

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-1634

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MARK SIECH AND PAM SIECH,

PLAINTIFFS-RESPONDENTS,

V.

ERV'S SALES & SERVICE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lincoln County:
ROBERT O. WEISEL, Judge. *Affirmed.*

MYSE, P.J. Erv's Sales & Service appeals a \$2,000 small claims judgment granted to Mark and Pamela Siech as a result of Erv's refusal to return a down payment on a custom-made boat the Sieches ordered. Erv's contends that there is no basis in law for rescission of the contract the Sieches made with Erv's for the boat. This court concludes that Erv's agent's representation that the boat could be modified to contain at least a forty-five-inch live well was a

misrepresentation of fact upon which the Sieches relied. The misrepresentation, even though innocent, was material to the Sieches, and they relied upon it in placing the order for a new boat. Because an innocent misrepresentation is sufficient to authorize rescission of a contract, the judgment is affirmed.

The trial court made findings of fact and conclusions of law. A trial court's findings of fact will be upheld unless they are clearly erroneous. *State v. Johnson*, 133 Wis. 2d 207, 216, 395 N.W.2d 176, 181 (1986). Although there is substantial disagreement between the Sieches and Erv's agent as to the circumstances surrounding this dispute, neither party contends that the trial court's findings are clearly erroneous and, therefore, the trial court's specific findings of fact control our analysis of the legal issues presented. Erv's asserts that the trial court incorrectly applied the facts to the law. The application of the facts to a legal standard is a question of law this court reviews independently. *National Amusement Co. v. DOR*, 41 Wis.2d 261, 266, 163 N.W.2d 625, 627 (1969).

The trial court found the Sieches ordered a custom-made boat from Erv's after the sales agent represented that after delivery, they could add at least a forty-five-inch live well to the boat. The Sieches ordered the boat based upon this representation. They subsequently discovered that the live well could not be added because it would not only void the manufacturer's warranty on the boat but would also substantially compromise the boat's structural integrity. The trial court determined that the purchase order was based upon an innocent misrepresentation of fact, the feasibility of adding a live well as a post-sale modification, and that the Sieches relied upon this misrepresentation in entering the contract to purchase the boat. Accordingly, the trial court concluded that rescission of the agreement was a remedy available to the Sieches and required that Erv's return the Sieches' \$2,000 security deposit.

Rescission of a contract is an appropriate remedy when a person's manifestation of assent to the contract is induced by a fraudulent or material misrepresentation made by another person which the recipient is justified in relying upon. *See* RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981). An innocent misrepresentation can form the basis for contract rescission. *First Nat'l Bank & Trust Co. v. Notte*, 97 Wis.2d 207, 221, 293 N.W.2d 530, 537 (1980). A non-fraudulent misrepresentation does not make a contract voidable unless it is material. *See* RESTATEMENT (SECOND) CONTRACTS § 164, cmt. b. Therefore, to demonstrate a claim for rescission of the sales contract based upon an innocent misrepresentation, the Sieches must show that: (1) Erv's made a misrepresentation of fact; (2) the misrepresentation was material; (3) the Sieches' reliance on the misrepresentation induced them to enter the contract; and (4) the Sieches were justified in relying on the representation. *See id.* cmt. a.

A misrepresentation of fact is an assertion that is not in accordance with the facts as they exist. *Schnuth v. Harrison*, 44 Wis.2d 326, 338, 171 N.W.2d 370, 377 (1969). In this instance, the trial court found that the representation of fact Erv's agent made was that at least a forty-five-inch live well could be added to the boat the Sieches ordered after its delivery. The evidence reflects that, in fact, this representation was untrue. The trial court accepted Sieches' testimony regarding information from the manufacturer and found that the proposed modification would significantly compromise the boat's structural integrity. In addition, the trial court also found that the proposed modification would have voided the manufacturer's warranty for the boat. Consequently, even if it was possible to do the modification, the substantial consequences were sufficient to render it unfeasible. The representation that the modification, even if physically possible, was a feasible alternative to meet the Sieches' desires was

erroneous because the modification would have voided the warranty. This further supports the trial court's finding that post-delivery modification creating at least a forty-five-inch live well could not be done on the boat ordered.

The trial court concluded that the installation of the well was material to the purchasers at the time of the order. A misrepresentation is material if it is likely to induce a reasonable person to manifest his assent by the misrepresentation or if the maker knows that it is likely that the recipient will be induced to manifest his assent by the misrepresentation. *First Nat'l Bank & Trust Co.*, 97 Wis.2d at 222-23, 293 N.W.2d at 538. Mark Siech is a muskie fisherman and needs at least a forty-five-inch live well to house muskies caught in tournaments. The absence of such a well precludes participation in these tournaments because of the fragile nature of the muskie once caught. Because Siech intended to use the boat for muskie tournament fishing, the lack of a sufficiently-sized live well rendered the boat unfit for his intended use. The necessity of the live well was fully disclosed to the sales agent, who fully understood that such a well was of critical importance to the Sieches. Notwithstanding such information the agent represented that post-manufacturer modification creating a forty-five-inch live well was possible when, in fact, such modification ultimately turned out to be unfeasible. The trial court therefore properly concluded that the existence of at least a forty-five-inch live well was material to the purchaser entering into a contract for the purchase of this custom boat. The evidence is sufficient to demonstrate that the subsequent modification was a material consideration in the Sieches' decision to purchase the boat.

Siech testified and the trial court concluded that he was induced to enter into the contract for the purchase of the boat based upon the representation that a post-sales modification of the boat was possible. Siech testified that he

wanted the boat for a particular purpose and that the representation that the boat could be modified to meet that purpose substantially contributed to his decision to make the contract. The court therefore found that Siech relied upon the misrepresentation at the time he entered into the contract for the purchase of this custom-built boat. The evidence is sufficient to support the element of reliance required for the rescission of the contract.

Finally, there is no basis in the record establishing that the Sieches' reliance on the agent's misrepresentation was unjustified. The agent's assertion was not of peripheral importance but rather was directed at the core issue of the sale, purchasing a boat conducive to muskie fishing. Further, there are no factual circumstances evident in the record indicating that the Sieches should not have taken this representation seriously.

Erv's contends that it is entitled to retain the \$2,000 deposit because the Sieches breached the contract without justification, resulting in damages to Erv's despite Erv's efforts to mitigate. We have already determined that the trial court correctly concluded that the Sieches did not breach but were justified in rescinding the contract. Erv's also contends that even if the Sieches were justified in rescinding the contract, it is still entitled to retain the Sieches' deposit. According to Erv's, because rescission is an equitable remedy, it requires the Sieches to restore Erv's to its original position after expending more than \$2,000 to sell the boat. Erv's relies upon *Schnuth* for the proposition that where a contract is rescinded the parties are placed in the status quo as if no contract had ever been made. *Id.* at 339, 171 N.W.2d at 377. *Schnuth* does not support Erv's argument. In *Schnuth*, the court determined that the defendant had made misrepresentations which the plaintiff relied on and which entitled him to rescind a contract. The court awarded *the plaintiff* all the damages required to make him

whole. Here, as in *Schnuth*, we have concluded that Erv's made misrepresentations which the Sieches relied upon and which entitled them to rescind the contract. Accordingly, they are entitled to return of their deposit to place them in the same position they were in before the contract. Furthermore, a trial court may award damages for restitution to restore a plaintiff to his former position when rescission is granted because of fraud. *Head & Seemann, Inc. v. Gregg*, 104 Wis.2d 156, 167, 311 N.W.2d 667, 672 (Ct. App. 1981), *aff'd and remanded*, 107 Wis.2d 126, 318 N.W.2d 381 (1982). "Damages for restitution are different from damages for breach of contract; and the former are permissible to restore the plaintiff to his former position when rescission is granted because of fraud." *Id.* at 166, 311 N.W.2d at 672. Finally, granting rescission does not always restore the status quo. Rescission can require the creditor to bear the loss even though a misrepresentation may be innocent. *First Nat'l Bank & Trust Co.*, 97 Wis.2d at 225-26, 293 N.W.2d at 539.

In sum, an innocent misrepresentation of a material fact that the purchaser relied on is sufficient to authorize a purchaser to rescind an agreement he was induced to enter by virtue of such misrepresentation. *Id.* at 221, 293 N.W.2d at 537. The evidence is sufficient to support the trial court's finding that the elements of innocent misrepresentation are present, authorizing the Sieches' rescission of the contract in question. Accordingly, the trial court correctly concluded that the Sieches were entitled to recover the down payment they made as part of the contract for the purchase of a custom-made boat with Erv's Sales & Service. The judgment is therefore affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

