COURT OF APPEALS
DECISION
DATED AND RELEASED

April 9, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3300

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

CHARLES J. SASSARA,

Plaintiff-Respondent,

v.

RICK BRAUN, FRED ARNDT and AUTOMOTIVE-AIRCRAFT CONSULTANTS, INC.,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Rick Braun and Automotive-Aircraft Consultants, Inc., appeal from a judgment in favor of Charles J. Sassara for the purchase price of a used airplane and $25,000 punitive damages. Braun contends that the trial court's

findings as to the elements of misrepresentation are clearly erroneous, that rescission was not the proper remedy because the status quo could not be restored, that it was error to admit deposition testimony taken when Braun was not represented by counsel, and that punitive damages and prejudgment interest were not justified. We affirm the judgment.

In September 1992, Braun placed an advertisement in a national publication to sell a 1947 Republic SeaBee plane. The advertisement read:

> 1947 Republic SeaBee. New paint, new interior, very extensive annual. Recent top overhaul. New metal prop, new glass, no corrosion ever. Many updates. Would like to trade for your airplane. Only $29,900.00

In response to the advertisement, Sassara, of Gridwood, Alaska, called Braun for information about the plane. He was told that inspection of the plane was about to be finalized or "signed off" by an IA mechanic.[1] By facsimile Braun forwarded to Sassara a specification sheet setting forth items which were inspected or replaced during an October 1992 annual inspection of the plane. It also indicated that only 200 hours had been logged on the engine since the last major overhaul. Braun indicated that there were three repairs to be completed on the plane: hooking up the radio, repairing an oil leak and connecting some engine gauges.

The parties agreed on a $25,000 purchase price. Sassara wired $2000 to Braun to hold the plane until he could come to Wisconsin to pick it up.

Sassara arrived in Wisconsin on November 16, 1992. He looked at the plane. Braun indicated that the three repairs had not yet been completed but would be finished within the next two days. On the way to the bank to pay Braun, Sassara looked

[1] An IA mechanic is a mechanic who has received an Inspector's Authorization from the Federal Aviation Administration. An IA mechanic examines the aircraft annually to determine its airworthiness and compliance with applicable standards.

at the log books Braun had for the plane. Although Sassara had been planning to fly the plane home, he decided to return in a couple of weeks after the repairs were completed to pick it up.

Between November 17, 1992 and May 1993, the plane was not ready for delivery to Sassara. Sassara came to Wisconsin in May. The plane was still under repair at the Cyndy Guntly Memorial Airport, a private airfield operated by Thomas Guntly. Guntly was making repairs on the plane for Braun. Guntly informed Sassara that the landing gear on the plane had been installed backwards. Sassara requested Braun to deliver the log books. Braun delivered the log books to the Guntly airfield. The annual inspection was signed by Fred Arndt, an IA.

During this visit, Sassara discovered that rather than having ten quarts of clean oil as a result of the "top overhaul" done on the plane, the plane had only five quarts of black, grimy oil. Upon inspection of the log books, Sassara noticed the absence of reference to total airtime flown and repair directives from the Federal Aviation Administration. He also noted that the IA's inspection note had been typed on another piece of paper and glued into the log book. There was no airworthiness certificate with the log books.

Sassara demanded his money back on the grounds that he had been induced to purchase by Braun's representations that the plane had an airworthiness certificate and a fresh annual inspection. Braun refused to refund Sassara's money until the plane was put back in the condition it was when Braun sold it.[2] This action was commenced to rescind the purchase agreement on the grounds of misrepresentation.

[2] The plane was disassembled during an inspection by an FAA inspector.

The matter was tried to the court. The court found that Braun had intentionally deceived Sassara as to the condition of the aircraft and that Braun had forged and altered documents related to the plane. The court rescinded the contract, returned to Sassara the $25,000 purchase price plus prejudgment interest from November 17, 1992, awarded additional damages of $2400 owed to Guntly for storage and labor in inspecting the plane, and awarded punitive damages of $25,000.

The first issue raised by Braun, whether the trial court's finding of fraud is supported by the evidence, is driven by the trial court's credibility determination. The trial court found that Braun's testimony was "incredible, if not outright perjury." Where the trial court acts as the finder of fact and there is conflicting testimony, the court is the ultimate arbiter of the witnesses' credibility. *See* ***Cogswell v. Robertshaw Controls Co.***, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979). We are required to give due regard to the opportunity of the trial court to assess the credibility of the witnesses. *See §* 805.17(2), Stats. The weight of the evidence is peculiarly within the province of the trial court acting as the trier of fact. *See* ***Wiederholt v. Fischer***, 169 Wis.2d 524, 533, 485 N.W.2d 442, 445 (Ct. App. 1992). To the extent that Braun's argument relies on his testimony, it fails.

The essential elements of misrepresentation are: (1) a false representation of fact; (2) made with intent to defraud and for the purpose of inducing another to act upon it; and (3) upon which another did in fact rely and was induced to act to his or her detriment. *See* ***D'Huyvetter v. A.O. Smith Harvestore,*** 164 Wis.2d 306, 320, 475 N.W.2d 587, 592 (Ct. App. 1991). Each element was satisfied by the evidence here.

Braun's advertisement indicated that the plane had a "very extensive annual" and "no corrosion ever." Guntly, at Sassara's request, inspected the plane and estimated that it would cost $15,000 to make needed repairs to the plane. Charles Ebert, an FAA inspector, examined the plane and refused to issue an airworthiness certificate

because of numerous defects he discovered. Both found defects in the plane which a proper annual inspection would have discovered and required repaired. Both found corrosion.

The advertisement also indicated a recent top overhaul. Sassara discovered that the condition of the oil in the plane was not consistent with a top overhaul. The first element of misrepresentation is satisfied.[3]

The intent to defraud could be inferred from Braun's presentation of the log books. The evidence showed that Braun had purchased the plane in May 1992 "as is where is for parts only as a rebuildable aircraft. No logs included." Braun's explanation for the log books he presented to Sassara was found incredible.[4] The trial court's finding that the log books were bogus is not clearly erroneous. Thus, a reasonable inference from the facts is that Braun intended to defraud Sassara and induce Sassara to purchase the plane.[5] Generally intent must be inferred from the acts and statements of the person. *See* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 236-37, 517 N.W.2d 658, 664 (1994). We must accept a reasonable inference drawn by the trial court. *See* ***id.*** at 237, 517 N.W.2d at 664.

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[3] It is not necessary to address Sassara's claim that Braun made misrepresentations by silence.

[4] Braun submitted an admittedly forged purchase agreement which purported to show that Sassara purchased the plane "as is." Braun claims that the trial court committed reversible error in refusing to allow an offer of proof as to Braun's belief that Arndt forged the purchase agreement. We do not address this claim because it is simply mentioned and not specifically argued. *See* ***Fritz v. McGrath***, 146 Wis.2d 681, 686, 431 N.W.2d 751, 753 (Ct. App. 1988).

[5] This inference also arises from defective structures in the plane that had been painted over before the sale. *Cf.* ***Radford v. J.J.B. Enters., Ltd.***, 163 Wis.2d 534, 545, 472 N.W.2d 790, 795 (Ct. App. 1991) (jury could infer intent to deceive from fact that putty and painting applied to the hull of a boat concealed underlying dry rot).

It is the reliance element on which Braun devotes a substantial portion of his argument. Reliance must be "justifiable." *See* ***Ritchie v. Clappier***, 109 Wis.2d 399, 406, 326 N.W.2d 131, 135 (Ct. App. 1982). Braun goes on at length about how Sassara had adequate opportunity to inspect the plane or question Braun, that Sassara had an opportunity to examine the log books before the purchase price was paid, that Sassara should have noticed that the plane did not have an FAA required airworthiness certificate in the front window, and that Sassara was not a novice in the purchasing and selling of planes. He suggests that Sassara's reliance was not reasonable because the "discrepancies Sassara found following his purchase of the plane would have been just as evident prior to his purchase, if he had only looked." He further asserts that as a matter of law Sassara could not rely on representations regarding future events, namely, that the IA would sign off on the annual inspection. *See* ***D'Huyvetter***, 164 Wis.2d at 320, 475 N.W.2d at 592.

Braun ignores the fact that his representations, the importance of the supposedly recent annual inspection, and the imminent IA's approval short circuited Sassara's belief that a close inspection was warranted. The advertisement in the trade magazine demonstrates the design to sell the plane without full disclosure. The parties communicated by phone. Braun knew that Sassara intended to fly the plane home when he came to pick it up in November 1992 and that the plane did not have an airworthiness certificate. Under these circumstances, Sassara's reliance on Braun's failure to reveal that the plane was in no condition to fly was reasonable. Moreover, the representation that the IA would sign off on the inspection was not an opinion as to what would happen in the future–it was a condition of the sale. We sustain the trial court's finding that Sassara's reliance was reasonable.

Braun next argues that it was error for the trial court to grant rescission of the contract when it was not possible for the plane to be returned in its pre-sale condition. The trial court ordered the return of the plane to Braun upon payment of the judgment. The court

has the power to apply equitable remedies as necessary to meet the needs of the case and to do complete justice between the parties. *See* ***Syring v. Tucker***, 174 Wis.2d 787, 804, 498 N.W.2d 370, 375 (1993). That the court did not require Sassara to reassemble the plane to its pre-sale condition is not without logic. That would be an expense to be borne by Braun in any event.

Braun suggests that rescission was not appropriate because monetary damages could compensate Sassara.[6] Rescission based on misrepresentation is broader than the right of rescission based on breach of contract. *See* ***Meas v. Young***, 138 Wis.2d 89, 98, 405 N.W.2d 697, 701 (Ct. App. 1987). Rescission for misrepresentation is available even when the wrong may be compensated in money damages. *See* ***id.***

Braun also claims that the award to Sassara of $2400 to cover Guntly's storage and labor charges is not supported by any evidence that Sassara actually paid that amount to Guntly. However, Guntly testified that outstanding charges against the owner of the plane amounted to $2400. Guntly's testimony was sufficient evidence to support the award to Sassara. Moreover, there was no objection to Guntly's testimony and no indication that the trial court was put on notice that Braun disputed this sum. We properly decline to review an issue on appeal when the appellant has failed to give the trial court fair notice that it is raising a particular issue and seeks a particular ruling. *See* ***State v. Salter***, 118 Wis.2d 67, 79, 346 N.W.2d 318, 324 (Ct. App. 1984).

Braun contends that prejudgment interest was not justified because the amount of damages was not fixed and determinable prior to trial. Whether prejudgment interest should be awarded is a question of law. *See* ***Loehrke v. Wanta Builders, Inc.***, 151 Wis.2d 695, 706, 445 N.W.2d 717, 722 (Ct. App. 1989). Such interest is available

[6] Curiously, Braun suggests that because Sassara's purchase money could be returned to him as damages, rescission was not a proper remedy.

when there is a reasonably certain standard for measuring damages. *See* ***id.*** In the case of rescission, the amount of damages is reasonably certain–the purchase price paid. *Cf.* ***Murray v. Holiday Rambler, Inc.***, 83 Wis.2d 406, 438, 265 N.W.2d 513, 529 (1978). There is no merit to a claim that the amount here was not determinable

Braun asserts that because there were multiple defendants, prejudgment interest was barred *See* ***Imark Indus., Inc. v. Arthur Young & Co.***, 141 Wis.2d 114, 138-39, 414 N.W.2d 57, 67-68 (Ct. App. 1987) (preverdict interest is prohibited in cases where the existence of multiple defendants prevents any single defendant from knowing prior to trial the precise amount of his ultimate liability). Although Arndt was named as a party to the action, he was never served. Arndt was not a presence in the case which prevented Braun from determining his ultimate liability. The same is true with respect to defendant Automotive-Aircraft, the party who sold the plane. Braun is the sole shareholder in that corporation. The determination of liability for damages was not obscured by the presence of Braun's solely-owned corporation in the action.

Braun argues that it was error to admit the deposition of Ebert, the FAA inspector who examined the plane after Sassara demanded rescission. At trial, Braun sought to exclude the deposition on the grounds that during an examination by an FAA attorney, Ebert admitted that some of the matters testified to were not factual but were his opinions or speculation of what occurred regarding the plane. The trial court ruled that the objection was waived because it was not made at the deposition. Braun suggests that waiver should not apply because he was not represented by counsel at the time the deposition was taken and did not attend the deposition. That Braun chose not to obtain counsel or appear at the deposition cannot relieve him of his waiver of objections. There was no error in admitting the deposition of Ebert.

The final claim is that punitive damages were not available because this was a breach of contract case and Braun's conduct was not outrageous. Whether punitive damages are available is a question of law which we decide de novo. *See* ***Loehrke***, 151 Wis.2d at 701, 445 N.W.2d at 720.

Although punitive damages are not available in breach of contract actions, they are if the defendant has committed a tort as well as a breach of contract. *See* ***Autumn Grove Joint Venture v. Rachlin***, 138 Wis.2d 273, 279-81, 405 N.W.2d 759, 762-63 (Ct. App. 1987); *see also* ***Loehrke,*** 151 Wis.2d at 703, 445 N.W.2d at 721 (punitive damages may not be recovered in an action which is both a tort and breach of contract, unless a tort is pleaded and proven). This was a fraud case and the remedy granted was rescission of the contract. It was not a straight breach of contract case. Additionally, compensatory damages of $2400 were awarded on the misrepresentation claim and the prerequisite for awarding punitive damages satisfied. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 393, 541 N.W.2d 753, 763 (1995) (punitive damages may not be awarded in the absence of an award of actual damages).

Punitive damages are intended to punish a person for outrageous conduct or conduct in "'reckless indifference to the rights of others.'" ***Lundin v. Shimanski***, 124 Wis.2d 175, 197, 368 N.W.2d 676, 687 (1985) (quoted source omitted). The trial court concluded that the evidence established that Braun attempted to pass off the plane as

airworthy when it was not. Not only was Braun's conduct fraudulent, it was dangerous as well. We conclude that the award of punitive damages was appropriate.[7]

By the Court.—Judgment affirmed.

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

[7] It has not gone unnoticed that counsel for the appellants, Attorney Sally Yule Mengo, has been less than circumspect in her representations to this court. This court has found instances where counsel has stated the circumstances of an issue in such an oblique manner that it misrepresents the state of the record. For example, counsel's argument suggests that the trial court did not order the return of the airplane when, in fact, return was ordered. Counsel also represents that this was a contract case, blatantly ignoring the fact that this was a tort case as well. The most obvious misrepresentation is counsel's assertion that "the court erroneously concluded that prejudgment interest should be calculated from October 22, 1992 forward." The record citation to support this proposition is to Sassara's closing argument. Counsel has also included a calculation of the prejudgment interest in the appendix which is not in the record. As it turns out, the trial court ordered prejudgment interest from November 17, 1992, the date counsel agrees the plane was paid for. We admonish counsel for this lack of candor.