

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

June 24, 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.

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

No. 96-2462

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

NORWEST BANK WISCONSIN EAU CLAIRE, N.A.,

PLAINTIFF-RESPONDENT,

V.

MICHAEL G. PLOURDE AND JANET L. PLOURDE,

DEFENDANTS-APPELLANTS,

**EAU CLAIRE COOP OIL COMPANY, STROMWALL JOSEPH
AND GUSTAVESON, INC., PETER J. SPEROS AND HELEN
D. SPEROS,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Eau Claire County: RODERICK A. CAMERON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Michael and Janet Plourde appeal a dismissal of their claim after remand from a prior appeal to this court. The Plourdes contend that the circuit court erred by restricting the scope of the issues to be tried on the Plourdes' counterclaim to a breach of contract claim. The Plourdes also allege that the circuit court improperly refused to allow them to challenge the amount claimed due by Norwest Bank Wisconsin Eau Claire, N.A. in its foreclosure action. The Plourdes further allege that the circuit court improperly refused evidence demonstrating Norwest failed to mitigate its damages and excluded evidence that Norwest prevented the Plourdes from mitigating their damages. Because we conclude the circuit court properly restricted the trial to the breach of contract issue, the judgment is affirmed.

This case has a long, complex history. A complete recitation of relevant facts is found in *Norwest Bank Wisconsin Eau Claire, N.A. v. Plourde*, 185 Wis.2d 377, 518 N.W.2d 265 (Ct. App. 1994) (*Plourde I*). The first trial of Norwest's foreclosure action on the Plourdes' properties focused on Norwest's agreement to finance Michael Plourde's purchase and development of a series of properties, including a twenty-four-unit apartment complex to be located in Hudson. The Plourdes counterclaimed that Norwest had breached its loan commitment agreement by refusing to advance money on the loan until they provided additional security to secure the loan on one property. The Plourdes also counterclaimed that Norwest refused to advance any money on the loan for construction of the Hudson complex. The Plourdes further contend that Norwest knew there was insufficient cash flow with the refusal of the loan advances for the Plourdes to pay their mortgage obligations, causing them to default on the mortgage and producing substantial financial injury.

At the first trial, the court impaneled an advisory jury that heard the Plourdes' breach of contract counterclaim against Norwest. The jury determined Norwest had broken the loan agreement and awarded the Plourdes \$1.7 million in damages. After a hearing, the circuit court issued a memorandum in which it concluded the jury determination of verdict to be solely advisory, and that the loan agreement had not been breached. The court entered judgment in Norwest's favor, and dismissed the Plourdes' counterclaim.

The Plourdes appealed the judgment with a plethora of challenges, including their right to a jury trial and whether they had alleged sufficient claims to compose tort action entitling them to punitive damages. This court determined the Plourdes had a right to a jury trial. We concluded that, due to the presence of an advisory jury, the parties' perception of who would function as the finder of fact so permeated the trial that it affected the parties' ability to fully and fairly try the case. We determined therefore it was necessary to order a new trial in the interest of justice rather than reinstate the jury's verdict. We vacated judgment and remanded the matter for a new trial before a jury. *Plourde I*, 185 Wis.2d at 391, 518 N.W.2d at 269. The sole issue in this appeal is the scope of the remand.

Because those issues raised are all resolved by a determination of the scope of the prior remand, the question presented is one of law which we review without deference to the circuit court. *Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983). We base our decision and the scope of the remand upon our conclusions of *Plourde I*.

Our first determination in *Plourde I* was whether the Plourdes' counterclaim that Norwest had breached the loan commitment agreement in bad faith should have been tried to a jury as a matter of right. We determined the

Plourdes were entitled to a jury as a matter of right on their counterclaim because those claims would subsequently have been precluded by res judicata, or claims preclusion. *Id.* at 387, 518 N.W.2d at 268. We remanded on this issue solely because the parties had not been aware that the jury's determination would be binding upon them; our remand did not require the circuit court to reopen all issues of the case. The Plourdes support their contention that the remand encompassed more than the necessity to try a breach of contract claim before a jury with certain language contained in *Plourde I*, but that language is located only in our discussion as to the necessity for a new trial. *Id.* at 391, 518 N.W.2d at 269. We determined that a remand to the circuit court was required because the parties were unaware that the jury's determination was binding, and that this so influenced the parties' presentation of the case that it would be improper to reinstate as the judgment in the case the finding of the jury perceived as merely advisory. Because the issues were not fully and fairly tried, this court ordered a retrial. *Id.*

Before the first trial the circuit court made several determinations, which included a partial summary judgment on certain counterclaims brought by the Plourdes. We will not consider these counterclaims at this juncture because they were not presented to us for review on the earlier appeal. *See Waushara County v. Graf*, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992). In addition, any appeal of these counterclaims would be precluded due to Plourdes' failure to timely appeal these issues. *See* § 808.04(1), STATS.

In *Plourde I* we considered the Plourdes' allegation that they had stated sufficient claims to constitute a cause of action in tort allowing them to seek punitive damages. *Id.* at 391, 518 N.W.2d at 270. We determined that Norwest's failure to advance money on the loan to the Plourdes did not constitute a tort. *Id.* at 392, 518 N.W.2d at 270. Because Norwest had no duty to complete the loan

other than that necessary to the loan commitment agreement, the Plourdes' claim was limited to breach of contract, which does not entitle them to punitive damages. *Id.* at 392, 518 N.W.2d at 270. The Plourdes did have an opportunity on remand to show Norwest had made a knowing and fraudulent claim for \$27,000, which was included in Norwest's foreclosure action and which the Plourdes assert was not paid or advanced by Norwest and to which they were not entitled. *Id.* at 392, 518 N.W.2d at 270. This court proposed that if the Plourdes were able to show that this claim was knowingly and fraudulently being asserted by Norwest, a claim in tort would have been shown. The record on remand discloses that the Plourdes have not pursued this avenue and have failed to demonstrate such a claim.

On remand, the Plourdes instead challenged the amount Norwest claimed in its foreclosure action asserting that Norwest had not mitigated its damages, and had prevented them from mitigating their own damages. The Plourdes argue Norwest is entitled to less than the amount due on the mortgage. We agree with the circuit court that these issues were not encompassed on remand, and were disposed of at summary judgment at the first trial of *Plourde I*. The only issues this court decided in *Plourde I* were that of breach of contract and the Plourdes' right to a jury trial. *Id.* at 390, 518 N.W.2d at 270. With the exception of the Plourdes' opportunity to demonstrate a claim in tort, the only issue on remand was the claim of breach of contract. *Id.* at 392, 518 N.W.2d at 270. The circuit court properly limited those issues to those we directed in *Plourde I*; the Plourdes' claim that the remand reopened all issues asserted in the first pleadings of *Plourde I* is rejected.

By the Court.—Judgment affirmed.

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

