COURT OF APPEALS
DECISION
DATED AND FILED

OCTOBER 20, 1999

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. 98-2682

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

RICHARD A. WILLIAMS AND KATHLEEN J. WILLIAMS,

PLAINTIFFS-RESPONDENTS,

V.

LANCE H. HACKER AND SHARON HACKER,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

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

¶1 PER CURIAM. Lance and Sharon Hacker appeal from the judgment entering judgment on the verdict in favor of Richard and Kathleen Williams and dismissing the Hackers' counterclaims. They argue on appeal that the trial court erroneously refused to change the answers to certain special verdict

questions; the judgment should be reversed because the real controversy was not tried; the trial court erred when it refused to allow the Hackers' claim on the conversion of a business interest and the misrepresentation of the sale of a business; the trial court erred when it did not exclude the testimony of an expert; and the trial court erred when it awarded attorney's fees to the Williamses. Because we conclude that the trial court properly decided these issues, and we decline to exercise our discretionary authority to reverse, we affirm.

BACKGROUND

¶2 The Williamses are the owners of a building in Waldo, Wisconsin. For many years, the Williamses operated a restaurant in the building. At all relevant times, there was an underground fuel oil storage tank on the property which was being used to store fuel oil used to heat the furnace in the building. In 1994, the Williamses entered into negotiations with the Hackers to purchase the building and real property. Eventually, the parties entered into a lease and an option contract for the building and property. The Hackers leased the building from the Williamses for a period of three years at a rent of $3000 per month. The Hackers paid $10,000 for the option to purchase the building and property during the three-year term. The Hackers also purchased restaurant equipment from the Williamses for $40,000.

¶3 In July 1994, the Hackers began operating the restaurant. In March 1995, the Hackers went to talk to a banker about obtaining financing to purchase the building. The banker told them that they would need to determine what, if any, contamination was on the site from the underground fuel oil storage tank before he would consider financing the purchase of the property. Based on this, the Hackers did not apply for financing.

¶4 There was conflicting testimony about what happened next. The Hackers claim that Mr. Williams told them that he would remove the tank after they agreed to purchase the property. Mr. Williams testified that he told them he would remove the tank if they could show him that they could get financing if the tank were removed. Relations between the landlord and the tenant deteriorated over the rest of the lease term because of this and other disputes. Eventually, the lease expired and the Hackers had not exercised their option to purchase. The Hackers remained in the building, operating the restaurant without paying rent, beyond the expiration of the lease.

¶5 In July 1997, the Williamses then brought a small claims eviction action against the Hackers seeking restitution of the restaurant. The Hackers answered the complaint, counterclaimed for breach of warranty and contract, misrepresentation, reimbursement for improvements, and specific performance, and asked that the case be tried in circuit court. The issue of possession of the restaurant was tried before the small claims court. The small claims court allowed the Hackers ninety days' equitable occupancy of the restaurant at a rent of $2500 per month.[1] Subsequently, the Hackers consented to restitution, and the Williamses again began operating the restaurant.

¶6 A trial was held in the circuit court on the issues of what rent, if any, the Williamses were entitled to recover and whether the Hackers were entitled to recover on their counterclaims. The jury was asked to answer a number of special

[1] The property had an apartment over the restaurant which the Hackers had subleased to another tenant for $500 per month. The Hackers testified that because of the dispute with the Williamses, they were no longer able to rent out the apartment. Therefore, the small claims court determined that the Williamses were entitled to a $3000 per month contractual rate minus the $500 the Hackers lost for the rent of the apartment.

verdict questions. The jury awarded the Williamses $22,000 in back rent and did not allow any of the Hackers' counterclaims. The Hackers appeal.

ANALYSIS

¶7 The first argument the Hackers raise is that the jury's answers to certain of the special verdict questions—questions seven, eleven, twelve, thirteen, fourteen and sixteen—were not supported by credible evidence and should have been changed by the court.[2] The first answer the Hackers challenge is the answer to question seven. The Hackers, in essence, assert that the jury's answer to question seven was inconsistent with its answers to questions five and six. Questions five and six asked if the Williamses made a misrepresentation of fact as to the nonexistence of the underground storage tank and whether such misrepresentation was untrue. The jury answered yes to both of these questions. Question seven asked if the Williamses made the misrepresentation knowing it was untrue or recklessly without caring whether it was true or untrue. The jury answered no to this question.

¶8 The Hackers also object to the jury's answer to question eleven. That question asked, "In view of all the evidence including the defendants', the Hackers', education, background and right to rely without independent investigation, did the defendants, the Hackers, believe such representation to be true and justifiably rely on it to their pecuniary damage?" The jury answered no. Question twelve asked whether the Williamses were negligent in making this representation. The jury answered no. Question thirteen asked if the Hackers

[2] The standard of review requires us to search the record for evidence supporting the jury's verdict. Usually, this burdensome task is made easier by the respondents' citation to the record. We note our displeasure that the respondents did not bother to respond to this argument in their brief. This creates unnecessary work for the court and is an extremely risky tactic.

relied on the representation to their pecuniary damage. The jury answered no. Question fourteen asked if the Hackers were negligent in relying on the representation. The jury answered yes. Question sixteen asked if the Williamses made any promises material to the option to purchase involving the underground storage tank. The jury again answered no.

¶9 Our standard of review for a jury verdict is that

> it will be sustained if there is any credible evidence to support the verdict. When the verdict has the trial court's approval, this is even more true. The credibility of the witnesses and the weight afforded their individual testimony is left to the province of the jury. Where more than one reasonable inference may be drawn from the evidence adduced at trial, this court must accept the inference that was drawn by the jury. It is this court's duty to search for credible evidence to sustain the jury's verdict. This court is not to search the record on appeal for evidence to sustain a verdict that the jury could have reached, but did not.

Fehring v. Republic Ins. Co., 118 Wis.2d 299, 305-06, 347 N.W.2d 595, 598 (1984) (citations omitted), *overruled on other grounds by* ***DeChant v. Monarch Life Ins. Co.***, 200 Wis.2d 559, 577, 547 N.W.2d 592, 299 (1996).

¶10 Our independent review of the record establishes that there was evidence to support the jury's answers to all of these questions. The first answer the Hackers assert must be changed is that to question seven. The Hackers argue that once the jury found that the Williamses misrepresented the existence of the underground storage tank and knew the misrepresentation to be untrue, then the jury had to find that the Williamses made it knowing it was untrue or recklessly without caring it was untrue. We disagree.

¶11 The Hackers base their claim that the Williamses misrepresented the existence of the underground storage tank on certain language in the lease. At

trial, the Hackers' counsel asked Mr. Williams about this language. The following exchange took place between the Hackers' counsel and Mr. Williams:

> Q: On page 11 at the first full paragraph it states "Lessor"-and first of all, I would like to just clarify that the lessor would be you, is that correct, and your wife?
>
> A: Yes.
>
> Q: And the lessees are the Hackers? The lessees?
>
> A: Right.
>
> Q: It states "Lessor warrants to the lessee that the lessor is not aware, nor does lessor have notice or reason to be aware, of the existence of any violation of local, state or federal law including, but not limited to, the existence of an underground storage tank upon the premises. Past use of the premises as a landfill or dump or the existence of any surface or subsurface conditions that might be actionable by any governmental body under the broad generic term of 'environmental law' or as may constitute a public or private nuisance."
>
> ....
>
> Is that correct?
>
> A: That's correct.
>
> Q: It is your understanding that that paragraph does not state that there's no underground storage tank?
>
> A: When this was written I asked [my attorney] to make sure that it is written in there that there is a tank. I interpret this to say, that is, at the time there was no violation of local, state or federal laws with this tank, but there was a tank there, that there was nothing wrong with it locally, federally, etc.
>
> Q: So it's your opinion that the paragraph states that you're warranting there's no violation with respect to the tank; is that correct?
>
> A: Correct.
>
> Q: And it's not necessarily saying there was no tank?
>
> A: I never said there never was a tank there. I will not admit to that.

¶12 From this testimony, the jury could reasonably infer that while Mr. Williams did misrepresent the existence of the tank and he knew that the tank

was there, he neither intentionally nor carelessly made the misrepresentation. From this same testimony, the jury could also reasonably infer that Mr. Williams was not negligent in making the misrepresentation to the Hackers. This testimony, therefore, supports the jury's answers to questions seven and twelve.

¶13 The Hackers also assert that the jury's answer to question eleven was not supported by the evidence. This question asked if the Hackers justifiably relied on this misrepresentation to their pecuniary damage. This question has two parts: Did the Hackers rely on the misrepresentation and did they suffer pecuniary damage? There is evidence in the record from which the jury could have inferred that the Hackers did not rely on the misrepresentation and that they did not suffer pecuniary damage. Mr. Williams testified that he showed the Hackers where the tank was sometime around the time they signed the option and lease. There was also testimony that the place where the tank was filled was visible on the property. The fuel in the tank was used to supply one of two furnaces in the building. From all of this testimony, the jury could reasonably infer that the Hackers did not rely on the misrepresentation.

¶14 There was also evidence from which the jury could have inferred that the Hackers did not suffer pecuniary damage by relying on the misrepresentation or, rather, a lack of evidence that they did suffer damage by relying on the misrepresentation. The testimony established that the Hackers discussed financing with only one bank and that they did not fill out a loan application at that bank. From this testimony, the jury could have inferred that the Hackers did not suffer pecuniary damage as a result of the misrepresentation. The jury's answers to questions thirteen and fourteen are consistent with its answer to question twelve and therefore, for the same reasons, are supported by the evidence.

¶15 The Hackers also challenge question sixteen which asks whether the Williamses made any promises material to the option to purchase involving the underground storage tank. Again, the jury answered no. Our review of the record also indicates that the jury could reasonably make this inference based on the evidence presented. Our review establishes that there was credible evidence presented at the trial to support the jury's answer to each of these questions.

¶16 The Hackers next ask that we exercise our discretionary authority to reverse a judgment when an error to which there was not an objection results in either the real controversy not being tried or a miscarriage of justice. *See* § 752.35, STATS. The Hackers argue that special verdict question sixteen is incomplete and confusing because it refers to an option to purchase and omits any reference to the lease and offer to purchase, and that the instruction related to the question was misleading. In addition, they argue that the trial court erred in presenting special verdict questions one and three to the jury.

¶17 The Hackers did not object to either the questions or the instruction at trial. Failure to object to the instruction or the verdict at conference constitutes a waiver of any error. *See* § 805.13(3), STATS. "In a case where an instruction obfuscates the real issue or arguably caused the real issue not to be tried, reversal would be available in the discretion of the court of appeals under sec. 752.35, Stats." ***Vollmer v. Luety***, 156 Wis.2d 1, 22, 456 N.W.2d 797, 807 (1990). Section 752.35 allows the court, in its discretion, to reverse when it appears from the record that the real controversy has not been fully tried, or it is probable that justice has for any reason miscarried.

¶18 We are not convinced that the special verdict question sixteen or the accompanying instruction resulted in either the real controversy not being tried or

a miscarriage of justice. First, we are not convinced that either the question or instruction was misleading. Second, even if they were misleading, the Hackers have not explained why that confusion obfuscated the real issue or caused the real issue not to be tried. As to question sixteen, the Hackers merely state, without explanation, that the error prevented significant legal issues from being properly tried. This is not sufficient to establish a need for a new trial. We also note that the jury's answer to question sixteen was consistent with its answers to the other questions. This further undermines the Hackers' argument that the instruction and question were misleading. We decline to exercise our discretionary authority.

¶19 The Hackers do not assert that questions one and three were misleading, but rather that the trial court erred in presenting them to the jury. The Hackers now challenge these questions, asserting that they contain misstatements based on the findings of the small claims court in the prior eviction proceeding. The Hackers, however, had the opportunity to object to these questions before the trial court presented them to the jury, but they did not. Their failure to object at the appropriate time waives any error. *See* § 805.13(3), STATS.

¶20 The Hackers next argue that the trial court erred when it denied their motion to amend their pleadings to allow claims for conversion of the business, misrepresentation of the sale of the business and their request for damages. The trial court apparently concluded that the Hackers were not entitled to bring a claim of conversion because they did not have a right of possession to the leasehold.[3] We agree with the trial court's determination.

[3] The Hackers do not give a citation to the record for this statement nor for their assertion that there was ample evidence in the record to establish their claim of misrepresentation.

¶21 The Hackers also assert that there was sufficient evidence to establish a case of misrepresentation. They do not, however, offer any citations to support this argument. While we are required to search the record to support the jury's verdict, we are not required to search the record for facts that support counsel's contention. *See* ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964). Nor do they offer any citations to legal authority. Therefore, we decline to reach this issue. *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

¶22 The Hackers argue that the trial court erred when it allowed the expert testimony of Norbert Hintz, Jr. Hintz, a fuel oil distributor and the person who installed and maintained the tank, testified about the underground fuel storage tank. The Hackers argue that the testimony was irrelevant and should have been excluded. The admissibility of expert testimony is within the discretion of the trial court. *See* ***State v. Blair***, 164 Wis.2d 64, 74, 473 N.W.2d 566, 571 (Ct. App. 1991). "A determination of whether a proffered expert witness should be permitted to testify requires an evaluation of whether the testimony will 'assist' the jury." ***Id.*** (quoted source omitted).

¶23 The underground storage tank was an important issue in the case. The Hackers' counterclaims were primarily based on the existence of the underground tank. Two subissues were whether the tank violated any law and whether it created an environmental hazard. Hintz's testimony was important to both of these issues. We conclude that the trial court did not erroneously exercise its discretion when it allowed Hintz to testify.

¶24 The Hackers' final argument is that the trial court should not have allowed attorney's fees to the Williamses. The parties do not appear to dispute

that the contract between the Hackers and the Williamses provided for the award of attorney's fees. The Hackers now challenge the amount awarded by the court. The Williamses initially asked for a little over $9000 in fees. The court would not allow fees for the time spent defending against the counterclaims. The court noted that many of the claims were intertwined and it would be impossible for the Williamses' counsel to separate them out. The court, therefore, allowed fifty percent of the claimed fees. The court also noted that the hourly rate requested was "rather modest under the circumstances."

¶25 The Hackers argue generally that the fees are speculative, excessive and violate public policy but do not specifically explain why the award was erroneous. We will uphold the circuit court's determination of the amount of attorney's fees which are reasonable in a given case unless the court erroneously exercised its discretion. *See* ***Michael A.P. v. Solsrud***, 178 Wis.2d 137, 153, 502 N.W.2d 918, 925 (Ct. App. 1993). We see no reason to disturb the trial court's determination. Therefore, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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