

**COURT OF APPEALS
DECISION
DATED AND FILED**

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Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 99-2651

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JOHN D. LUCIN AND DONNA M. LUCIN,

PLAINTIFFS-APPELLANTS,

v.

ED B. ALTMANN AND LOIS A. ALTMANN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Wood County:
EDWARD F. ZAPPEN, Judge. *Reversed and cause remanded.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 DYKMAN, P.J. John and Donna Lucin appeal from an order granting a motion for summary judgment and dismissing their claims for intentional, negligent, and strict responsibility misrepresentation against Ed and Lois Altmann. The Lucins contend that the circuit court erred in granting the

Altmanns' motion for summary judgment because material questions of fact are in dispute. We conclude that a factual dispute exists as to whether the Altmanns made untrue representations about defects in the house they sold to the Lucins. A factual dispute also exists as to whether the Altmanns knew of the defects of which the Lucins complain. The Lucins also contend that the circuit court incorrectly concluded that summary judgment was proper because the Lucins failed to show any damages. We conclude that whether the Lucins have measurable damages remains a disputed question of fact. Accordingly, we conclude that summary judgment was improperly granted and reverse.

I. Background

¶2 The pleadings, affidavits, and depositions filed in this summary judgment proceeding reveal the following facts. In 1994, the Lucins purchased a house from the Altmanns. The Altmanns had owned and occupied the house since the time it was built. Mr. Altmann is a general contractor and had performed maintenance on the house. Before purchasing the house from the Altmanns, one or both of the Lucins visited the house and spoke with the Altmanns about the condition of the property. The Altmanns provided the Lucins with a Real Estate Condition Report (Condition Report) prepared and signed by Mrs. Altmann. The Condition Report contains sections providing for a variety of disclosures regarding the condition of the property, including sections to disclose problems with the roof, septic system, foundation, and pest infestation. On the Condition Report, Mrs. Altmann marked a line indicating that the fireplace did not work, but did not note any other defects. After moving into the house, the Lucins had problems with the septic system, carpenter ants, roof leakage, and the house foundation.

¶3 The Lucins brought this suit against the Altmanns on September 19, 1996. The complaint alleged causes of action for intentional misrepresentation, negligent misrepresentation, and strict responsibility misrepresentation. The parties proceeded with discovery, and on June 7, 1999, the Altmanns filed a motion for summary judgment. The Altmanns argued that the Lucins had produced no evidence to substantiate their claims. The motion was accompanied by fifteen affidavits, including statements by the Altmanns and other members of their family. The Lucins filed affidavits opposing the Altmanns' motion for summary judgment.

¶4 On August 25, 1999, the circuit court granted the motion for summary judgment after concluding that there were no facts suggesting that the Altmanns knew of the conditions on which the Lucins' complaint was based. In support of its conclusion, the circuit court made findings of fact specific to the septic system, the carpenter ants, the roof leakage, and the foundation of the house. The circuit court also concluded that even with the defects, the value of the house was equal to the purchase price, therefore dismissal was also warranted on the ground that the Lucins had not shown any damages. The Lucins appeal.

II. Standard of Review

¶5 We review a grant or denial of summary judgment de novo, using the same methodology as the circuit court. *See M&I First Nat'l Bank v. Episcopal Homes Mgt., Inc.*, 195 Wis. 2d 485, 496-97, 536 N.W.2d 175 (Ct. App. 1995). We need not recite the details of the methodology here other than to point out that summary judgment methodology prohibits the circuit court from deciding questions of fact. *See Preloznik v. City of Madison*, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). The methodology is intended to prevent a trial on

affidavits and depositions. *See State Bank v. Elsen*, 128 Wis. 2d 508, 511, 383 N.W.2d 916 (Ct. App. 1986). Summary judgment is not to be used as a short cut to avoid a full trial where a factual dispute exists.¹ *See id.* “The court determines only whether a factual issue exists, resolving doubts in that regard against the party moving for summary judgment, because that party has the burden of establishing the absence of a factual issue.” *Id.* at 512 (citation omitted).

III. Analysis

¶6 The Lucins argue that the circuit court erred in granting summary judgment because there are material issues of fact entitling them to a trial. The Lucins assert that the Altmanns told them the house was free of defects, but that they discovered several problems shortly after moving in. The Lucins further contend that the Altmanns knew of defects that they failed to disclose on the Condition Report. The Altmanns argue that they are entitled to summary judgment because there is no evidence that they were aware of any defects in the house at the time Mrs. Altmann filled out the Condition Report. The Altmanns further contend that all the defects in the property were either unknown to them or disclosed to the Lucins. We conclude that there are disputed material facts as to whether the Altmanns knew of undisclosed defects and whether the Altmanns made untrue representations. Because there are disputed material facts, summary judgment was improperly granted. We therefore reverse.

¹ Because a circuit court is prohibited from deciding issues of fact upon a motion for summary judgment, a grant of summary judgment which includes findings of fact will be reversed more often than not. “Findings of fact are unnecessary under and depart from summary judgment methodology.” *Elsen*, 128 Wis. 2d at 515.

¶7 Using summary judgment methodology, we first examine the complaint to determine whether it states a claim, and then the answer to determine whether it presents a material issue of law or fact. See *Guenther v. City of Onalaska*, 223 Wis. 2d 206, 210, 588 N.W.2d 375 (Ct. App. 1998). If the pleadings are sufficient, our next step is to determine whether the moving party's affidavits and other proof make out a prima facie case for summary judgment. See *Swatek v. County of Dane*, 192 Wis. 2d 47, 62, 531 N.W.2d 45 (1995). If the moving party has made a prima facie case for summary judgment, we then examine the affidavits² and other proof of the opposing party to decide whether there are disputed material facts. See *id.* If there are, then summary judgment is improper. See *Preloznik*, 113 Wis. 2d at 116.

¶8 The Lucins' complaint properly states causes of action for intentional, strict responsibility, and negligent misrepresentation. In the Altmanns' answer, they assert affirmative defenses and deny most of the Lucins' allegations. Therefore, material issues of fact and law are presented by the pleadings. Because the pleadings establish material issues of fact and law, the next step in summary judgment methodology is to examine the Altmanns' affidavits to determine whether they have made a prima facie case for summary judgment. See *Swatek*, 192 Wis. 2d at 62.

¶9 In determining whether the Altmanns' affidavits make out a prima facie case for summary judgment, we first note that the Lucins' claims against the Altmanns are for intentional, strict responsibility, and negligent misrepresentation.

² A recent decision by the supreme court adopting the "sham affidavit" rule in summary judgment cases, *Yahnke v. Carson*, 2000 WI 74, ___ Wis. 2d ___, 613 N.W.2d 102, does not affect the case before us. Neither the Altmanns nor the Lucins have alleged that the other party has submitted any "sham affidavits."

All three of the causes of action share at least two elements: “(1) [t]he representation must be of a fact and made by the defendant; (2) the representation of fact must be untrue.” *Whipp v. Iverson*, 43 Wis. 2d 166, 169, 168 N.W.2d 201 (1969). In other words, the Lucins’ claims depend on whether the Altmanns made factual representations that were untrue. At least one of the Lucins’ claims also depends on whether the Altmanns had knowledge that they were making untrue representations. One element of an intentional misrepresentation claim is that the defendant “either made [a] representation knowing it was untrue or made it recklessly without caring whether it was true or false.” *Ramsden v. Farm Credit Servs.*, 223 Wis. 2d 704, 719, 590 N.W.2d 1 (Ct. App. 1998) (footnote omitted).

¶10 In their affidavits, the Altmanns both state that during the time they lived in the house, they were not aware of any of the problems of which the Lucins complained, except for some condensation under the roof, which had been fixed in 1985. Mr. Altmann’s affidavit also states that he told Mr. Lucin that the roof had never been replaced and that the Lucins “would be lucky to get two years out of it.” Essentially, the Altmanns’ position in their affidavits and supporting documents is that they accurately explained to the Lucins the nature of any problems of which they knew. If the Altmanns’ affidavits and other proof are taken as true, they establish a prima facie case for summary judgment.

¶11 Because the Altmanns’ affidavits and supporting documents make out a prima facie case for summary judgment, we next examine the affidavits and other proof offered by both parties to determine whether there are material facts that remain in dispute. *See Swatek*, 192 Wis. 2d at 62. Mr. Lucin’s affidavit states that before purchasing the house in 1994, he saw water stains in the living room ceiling and asked Mr. Altmann whether there were ongoing leaks in the roof over the living room or near the overhang of the garage, and that Mr. Altmann

answered “no.” Mr. Lucin’s affidavit also states that Mr. Altmann told him that they took care of any water condensation problems in the roof by installing soffit vents. In another affidavit, Mr. Lucin’s brother-in-law, Richard Polcyn, confirms Mr. Altmann’s statements about the condensation problems and soffit vents.

¶12 In the Condition Report, the Altmanns deny any knowledge of defects in the roof. In his affidavit and his deposition, Mr. Altmann states that he is a general contractor and has always been in the construction business. He further states that he “took an active role in the building/remodeling of his one-time home.” Photographs accompanying Mr. Lucin’s affidavit demonstrate a variety of problems underlying the roof structure and other parts of the house.

¶13 The Lucins’ affidavits both state that shortly after they moved in, water was coming through the living room ceiling. Mr. Lucin avers that the garage roof was also leaking, and they had to replace roof decking in several areas due to rot. According to Mrs. Lucin’s affidavit, after moving in, she called the Altmanns about the water leakage in the living room, and Mr. Altmann told her that “we always kept that dry in there with the fireplace going.” Mrs. Lucin further avers that she was “puzzled by that remark because [the Altmanns] had told us that the fireplace had not been working for a number of years.” The Condition Report also states that the fireplace was not working.

¶14 Mr. and Mrs. Altmann both state in their affidavits that they never knew of any problems with carpenter ants. The Condition Report filled out by Mrs. Altmann also denies knowledge of any current or previous problems with carpenter ants. Mr. Lucin’s affidavit states that after moving in, he discovered that a wall of the utility room contained drill holes of the sort used by exterminators. Mrs. Lucin’s affidavit states that the holes were covered over by a piece of trim.

Mr. Lucin's affidavit adds that the Altmanns built the house and that no one but the Altmanns had lived in the house before the Lucins moved in.

¶15 “Any reasonable doubt as to the existence of disputed material fact is resolved against the moving party.” *Gray v. Marinette County*, 200 Wis. 2d 426, 434, 546 N.W.2d 553 (Ct. App. 1996). We conclude that the affidavits and other proof demonstrate that disputed facts exist as to whether the Altmanns made untrue representations and whether they knew of the defects of which the Lucins complain. Therefore, the Altmanns' motion for summary judgment was improperly granted. We note that other material issues of fact may also be in dispute. However, we need not delineate each of them. Any disputed question of material fact is sufficient to defeat a motion for summary judgment. *See Preloznik*, 113 Wis. 2d at 122.

¶16 Because the issue of damages will probably arise again, we address it. The Lucins contend that the circuit court incorrectly concluded that summary judgment was warranted in that they failed to show any damages under the applicable damages rule. Whether the circuit court used the proper legal standard in determining the measure of damages is a question of law that we review de novo. *See Three & One Co. v. Geilfuss*, 178 Wis. 2d 400, 410, 504 N.W.2d 393 (Ct. App. 1993). The circuit court's determination as to damages was based on a fair market value measure of damages. The court concluded that the proper measure of damages was the difference between the price the Lucins paid for the house and the fair market value of the house with the defects.

¶17 The Lucins do not allege that the value of the house is less than the purchase price. However, the Lucins assert that under *Vandehey v. City of Appleton*, 146 Wis. 2d 411, 415, 437 N.W.2d 550 (Ct. App. 1988), an alternative

measure of damages in intentional and strict responsibility misrepresentation actions is the reasonable cost of putting the property in the condition in which it was represented to be. We agree. The supreme court adopted this “reasonable cost” rule of damages in *Ollerman v. O’Rourke Co.*, 94 Wis. 2d 17, 53, 288 N.W.2d 95 (1980), and *Vandehey* expressly noted the application of the rule to causes of action for strict responsibility misrepresentation, as well as negligent and intentional misrepresentation. See *Vandehey*, 146 Wis. 2d at 415. Whether the Lucins can show measurable damages under this “reasonable cost” rule is a question of fact, therefore summary judgment was not properly granted on the ground that the Lucins failed to show any damages.

By the Court.—Order reversed and cause remanded.

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