

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 2015

Diane M. Fremgen
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. 2014AP2375

Cir. Ct. No. 2014SC1395

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

GLENN MICHAEL BORKOWSKI,

PLAINTIFF-RESPONDENT,

V.

JOHN R. FARNEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
FAYE M. FLANCHER, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ This is a dispute about whether John Farney knew his deck was not built up to code when he told Glenn Borkowski it was and

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

sold Borkowski his house. Both parties were pro se below and continue without representation on appeal. Both the circuit court commissioner and the trial court judged in favor of Borkowski, awarding him \$3500 in damages for the repairs he will have to make to the deck. We affirm.

BACKGROUND

¶2 Borkowski sued Farney in small claims court, alleging “fraud on nondisclosure of building code and non repair of final deck inspection.” Borkowski bought Farney’s house, closing on November 27, 2013. Farney had indicated, in the real estate condition report, which he signed on September 30, 2013, that he was unaware of any “remodeling affecting the property’s structure or mechanical systems ... or ... additions to this property” done during his ownership without the required permits. Borkowski made an offer to purchase on November 1, 2013. It is not clear from the testimony when Farney started building a deck on the house. Farney got a county zoning permit on August 27, 2012, and Farney called the village inspector on November 7, 2013, to come out and “[c]heck the deck,” so the deck must have been started somewhere in between. We do know that the deck had been built by November 15, 2013, because an after-the-fact building permit was issued that day. An initial inspection was done that same day by building inspector Kirk Buchaklian, and the deck was found to be deficient. Buchaklian gave Farney a plan for Farney to correct those aspects that were not up to code.

¶3 On November 5, 2013, Borkowski had a home inspection done. The written report shows several issues with the house, including some problems with the deck. After this inspection, Borkowski made an addendum to the offer to purchase, asking Farney to repair some plumbing issues, which he did. Borkowski

testified that he did not do an addendum with regard to the deck because “we didn’t think it was necessary.”

¶4 On November 19, 2013, James H. Keeker, a building inspector and the manager of the village of Caledonia building and development department, did the final inspection, after he was called by Farney. Keeker testified that Farney told him the connection of the post to pier needed to be inspected, and when asked twice if several other elements needed inspection, Farney said no. Based on this answer, Keeker thought Buchaklian had inspected everything and issued the final occupancy permit for the deck. In fact, all of the other things mentioned had not been fully inspected. The documentation of the final inspection was given to Borkowski, and Borkowski’s agent forwarded an e-mail to him from Farney’s agent indicating that Farney represented that the deck was “now fully compliant.”

¶5 After the November 27, 2013 closing, Borkowski noticed shoddy-looking work on the deck and called the building inspector, who informed him that there was never a full, final inspection done on the deck. A subsequent inspection revealed that the deck had been built without a village of Caledonia building permit and that it had several substandard elements. Borkowski filed this lawsuit, asking for \$3500 in damages for the repairs he will have to make to the deck to bring it up to code. The trial court ruled in Borkowski’s favor. On appeal, Borkowski maintains that Farney misrepresented that the deck had passed inspection when it had not.

DISCUSSION

¶6 This is a claim for misrepresentation. To prove misrepresentation, the plaintiff must show that (1) the defendant made a representation of fact to the plaintiff, (2) the representation was false, and (3) the plaintiff relied on the

misrepresentation to his detriment or damage. *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶13, 270 Wis. 2d 146, 677 N.W.2d 233. We will not overturn the trial court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). Whether the facts add up to a legal claim of misrepresentation is a question of law we review de novo. *Loula v. Snap-On Tools Corp.*, 175 Wis. 2d 50, 54, 498 N.W.2d 866 (Ct. App. 1993). Determination of the credibility of the parties and witnesses is within the sound discretion of the trial court. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983).

¶7 As stated above, Borkowski's argument is that Farney misrepresented the condition of the deck on the real estate condition report and by sending him documentation that the deck had passed final inspection when in fact it had not. Borkowski seeks the cost of bringing the deck up to code.

¶8 Farney's version of events is that he was not aware that he needed a village building permit for the deck he himself built on his home. He did get a county zoning permit, and he thought that was enough. So when he indicated on the real estate condition report that he was not aware of remodeling that required a permit but had been done without, he thought he was telling the truth. Farney argues that it was he who was misled by the inspectors, as they indicated that they had done a final inspection when in fact they had not. Borkowski never gave him a written notice of defect about the deck, so he had no opportunity to cure. Furthermore, the purchase agreement did not give Farney the right to cure, so Borkowski could have walked away from the deal.

Representation of Fact

¶9 There is no dispute that Farney made a representation of fact to Borkowski, in the real estate condition report, that Farney was not aware of any remodeling done on the house without the required permitting. And Farney's forwarding of the final occupancy permit to Borkowski represented that there were no remaining code violations related to the deck.

Representation Was False

¶10 The second element, whether this representation was false, turned on the credibility of the parties. Farney said he did not know he needed a permit and that the inspectors misled him regarding the final inspection. Borkowski said that Farney did not disclose unpermitted additions to the property and that he misrepresented that the deck had passed inspection when it had not.

¶11 The trial court heard testimony from Buchaklian who testified regarding the inspection process for a deck. Normally, such an inspection is done in three steps. First, the inspector inspects the postholes, to make sure they are deep enough. Second, the inspector checks the framing. Third, a final inspection is done.

¶12 There was testimony about inspecting Farney's deck. An after-the-fact building permit was issued on November 15, 2013, with a plan for Farney to correct those aspects that were not up to code. Buchaklian came to the house on that date and checked the postholes that were done. Not all the postholes were finished, so Buchaklian could only inspect some. Buchaklian was not aware that anyone did a framing inspection. Keeker did the final inspection on November 19, 2013, after he was called by Farney. Keeker testified that Farney

told him the connection of the post to pier needed to be inspected, and when asked twice if several other elements needed inspection, Farney said no. Based on this answer, Keeker thought Buchaklian had inspected everything, and he signed off on the final inspection. In fact, all of the other things mentioned had not been fully inspected. When asked if he thought Farney had lied to him about the inspection, Keeker answered, "That would be my understanding." Buchaklian testified that he did not do a final inspection of the deck "until there was a problem," that is, when Borkowski called him around December 4, 2013. On December 16, 2013, Buchaklian wrote Borkowski an e-mail detailing the ways in which the deck had not passed inspection.

¶13 Borkowski introduced a letter from Farney's neighbor stating that the neighbor had advised Farney that he thought he needed a permit for the deck, but that Farney told the neighbor he had built a deck before and did not need a permit. Borkowski testified that while he and his wife use the deck, they do not do so for large parties, as they do not believe the deck is safe. Borkowski presented three estimates for work that needed to be done on the deck, for \$4800, \$3150, and \$5200.

¶14 Farney testified that when he pulled the county zoning permit, no one told him he needed a village building permit as well. Farney said that the documents he provided to Borkowski were all in good faith.

¶15 This case came down to a credibility contest. The court believed Borkowski and not Farney. The court noted that the deck had been built without a required permit and that while the parties had different views of the facts, the testimony of Buchaklian and Keeker was "very compelling." Regarding Farney's statement that he should not be liable because he did the condition report to the

best of his knowledge, the court indicated, “I don’t find that to be a credible statement.” The court further found:

I think Mr. Farney took some short-cuts here. He wanted to do the deck himself, which he could do. The sale of this house was pending. Mr. Farney wanted that deck to be—to be signed off on. He misrepresented to Mr. Keeker that Mr. Buchaklian had done all of the inspections, causing Mr. Keeker to sign off on that final inspection when, indeed, the deck had never been inspected. And it wasn’t until significantly later that the new homeowner Mr. Borkowski realized that that had been done.

The court thus concluded that Farney’s representation regarding the deck was false. Credibility determinations are for the trial court. *Noll*, 115 Wis. 2d at 644.

Borkowski’s Reliance and Damages

¶16 The court summed up Borkowski’s argument: “The plaintiff’s argument in this case is that he was misled. He believed that the deck met code when, in fact, it didn’t.” The court referred to Borkowski’s testimony that he does not use the deck for large parties. Also, the court noted that Borkowski had presented evidence of his damages by three estimates, ranging from \$3150 to \$5200, with an average of \$4383. Based on these facts, we can infer that the court concluded that Borkowski relied on Farney’s misrepresentation to his detriment.

CONCLUSION

¶17 Borkowski proved his misrepresentation case.² Based on all the evidence and testimony, the court found for Borkowski. The court's conclusion is supported by the evidence.

By the Court.—Judgment affirmed.

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

² Farney argues that Borkowski never gave him the contractual notice of defect regarding the deck upon receipt of the home inspection report. Farney acknowledges that he became aware after the home inspection that the proper permits had not been acquired. Farney then proceeded to attempt to obtain the final permit. Borkowski's claim is based on Farney's subsequent misrepresentation, after the home inspection, that the deck had passed a final inspection with the building inspector.

The parties did not address whether statutory and administrative code provisions regarding real estate sales and home improvement construction apply to this case, so we do not address these authorities.

