COURT OF APPEALS
DECISION
DATED AND FILED

May 19, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2085

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

MICHELLE L. FISCHER,

PLAINTIFF-RESPONDENT,

V.

JOSEPH R. POWERS AND TONI M. POWERS,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Joseph and Toni Powers (hereinafter referred to singularly as Powers) appeal from a judgment allowing Michelle Fischer to rescind her purchase of a home from Powers and refunding her purchase payment. Powers argues that it was error to permit Fischer to seek the rescission remedy, that evidence of Fischer's motive for removing her action from small claims court

to the circuit court should have been allowed, that it was error to impanel an advisory jury, and that an offset should have been made for the rental value of the home. We reject Powers' claims and affirm the judgment.

On April 30, 1996, Fischer purchased Powers' home. The Real Estate Condition report completed by Powers indicated no knowledge of any current or previous termite, powder-post beetle or carpenter ant infestations, and no knowledge of either remodeling affecting the property's structure or mechanical systems or additions to the property made without the required permits.

After moving into the home, Fischer discovered that it was infested with carpenter ants. In June 1996, Fischer was informed that plumbing work in the first-floor bathroom violated several plumbing code provisions. Further, Powers had remodeled the first-floor bathroom without obtaining a permit for plumbing revisions. Fischer commenced a small claims action in April 1997 seeking compensatory and punitive damages. On June 16, 1997, she filed an amended complaint which sought rescission for a breach of warranty and compensatory damages for misrepresentations. A jury trial demand was made.

The matter was tried on May 4 and 5, 1998. At the start of the trial, Fischer withdrew her breach of warranty claim but indicated that she was still seeking a judgment for rescission. Powers argued that rescission was not an available remedy for misrepresentation. Powers' objection was taken under advisement by the trial court. At the end of the first day of trial, Powers moved to dismiss the claim for rescission on the grounds that a party cannot seek both money damages and rescission. The next day the trial court required Fischer to elect her remedy—either rescission or damages. Fischer elected to seek a

rescission remedy. The trial court agreed with Powers' contention that Fischer was not entitled to a jury trial on the equitable remedy of rescission but indicated that the jury would be asked to determine the factual issue of whether there was any misrepresentation. The jury was not asked any questions on damages. The jury found that Powers had intentionally misrepresented both the absence of a carpenter ant infestation and that no remodeling had been done without proper permits.

Powers argues that upon Fischer's filing her small claims action for damages, Fischer made an irrevocable election of remedies and she could not later pursue the remedy of rescission. *See* ***Stadler v. Rohm***, 40 Wis.2d 328, 335, 161 N.W.2d 906, 909 (1968) (an action for damages affirms the contract and precludes a later action for rescission). The election of remedies doctrine has "been the subject of much adverse criticism by courts and commentators because of the substantial injustice which frequently results from its application." ***Schwabe v. Chantilly, Inc.***, 67 Wis.2d 267, 277, 226 N.W.2d 452, 457 (1975) (quoted source omitted). It is a "harsh, and now largely obsolete rule." ***Id.*** at 277-78, 226 N.W.2d at 457 (quoted source omitted). The doctrine "should be confined to cases where the plaintiff may be unjustly enriched or the defendant has actually been misled by the plaintiff's conduct or the result is otherwise inequitable or res judicata can be applied." ***Id.*** at 278, 226 N.W.2d at 457 (quoted source omitted). "[I]t is inequitable to regard an election of remedies as final unless the party was aware, or should have been aware, of all the material facts ...." ***Gaugert v. Duve***, 217 Wis.2d 164, 175, 579 N.W.2d 746, 751 (Ct. App. 1998), *review denied*, ___ Wis.2d ___, 584 N.W.2d 123 (1998). If a party is ignorant of substantial facts, the court must consider whether "such ignorance is the result of a failure to resort to

reasonable means of knowledge within his [or her] reach." ***Stadler***, 40 Wis.2d at 337, 161 N.W.2d at 910 (quoted source omitted).

The determination of whether a final election of remedies bars a subsequent request for rescission involves both findings of fact and conclusions of law. *See* ***Gaugert***, 217 Wis.2d at 175-76, 579 N.W.2d at 751-52. We will not set aside the trial court's findings of fact unless clearly erroneous and we review the question of law independently of the trial court. *See* ***id.*** at 176, 579 N.W.2d at 752.

The trial court found that Fischer originally sought money damages because she believed and hoped that the exterminator would be successful in getting rid of the carpenter ants. She followed the treatment plan recommended by the exterminator. Fischer amended her complaint to seek rescission after the spring thaw and her discovery that the carpenter ants remained. At that point Fischer did not think she would ever get rid of them. The trial court concluded that Fischer had acted reasonably in originally anticipating that the carpenter ants could be eradicated.

Upon filing her small claims complaint, Fischer lacked knowledge about the pervasiveness of the carpenter ant problem—a substantial fact. Although the exterminator did not guarantee the treatment plan, Fischer acted reasonably in believing that the treatment plan would be successful. She cannot be faulted for having optimism. Fischer was not a sophisticated entrepreneur like the buyer in ***Stadler*** who was not allowed to seek rescission after filing a claim for damages. *See* ***Stadler***, 40 Wis.2d at 340, 161 N.W.2d at 912. Rather, she was a first-time home buyer who reasonably relied on professional advice about correcting the problem occasioned by Powers' misrepresentation. Fischer

amended her request for relief within two months of the filing of her small claims action. Even though Fischer was not forced to make a declaration of whether she was seeking rescission or damages until the second day of trial, Powers was not misled because the rescission request was in the case from nearly the beginning. We conclude that it would be inequitable to preclude Fischer from seeking rescission.

Powers claims that the trial court improperly limited an attempt to show that Fischer's motive for seeking rescission was not related to the carpenter ant problem but was because Fischer's neighbor (who happened to be Joseph Powers' father) had called the police on her. However, Powers' argument that the evidence was relevant to the election of remedies issue is raised for the first time on appeal. At trial, Powers argued that Fischer's motivation for converting the case from a small claims matter to a claim for rescission was relevant to the materiality of the misrepresentation. Therefore, we do not address Powers' new argument as to the relevancy of the evidence regarding neighbor disputes. *See* ***State v. Rogers,*** 196 Wis.2d 817, 826, 539 N.W.2d 897, 900 (Ct. App. 1995) ("[A] party seeking reversal may not advance arguments on appeal which were not presented to the trial court.")

The trial court heard Powers' offer of proof and ruled that evidence of neighbor disputes was irrelevant to the determination to be made by the jury on whether a misrepresentation occurred. Whether a trial court admits or excludes evidence is a discretionary determination. *See* ***Johnson v. Agoncillo***, 183 Wis.2d 143, 154, 515 N.W.2d 508, 513 (Ct. App. 1994). We will not reverse such a discretionary determination on appeal if it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. *See* ***id.*** Here, the trial court correctly noted that the reason the case was taken from small claims

court to a jury trial was not relevant to the matter being tried. Moreover, evidence of neighbor disputes would have taken the trial into collateral matters and obscured the real issue—whether misrepresentations were made. The trial court properly exercised its discretion in excluding evidence of neighbor disputes.

Powers claims that because Fischer was seeking an equitable remedy, a jury should not have been impaneled. The trial court deemed the jury to be advisory only and necessary for determining factual issues. It was within the trial court's discretion to use an advisory jury. *See* ***Meas v. Young***, 138 Wis.2d 89, 98, 405 N.W.2d 697, 701 (Ct. App. 1987); § 805.02(1), STATS. The decision was reasonable because the jury had already heard a full day of testimony before the claim was converted to one requiring an equitable remedy. Powers does not specifically argue that the trial court erroneously exercised its discretion, and therefore we do not address the issue any further.

Powers sought to have the rental value of the home set off against the obligation to repay Fischer her purchase price. Contrary to Powers' assertion, ***Head & Seemann, Inc. v. Gregg***, 104 Wis.2d 156, 168, 311 N.W.2d 667, 673 (Ct. App. 1981), *aff'd*, 107 Wis.2d 126, 318 N.W.2d 381 (1982), does not require the defrauded buyer to pay rental value to the seller. ***Gregg*** merely recognizes that ordinarily that occurs. What is critical is that the trial court, acting as a court of equity, "makes the calculated adjustments necessary to do complete justice." ***Id.*** at 167, 311 N.W.2d at 672. A decision in equity is reviewed under the erroneous exercise of discretion standard. *See* ***Torke/Wirth/Pujara, Ltd. v. Lakeshore Towers***, 192 Wis.2d 481, 508, 531 N.W.2d 419, 429 (Ct. App. 1995).

The trial court denied Powers' request for an offset of the rental value because it found that the rental value and interest on the purchase price

"amounts to a wash." Powers argues that there is no basis in the record for that conclusion because Fischer did not offer any evidence of interest she paid on money borrowed to purchase the home. The trial court was not thinking of the interest Fischer paid. Rather, Powers was not awarded the offset for the rental value because of the benefit conferred to Powers by having possession of Fischer's $64,500 purchase price for the same period of time. The trial court did not require Powers to pay interest to Fischer on the $64,500. A reasonable basis exists for the trial court's denial of an offset for the rental value of the home. It was a proper exercise of discretion.

Powers' reply brief consists of nothing more than a motion for summary reversal based on Fischer's alleged failure to timely file her respondent's brief. RULE 809.19(3), STATS., requires the respondent's brief to be filed within thirty days of service of the appellant's brief. When the appellants' brief was filed there was no indication that copies of the brief had been hand delivered to Fischer. The respondent's brief was accepted as timely filed because three days were added to the time for filing pursuant to § 801.15(5)(a), STATS. (three days are added to the period when service is made by mail). Even considering that the appellants' brief was hand delivered, the respondent's brief was only two days late. Striking the brief and granting summary reversal is too harsh a sanction for conduct which did not cause actual prejudice. We deny the motion to strike the respondent's brief and for a monetary penalty.

By the Court.—Judgment affirmed.

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