives this court no basis to conclude that the circuit court disregarded the correct standard immediately after enunciating it.

SPOLIATION INSTRUCTION

¶14 Janet testified to several phone conversations with Ross, and to the notes she took on the conversations. After the lawsuit began she compiled a summary of the notes into one document prepared on her computer, and disposed of the actual notes. The circuit court subsequently denied Ross's request for a jury instruction informing the jury that if it found the notes were essential evidence, it could infer from their destruction that they contained information unfavorable to the Macioleks. Ross contends that the circuit court's refusal to give the instruction was error, although the circuit court allowed him to argue the inference to the jury.

¶15 We conclude that the circuit court properly denied the requested spoliation instruction. A circuit court should not give the instruction Ross requested in the absence of clear, satisfactory and convincing evidence that a party has intentionally destroyed or fabricated evidence. *See* ***Jagmin v. Simonds Abrasive Co.***, 61 Wis. 2d 60, 80-81, 211 N.W.2d 810 (1973). There was no such evidence of intent here. In any event, any error in refusing the instruction was harmless. Ross was permitted to argue for an inference that the notes damaged the Macioleks' case, and the contents of the phone conversations at issue went only to the issue of waiver, which the jury chose not to reach.

DENIED MOTIONS IN LIMINE

¶16 The circuit court uses its discretion in determining whether to admit evidence. ***State v. Buck***, 210 Wis. 2d 115, 129, 565 N.W.2d 168 (Ct. App. 1997). The question on review is whether the circuit court "'exercised its discretion 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 (1983).

¶17 The circuit court properly admitted evidence that Ross lied during negotiations. Ross contended that the danger of unfair prejudice substantially outweighed the probative value of the evidence, and it was thus subject to exclusion under WIS. STAT. § 904.03 (2007-08).[1] He also contended that it was subject to exclusion under WIS. STAT. § 904.04(2), because it was a bad act the Macioleks intended to use to prove he had a character trait of untruthfulness. The evidence was relevant to the negotiations between the parties, and thus relevant to the issue whether they intended to contract. It was also relevant background. It was properly deemed not unduly prejudicial because, as the circuit court reasonably concluded, it was a lie made as a standard negotiating tactic. The court also reasonably concluded, for the same reason, that it was not really a bad act. Ross contends that at trial the Macioleks' attorney nevertheless attempted, repeatedly, to portray it as a bad act reflecting on Ross's honesty, in both the questions he asked and in opening and closing arguments. However, Ross fails to identify any point during the trial where he objected to counsel's alleged misuse of the evidence. Had he done so, the circuit court could have revisited its pretrial

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

ruling, or given a limiting instruction. We therefore decline to review the issue of how the Macioleks chose to use the evidence. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727 (we will not review an issue not raised before the circuit court).

¶18 The circuit court properly admitted the testimony of Meeks, the Macioleks' expert real estate agent. An expert's testimony is admissible if the expert's "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." WIS. STAT. § 907.02. Ross contended that Meeks' testimony about industry practice was not relevant to this particular case, and would not assist the jury in understanding the evidence or deciding the case. The Macioleks offered her testimony to prove that the parties intended to contract, based on industry practice and usage of the words in the standardized offer to purchase. As noted, the test for mutual assent is objective, and the fact finder decides the question by examining the wording of the contract as well as the surrounding circumstances. ***Management Computer Servs., Inc.***, 206 Wis. 2d at 178-79. The circuit court reasonably concluded that an expert real estate agent's testimony is relevant, and would assist the jury in its examination of this evidence and in its application of the objective test.

¶19 The circuit court properly admitted evidence that Ross temporarily believed that the Macioleks' acceptance of the counteroffer formed a binding contract. Ross contends that he was not qualified to give a legal opinion on the matter, and that his belief was irrelevant because he did not disclose it to the Macioleks. However, it was relevant to his intent, and the parties' intent to contract is an essential element of an enforceable contract. *See* ***Herder Hallmark Consultants, Inc. v. Regnier Consulting Group, Inc.***, 2004 WI App 134, ¶8, 275

Wis. 2d 349, 685 N.W.2d 564. The circuit court did not erroneously exercise its discretion by admitting this evidence.

By the Court.—Judgment affirmed.

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