

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 16, 1997

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.

NOTICE

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

No. 96-0860

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

DAVID STRACH AND JOYCE STRACH,

PLAINTIFFS-APPELLANTS,

v.

**FALLS WEST DEVELOPMENT CORPORATION,
RICHARDSON LAND DEVELOPMENT AND
REAL ESTATE, RICHARDSON LUMBER COMPANY,
RICHARDSON INDUSTRIES, INC., MARVIN D. DEBBINK,
INDIVIDUALLY, JOHN WASHATKO, INDIVIDUALLY, AND
GARY HEINECKE, INDIVIDUALLY,**

DEFENDANTS-RESPONDENTS,

**GENE SEEFELDT, INDIVIDUALLY, DAVID RICHARDSON,
INDIVIDUALLY, JOSEPH RICHARDSON II,
INDIVIDUALLY, JAMES RICHARDSON, INDIVIDUALLY,
JOSEPH RICHARDSON III, INDIVIDUALLY, STEVE
PROBELSKI AND DEBBIE PROBELSKI, INDIVIDUALLY,
B.A.R.D. INVESTMENT COMPANY AND BEMIS
MANUFACTURING COMPANY,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

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

PER CURIAM. David and Joyce Strach appeal from a judgment dismissing their claims against Falls West Development Corporation and others (the respondents). The Strachs' appeal is limited to a challenge to the trial court's dismissal of their claim that the respondents made fraudulent representations within the meaning of § 100.18, STATS., relating to restrictions governing property in their subdivision. Because the trial court correctly determined that there was insufficient evidence to support this claim, we affirm.

The dispute arises from the Strachs' ownership of Lot 88 in the River Oaks Addition No. 1 subdivision in Sheboygan, Wisconsin. The Strachs closed on the lot in April 1991 and built a home there. At the time the Strachs purchased the property, Protective Restrictions and Covenants were in place, having been recorded in December 1989. The Restrictions and Covenants are divided into two sections: "guidelines" and "restrictions." The guidelines address building design, parking, trees and overall appearance of the subdivision and are used by the subdivision's Architectural Control Committee (ACC) to review building and landscaping designs. The restrictions address, inter alia, placement of signs, permitted household pets, property maintenance, and storage of boats and trailers.

In June 1994, the Strachs sued the respondents for fraud and breach of contract arising out of the failure to enforce the Restrictions and Covenants. In particular, they were dissatisfied with the manner in which a neighboring home was being constructed and claimed that the ACC did not enforce the Restrictions

and Covenants with regard to that construction or with regard to boat and trailer storage, thereby lowering the Strachs' property value. After a trial to the court, the court dismissed the Strachs' claims. On appeal, the Strachs challenge only the dismissal of their § 100.18, STATS., fraudulent representation claim. Additional facts will be discussed as needed to resolve the appellate issue.

Section 100.18(1), STATS., prohibits the use of "any assertion, representation or statement of fact which is untrue, deceptive or misleading" in the sale of real estate.¹ It is undisputed that the developers of the real estate in the subdivision made representations to the public regarding the existence of the Restrictions and Covenants. The Strachs claim that the Restrictions and Covenants were promoted as part of the sales process and that their existence induced them to purchase property in River Oaks. However, because the Restrictions and Covenants were not being enforced to the Strachs' satisfaction, the statements about their existence and purpose were "untrue, deceptive and misleading."²

The Strachs claimed that the ACC failed to review building design and landscaping plans, deviated from the guidelines by changing the building requirements for corner lots and permitting a lot owner to delay building on the property for over one year after the purchase, and failed to enforce restrictions relating to construction signs on lots and storage of boats and trailers.

¹ For purposes of resolving the appellate issue, we assume without deciding that all of the respondents (with the exception of Steve and Debbie Probeliski, who built the neighboring home about which the Strachs complained) are subject to the provisions of § 100.18, STATS.

² In support of their arguments, the Strachs cite an unpublished decision of this court. This is prohibited under RULE 809.23(3), STATS., and the court imposes a \$100 sanction sua sponte. See *Kuhn v. Allstate Ins. Co.*, 181 Wis.2d 453, 467-68, 510 N.W.2d 826, 832 (Ct. App. 1993), *aff'd*, 193 Wis.2d 50, 532 N.W.2d 124 (1995).

The trial court distilled the Strachs' claims to three allegedly false representations:³ (1) River Oaks Addition No. 1 is subject to Restrictions and Covenants that affect all lot owners; (2) lot owners were buying an architecturally controlled environment protected by Restrictions and Covenants; and (3) the ACC was set up to enforce uniform and attractive maintenance of the subdivision. The respondents essentially admitted making these representations but denied that they were false.

The trial court found that these statements were not untrue, misleading or deceptive. The court found that application of the guidelines and enforcement of the restrictions were not so lax or arbitrary as to render the three representations untrue, misleading or deceptive. All building plans were reviewed by the ACC or someone at its direction, some guidelines were enforced in every case, and the ACC enforced the guidelines where it had not previously authorized a deviation from them. The court found that the ACC exercised appropriate discretion in enforcing or deviating from the guidelines and that the deviations approved by ACC did not detract from the subdivision's attractiveness.

The court disagreed with the Strachs that the ACC's enforcement was inept and the level of compliance was so low as to render representations regarding the effect of the restrictions untrue. The court found that compliance was high and the "enforcement procedure was reasonable and in accord with area practices and standards." The court specifically found that each restriction was followed. The court acknowledged evidence that recreational vehicles and trailers were not stored in garages but found that the Strachs failed to prove that the

³ These claims were articulated by the Strachs in their posttrial brief.

violations were so substantial as to render the representations regarding enforcement of the Restrictions and Covenants untrue or that the Strachs relied upon them to their damage.

The trial court gave greater weight to the expert witnesses presented by the respondents who opined that the enforcement procedure and level of compliance were appropriate for the subdivision and in accord with area standards. The trial court found these experts credible because each had experience selling real estate in the county and had viewed the subject subdivision. The trial court concluded:

In summary, the three representations made by the defendants [respondents] to Strach were all true. The restrictions and covenants are recorded and remain of record. The subdivision is architecturally controlled and protected by these restrictions and covenants. The ACC was set up and acted as an enforcement arm to ensure that the subdivision was maintained in a uniform and attractive way. The representations had no tendency to deceive. There is no likelihood or fair probability that a reader or listener of the representation would have been misled [sic].

A trial court's findings of fact will be upheld unless they are clearly erroneous. *See* § 805.17(2), STATS. The trier of fact is responsible for determining the weight of the evidence and the credibility of the witnesses, and we will not overturn those findings unless they are clearly erroneous. *See Micro-Managers, Inc. v. Gregory*, 147 Wis.2d 500, 512, 434 N.W.2d 97, 102 (Ct. App. 1988).

We conclude that the trial court's findings are not clearly erroneous. The court discounted the testimony of Robert Patch, the expert presented by the Strachs in support of their claim that they were misled by representations regarding the Restrictions and Covenants, because Patch did not work in real estate

in Sheboygan County and had not viewed River Oaks prior to testifying that the Restrictions and Covenants were not being enforced. The court found the respondents' experts more credible because each had experience in developing and selling real estate in Sheboygan County and each had viewed the subdivision before offering an opinion. One of the respondents' experts, Randall Rautmann, a real estate broker, subdivision developer and contractor for several homes in the River Oaks subdivision, testified that he was aware that steps had been taken to correct a nonconforming chimney on a house he was building in River Oaks, that there were some violations of the River Oaks restrictions and covenants, and that he would take steps to resolve them once a neighbor complained, starting with a telephone call to the neighbor and progressing to a letter advising of the violation. He stated that the market for River Oaks homes is very good. He testified that he believed the Restrictions and Covenants were being adequately enforced as evidenced by his building in the area. He opined that no subdivision had perfect compliance with its Restrictions and Covenants. Rautmann advocated common sense in enforcing such provisions. Two other real estate brokers testified that it is common not to strictly enforce rules regarding storage of recreational vehicles where the vehicle is stored on the property for a short period (such as loading for or unloading from a trip). It is also common to wait until a neighbor complains before addressing the violation with the offender.

Based on the foregoing evidence, the trial court did not err in rejecting the Strachs' false representation claim. The evidence did not establish that the Restrictions and Covenants were not being substantially enforced.⁴ The

⁴ We acknowledge that two other homeowners in the subdivision testified regarding violations of the Restrictions and Covenants. However, it was for the trial court as the finder of fact to weigh this evidence. See *Micro-Managers, Inc. v. Gregory*, 147 Wis.2d 500, 512, 434 N.W.2d 97, 102 (Ct. App. 1988).

Strachs have not convinced us that the ACC lacked discretion to deviate from the Restrictions and Covenants. Because we conclude that the trial court did not err, we need not address the Strachs' argument regarding the trial court's treatment of their damages claim.

The Strachs ask this court to require strict enforcement of the Restrictions and Covenants. We have already upheld the trial court's finding that the Protective Restrictions and Covenants have been substantially enforced. Furthermore, as the respondents point out, the Strachs did not seek such relief in the circuit court and cannot pursue it for the first time on appeal. *See Meas v. Young*, 138 Wis.2d 89, 94 n.3, 405 N.W.2d 697, 699 (Ct. App. 1987). Neither the Strachs' complaint, argument to the court or posttrial brief sought such relief.

By the Court.—Judgment affirmed.

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

