COURT OF APPEALS DECISION DATED AND FILED

January 10, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2681

Cir. Ct. No. 2001CV65

STATE OF WISCONSIN | **IN COURT OF APPEALS DISTRICT III**

STEVEN J. WICKENHAUSER AND CHRISTY K. WICKENHAUSER,

PLAINTIFFS-RESPONDENTS,

V.

JACK LEHTINEN AND CAROLYN LEHTINEN,

DEFENDANTS-APPELLANTS,

JOSEPH NIELSEN AND SHARON NIELSEN,

DEFENDANTS.

APPEAL from a judgment and orders of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jack and Carolyn Lehtinen (Lehtinen) appeal a judgment awarding Steven and Christy Wickenhauser compensatory and punitive damages and orders denying their motions for summary judgment and claim

preclusion. Lehtinen argues that because the Wickenhausers obtained rescission in a previous case, they are barred by the election of remedies from now obtaining compensatory and punitive damages. We agree and reverse the judgment.[1]

BACKGROUND

¶2 The Wickenhausers operate a dairy farm. They met Jack Lehtinen, a retired dentist who frequently invested in real estate. Between September 1997 and January 1998, the Wickenhausers and Lehtinen entered into a series of transactions where Lehtinen loaned money or paid bills on the Wickenhausers' behalf. The loans were typically secured by a mortgage on a parcel of real estate. However, Lehtinen contended that, in exchange for one of the loans and his promise to secure an additional $200,000 of financing, the Wickenhausers agreed to make him one-half owner of the mortgaged property.

¶3 Lehtinen arranged for friends, Joseph and Sharon Nielsen, to loan the Wickenhausers the additional $200,000. Lehtinen also presented the Wickenhausers with an option to purchase the property. The document gave Lehtinen a three-year option to purchase for $300,000. The Wickenhausers eventually signed the option.

[1] Lehtinen raises a number of alternative arguments: (1) claim preclusion and the common law mandatory counterclaim rule bar this action; (2) issue preclusion on liability from fraud findings in a prior equitable proceeding is fundamentally unfair in a subsequent action for compensatory and punitive damages; (3) compensatory damages are not permitted as a matter of law and the compensatory damages found by the jury were not supported by the evidence; (4) punitive damages are not permitted as a matter of law and Lehtinen was denied due process when the jury did not hear all the facts and circumstances surrounding the alleged fraud. Because we agree with Lehtinen that rescission in the first case bars recovery of damages in a second case, we need not address the alternative arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

¶4 In November 2000, Lehtinen claimed he owned one-half of the property and asked the Wickenhausers to sign a quit claim deed conveying him that interest. The Wickenhausers refused. On March 28, 2001, Lehtinen filed an action (first action) against the Wickenhausers. Lehtinen's complaint sought enforcement of the option to purchase.

¶5 On April 16, the Wickenhausers commenced this case. They sought a declaration of the ownership of property and compensatory and punitive damages arising from misrepresentations Lehtinen made at the time the option was signed.

¶6 On May 3, the Wickenhausers filed an answer in the first action. They asserted fraud as an affirmative defense, contending Lehtinen fraudulently induced them to sign the option. However, they did not counterclaim for damages. On May 14, the court began hearing testimony; the trial continued intermittently through the summer, ending on August 28.

¶7 On June 11, after testimony had begun in the first action, the Wickenhausers moved to consolidate the cases. The motion was denied. On July 27, the Wickenhausers filed an amended answer. The amended answer provided more detail about the fraud allegations, but again did not include a counterclaim for damages.

¶8 After testimony concluded in the first action, the court asked the parties to submit proposed findings of fact, conclusions of law and judgments. On September 28, 2001, the court adopted the Wickenhausers' document without modification. The judgment provided that the option to purchase contract was rescinded.

¶9 On October 26, the Wickenhausers moved for issue preclusion in this case. They asserted that liability regarding Lehtinen's misrepresentation had been decided in their favor in the first action and, therefore, Lehtinen could not deny liability in this case. He countered by moving for claim preclusion. Lehtinen asserted that the Wickenhausers were obligated to raise their damage claims in the first action and that the election of remedies doctrine prevented them from obtaining damages in this case when they had obtained rescission in the first action. The circuit court granted issue preclusion, but found:

> [T]he doctrine of claim preclusion does not apply here as there is no compulsory counterclaim statute in the State of Wisconsin. The [Wickenhausers] attempted to have [the cases] consolidated, but the motion was denied for reasons not relevant here. As noted by the [Wickenhausers], damages were not available in [the first action] and the fact that the remedies available in each case were separate and distinct precludes application of claim preclusion.

Lehtinen later moved for summary judgment on the basis of claim preclusion. That motion was likewise denied.

¶10 A jury trial commenced on August 23, 2004. The jury found compensatory damages in the amount of $274,184 and punitive damages of $500,000. Judgment was entered accordingly.

STANDARD OF REVIEW

¶11 The issue is whether the election of remedies doctrine bars the Wickenhausers from obtaining a damages judgment after having obtained a rescission judgment. This involves the application of facts to a legal standard, a question of law that we review independently. *See* ***Halverson v. River Falls Youth Hockey Ass'n***, 226 Wis. 2d 105, 115, 593 N.W.2d 895 (Ct. App. 1999).

DISCUSSION

¶12 Lehtinen argues that the Wickenhausers' damage claims are inconsistent with the judgment for rescission they obtained in the first action. Accordingly, Lehtinen contends this case is barred by the election of remedies.

¶13 Election of remedies is an equitable doctrine that bars a plaintiff from maintaining inconsistent legal theories or forms of relief arising from a single set of facts. ***Bank of Commerce v. Paine, Webber, Jackson & Curtis***, 39 Wis. 2d 30, 36, 158 N.W.2d 350 (1968). "The classic application of the election of remedies doctrine is that a defrauded party has the election of either rescission or affirming the contract and seeking damages." ***Head & Seemann, Inc. v. Gregg***, 104 Wis. 2d 156, 159, 311 N.W.2d 667 (Ct. App. 1981), *aff'd*, 107 Wis. 2d 126, 318 N.W.2d 381 (1982); *see also* **Digicorp, Inc. v. Ameritech Corp.**, 2003 WI 54, ¶67, 262 Wis. 2d 32, 662 N.W.2d 652 ("This court has consistently applied the rule that a party may not seek to set aside a contract on the basis of fraud and at the same time recover the benefit of the bargain.").

¶14 However, electing rescission does not mean a defrauded party can never obtain damages, as "[r]escission is always coupled with restitution." ***Head & Seemann***, 104 Wis. 2d at 159. Thus, a party may obtain damages for expenditures made in reliance on the bargain, rental or use value of the real estate, and incidental expenses. ***Id.*** at 167-68.

¶15 The Wickenhausers offer little response to Lehtinen's argument that the election of remedies applies here. They do not challenge that the rescission remedy obtained in the first action is inconsistent with their damage claims in this case. They do not contend that their damage claims are restitutionary in nature.

¶16 Instead, the Wickenhausers assert that the election of remedies does not apply because they attempted to consolidate the cases. They contend that the court's ruling denying consolidation prevented them from "requesting or obtaining damages" in the first action and therefore they never "elected" against damages. However, this argument is refuted by the record. After the court denied consolidation of the two cases, the Wickenhausers amended their answer in the first action. The court's ruling against consolidation did not prevent the Wickenhausers from counterclaiming for damages at that time.

¶17 Furthermore, we agree with Lehtinen that, when considering the election of remedies, there is no logical distinction between consolidated cases and separated cases. The central issue is the inconsistency of the remedies. Thus, regardless of whether the motion to consolidate was granted, the Wickenhausers cannot obtain inconsistent remedies arising from the same set of facts. The Wickenhausers essentially argue that they can do in two cases what they could not have done in one.

¶18 The Wickenhausers also contend that election of remedies should not apply because they merely defended against Lehtinen's claims in the first action. They argue they "did not sue for actual and punitive damages in [the first action]. They were sued by Lehtinen[], and defended against those claims. Under a different case number, with different grounds for relief and different parties, Wickenhausers pursued their claim for actual and punitive damages." However, the fact that the Wickenhausers were defendants in the first action is irrelevant when the judgment they obtained gave them affirmative relief. The Wickenhausers did more than defend Lehtinen's claims; they obtained a judgment for rescission. Rescission is inconsistent with the Wickenhausers' claims here for

actual and punitive damages. Having obtained a judgment for rescission, the Wickenhausers cannot obtain a judgment for damages.

By the Court.—Judgment and orders reversed.

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