

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 10, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0349

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PATRICK J. CONNORS D/B/A CASTLE ROCK REALTY,

**PLAINTIFF-APPELLANT-CROSS-
RESPONDENT,**

v.

DON SLAMA D/B/A JAJO L.L.C.,

**DEFENDANT-RESPONDENT-CROSS-
APPELLANT.**

APPEAL and CROSS-APPEAL from judgments of the circuit court for Juneau County: ROBERT F. CURTIN, Reserve Judge and JOHN W. BRADY, Judge. *Reversed and cause remanded with directions.*

¶1 ROGGENSACK, J.¹ Patrick J. Connors appeals from dismissal of his lawsuit to collect a commission for the sale of real estate. The circuit court dismissed the action at the conclusion of his case-in-chief because it concluded he had not complied with the requirement that he prove that he was a licensed real estate broker. WIS. STAT. § 452.20. Because Connors alleged and provided evidence from which it reasonably could be inferred that he was a licensed broker, we reverse the judgment of the circuit court and remand for a new trial.

BACKGROUND

¶2 Connors, who does business as Castle Rock Realty in Mauston, Wisconsin, sued Don Slama to collect a commission for the sale of real estate, which he alleged was due under the listing contract that was attached to the complaint. During the trial, Connors introduced, and the court received as evidence, three exhibits that identified Connors as a “broker” who does business as Castle Rock Realty: (1) a Wisconsin Realtors Association form listing contract (exhibit 1) signed by Connors and Slama; (2) an offer to purchase (exhibit 7), also made on a Wisconsin Realtors Association form; and (3) a Wisconsin Realtors Association form amendment to the listing contract (exhibit 2). Exhibit 7 also identified Bobbie Jo Stoughtenger, a sales associate in Connors’s office, as a “licensee.” Additionally, the deposit receipt (exhibit 8) for the earnest money associated with exhibit 7 states that “Castle Rock Realty Real Estate Trust Account” is the depositor. Neither Connors nor any of his witnesses specifically testified that he was a licensed real estate broker or salesperson. No evidence that

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98). Additionally, all further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

was offered or received implied he was not a broker licensed in the State of Wisconsin.

¶3 After Connors rested, Slama moved for dismissal on the grounds that Connors had not met his burden of proof under WIS. STAT. § 452.20, which states in relevant part:

No person engaged in the business or acting in the capacity of a broker [or] salesperson ... within this state may bring or maintain an action in the courts of this state for the collection of a commission or compensation for the performance of any act mentioned in this chapter without alleging and proving that he or she was a duly licensed broker [or] salesperson ... at the time the alleged cause of action arose.

The court granted Slama's motion to dismiss, concluding that Connors had not proved that he was a licensed broker or salesperson at the time the cause of action arose. Connors's counsel moved the court to immediately reopen his case to allow Connors to state that he was licensed by the state as a real estate broker. The court denied the motion.

¶4 Connors later moved for reconsideration. The trial court denied the motion and entered judgment for Slama on February 1, 2000. The trial court also awarded Slama \$100 in attorney's fees under WIS. STAT. § 799.25(10). Connors appeals from the judgment; Slama cross-appeals from the award of attorney's fees, arguing that the amount of attorney's fees should be governed by the listing contract (exhibit 1).

DISCUSSION

Standard of Review.

¶5 In a trial to the court, we will not reverse a circuit court's decision to grant a defendant's motion to dismiss at the close of the plaintiff's case unless its determination that there was no credible evidence to support the elements of the plaintiff's claim is clearly wrong. *See* WIS. STAT. § 805.17(2); *Household Utilities, Inc. v. Andrews Co.*, 71 Wis. 2d 17, 28, 236 N.W.2d 663, 669 (1975). Additionally, the decision whether to permit a party to reopen its case is a discretionary decision of the circuit court. *See Stivarius v. DiVall*, 121 Wis. 2d 145, 157, 358 N.W.2d 530, 536 (1984). This court will not reverse a discretionary determination unless there is no reasonable basis for it. *See id.*

Licensed Real Estate Broker.

¶6 The circuit court concluded that Connors had failed to meet his burden to prove that he was a licensed broker because his attorney did not elicit a direct statement from him in that regard. Connors contends it is a reasonable inference from the evidence in the record that he is a licensed broker. In the alternative, he argues that the circuit court erroneously exercised its discretion when it did not permit him to reopen his case to make an affirmative answer to one question. Slama contends the circuit court was correct. We agree with Connors.

¶7 The court dismissed the lawsuit because it concluded Connors failed to comply with WIS. STAT. § 452.20, which has two elements: pleading and proof that Connors was a broker or salesperson licensed in Wisconsin. Therefore, we first determine whether Connors alleged that he was a licensed real estate broker. When reviewing a complaint, we liberally construe it and will sustain a motion to

dismiss only if it is clear that under no circumstances can the plaintiff prevail. *See Barry v. Maple Bluff Country Club*, 221 Wis. 2d 707, 724, 586 N.W.2d 182, 189 (Ct. App. 1998), *review denied*, 222 Wis. 2d 674, 589 N.W.2d 628 (Wis. Dec. 08, 1998) (No. 97-0736). To test the sufficiency of a complaint, we examine both the complaint and its attachments. *See id.* at 724.

¶8 Connors’s complaint was filed *pro se* as a small claims action on forms provided by the court system for use without an attorney. It does not specifically allege that Connors was a licensed real estate broker or salesperson at the time the listing contract was entered into. However, Connors attached a copy of the listing contract to the complaint. It was prepared on a Wisconsin Realtors Association form in which Connors is identified as a broker affiliated with Castle Rock Realty. Therefore, given the nature of this action as one instituted in small claims court and the liberal rules that we apply to all pleadings, we conclude that Connors alleged sufficient facts to give notice that he was seeking a commission as a licensed real estate broker.

¶9 The circuit court focused its dismissal on a failure of proof at trial, as provided for in WIS. STAT. § 805.17(1).² On our review, we search the record to discover whether the circuit court was clearly wrong in its determination that, construing the evidence adduced at trial and all reasonable inferences therefrom in the manner, most favorable to Connors, there was no proof that he was a licensed real estate broker. *See Household Utilities*, 71 Wis. 2d at 26, 236 N.W.2d at 667. We first note that, although no witness testified that Connors was a licensed broker

² After a plaintiff has rested its case in a trial to the court, the defendant “may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.” WIS. STAT. § 805.17(1). The court may then determine the facts and render judgment against the plaintiff. *See id.*

or salesperson, the court received three exhibits on Wisconsin Realtors Association forms, all of which identified Connors as the broker for the transactions. It also received the deposit receipt for the earnest money on the offer to purchase, showing it was made in Connors's "Real Estate Trust Account," and correspondence showing Connors's business was located in Mauston, Wisconsin (exhibit 10). A reasonable inference from this evidence is that Connors, who collected earnest money on a proposed sale and duly deposited it in a Realtors trust account in Mauston, Wisconsin, was a Realtor licensed in Wisconsin. Furthermore, no evidence was offered, nor even any inference made, that Connors was not a licensed broker.³ The circuit court does not say why it would not be a reasonable inference from this evidence to conclude that Connors was a broker licensed in Wisconsin. And we have been presented with no argument in that regard. On a motion to dismiss, a circuit court may not disregard positive uncontroverted evidence and the reasonable inferences therefrom. See *Kilgust Heating v. Kemp*, 70 Wis. 2d 544, 549, 235 N.W.2d 292, 295 (1975). Therefore, absent an explanation from the circuit court, we conclude its determination, at this stage of the trial, is clearly wrong.⁴

¶10 Additionally, when Connors moved to immediately reopen his case-in-chief, the court summarily denied the motion, with no statement of why denial was appropriate. Where a circuit court does not articulate its reasoning, we may

³ At one point in the trial, Connors's attorney stated, in response to an objection by opposing counsel, that Connors was a licensed Realtor and therefore competent to interpret exhibit 1, a form contract he used in his business. Slama's counsel did not object to that statement, and the court then permitted Connors to answer the question about the listing contract.

⁴ While the fact of licensure could have been refuted in Slama's case-in-chief if such proof had been available, that does not change the inferences which reasonably may be drawn from the evidence currently in the record.

independently examine the record to determine if it provides a basis for the circuit court's exercise of discretion. *See State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498, 502 (1983). We have done so and can find no reasonable basis for refusing to permit Connors to testify to this one fact. Therefore, even if a court could conclude that it was not reasonable to infer from evidence in the record that Connors was a licensed broker in Wisconsin, it was an erroneous exercise of discretion to refuse to reopen Connors's case-in-chief when all the witnesses were still in court and a court reporter was present. Accordingly, we reverse the judgment of the circuit court and remand for a new trial.

CONCLUSION

¶11 Because Connors properly alleged that he was a licensed broker and the trial court ignored uncontroverted evidence in the record to support the allegation, we reverse the judgment of the circuit court and remand for a new trial. We do not reach the issue presented by Slama's cross-appeal because of the remand for a new trial.

By the Court.—Judgments reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

