

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 22, 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. 2005AP641

Cir. Ct. No. 2002CF388

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

MICHAEL S. MACLEISH AND MARNIE K. MACLEISH,

PLAINTIFFS-RESPONDENTS,

V.

PETER R. KLEINSCHMIDT AND ELIZABETH S. KLEINSCHMIDT,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Peter and Elizabeth Kleinschmidt appeal from a judgment awarding damages to Michael and Marnie MacLeish arising out of the Kleinschmidts' failure to close a residential real estate transaction. On appeal, the

Kleinschmidts challenge evidentiary rulings at trial. We conclude that the circuit court properly exercised its discretion in making these rulings, and we affirm.

¶2 The relevant facts are largely undisputed. The Kleinschmidts offered to purchase the MacLeishes' house. After exchanging counteroffers, the parties entered into a purchase contract contingent upon an inspection of the property by a registered home inspector and the absence of any defects. The offer to purchase defines "defect" as:

[A] structural, mechanical or other condition that would have a significant adverse effect on the value of the Property; that would significantly impair the health or safety of future occupants of the Property; or that if not repaired, removed or replaced would significantly shorten or have a significant adverse effect on the expected normal life of the Property. Defects do not include structural, mechanical or other conditions the nature and extent of which Buyer had actual knowledge or written notice before signing this Offer.

¶3 The home inspector found that the roof was in satisfactory condition, and it had some curling shingles. Although the MacLeishes made other repairs to the house in response to the inspector's report, they declined to replace or repair the curling shingles because curling shingles were normal wear for a six-year-old roof and were not a defect as defined in the offer to purchase.

¶4 After the MacLeishes declined to replace the curling shingles, the Kleinschmidts declined to close on the transaction. The MacLeishes sued the Kleinschmidts to recover approximately \$27,000, representing the expenses they incurred in preparing the house for sale to the Kleinschmidts pursuant to the inspector's report, expenses associated with the delay in selling the property to another buyer, and the difference in price between the purchase price agreed upon with the Kleinschmidts and the price agreed upon with the subsequent buyer.

¶5 A jury found that the MacLeishes and Kleinschmidts had a legally binding contract subject to contingencies, all the contingencies were satisfied, and the Kleinschmidts had to complete the transaction. The jury awarded the MacLeishes damages, and the Kleinschmidts appeal.

¶6 On appeal, the Kleinschmidts challenge the circuit court's exclusion of evidence to support their claim that the curling shingles were a defect. The Kleinschmidts offered into evidence the Roofing System Guarantee that the State of Wisconsin requires of its contractors.¹ Pursuant to the Guarantee, a curling shingle is a defect.² The MacLeishes countered that the Guarantee was irrelevant because the offer to purchase set forth a definition of "defect." The circuit court excluded the Guarantee as irrelevant.

¶7 Whether to exclude evidence is a matter for the circuit court's discretion. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. A court properly exercises its discretion when it examines the relevant facts, applies a proper legal standard, and, using a demonstrated rational process, reaches a reasonable conclusion. *Id.*

¶8 Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01 (2003-04).³ "The criterion of relevancy is whether the evidence sought to be introduced

¹ The Guarantee requires the contractor to warrant that the roofing system will remain free of defects, including curling shingles, for five years from the date of completion.

² The Kleinschmidts did not name any expert witnesses for trial.

³ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

would shed any light on the subject of inquiry.” *Rogers v. State*, 93 Wis. 2d 682, 688, 287 N.W.2d 774 (1980).

¶9 The Kleinschmidts contend that the Guarantee was relevant to whether the condition of the shingles had “a significant adverse effect on the expected normal life of the Property” as set forth in the definition of “defect” in the offer to purchase. The Kleinschmidts reason that if the State of Wisconsin views curling shingles as a defect, then curling shingles can be considered a defect generally.

¶10 How the State of Wisconsin defines a roof defect is not relevant to this case. The offer to purchase defined “defect,” and the issue was whether the curling shingles amounted to a defect thereunder, thereby relieving the Kleinschmidts of their obligation to complete the transaction.⁴ The circuit court properly exercised its discretion in excluding the Guarantee from evidence.

¶11 The Kleinschmidts next argue that the circuit court erred when it permitted Mike Daniels, the sellers’ nonlawyer real estate broker, to testify that the curling shingles were not a defect within the meaning of the offer to purchase. The circuit court concluded that the broker’s testimony was admissible as opinion testimony. On appeal, the Kleinschmidts challenge this evidentiary ruling, arguing that Daniels was not an expert under WIS. STAT. § 907.02 for purposes of such testimony.

⁴ We do not address the circuit court’s analysis of this evidentiary issue during postverdict motions because the circuit court’s initial relevancy determination was correct.

¶12 We do not address the issue as framed by the Kleinschmidts. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). Even if the circuit court erred in permitting Daniels to testify that the curling shingles were not a defect under the offer to purchase, the error was harmless because the Kleinschmidts did not object to the same testimony offered by other realtors.

¶13 We evaluate whether an evidentiary error “affected the substantial rights of the party.” *Martindale*, 246 Wis. 2d 67, ¶30. If it did not, the error is considered harmless. *Id.* “For an error ‘to affect the substantial rights’ of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue.” *Id.*, ¶32 (citations omitted).

¶14 There is no reasonable possibility that Daniels’ testimony contributed to the outcome because other realtors also testified that the curling shingles did not constitute a defect under the offer to purchase. The Kleinschmidts did not object to the testimony of Sharon Jensen and Kathy Nonhof, both realtors, that the inspector’s condition report did not identify defects which, if not cured by the MacLeishes, would have permitted the Kleinschmidts to withdraw from the transaction.

¶15 Additionally, Karl Meyer, the home inspector, testified in support of his inspection report that the roof was in satisfactory condition. With regard to the curling shingles, Meyer testified that he did not consider them to be in a defective condition, that the curling was in a small area of the roof and an early sign of aging, and that the shingles would probably last more than five years. Meyer testified that in performing his evaluation, he employed the defect standard set forth in the offer to purchase, and the shingles did not constitute a defect under the

contract. On cross-examination, Meyer conceded that curling in six-year-old shingles with an expectancy of twenty or twenty-five years was unusual, and he would recommend replacing the shingles. However, on redirect examination, Meyer testified that ninety-eight to ninety-nine percent of the roof was in very good condition. That portion of the roof with curling shingles did not affect the value of the home or its immediate condition.

¶16 In light of the testimony of Meyer and the other realtors, Daniels' testimony that the condition of the roof shingles did not rise to a defect under the offer to purchase did not affect the outcome.

¶17 Finally, the Kleinschmidts argue that nonlawyer realtors Nonhof, Jensen and Daniels offered inadmissible legal opinions that the MacLeishes did not have a legal obligation under the contract to repair the roof. We conclude that the Kleinschmidts did not preserve this issue for appeal.

¶18 When the Kleinschmidts moved the circuit court to preclude legal opinions from the realtors, the Kleinschmidts did not make it clear to which witnesses they were referring. The MacLeishes stated that realtor Daniels would testify but that another realtor, John Rohde, would not testify. At that point, the Kleinschmidts did not clarify the scope of their motion in limine to include other realtor witnesses and, more importantly, they did not object to the subsequent testimony of Nonhof and Jensen. “[A] party must raise and argue an issue with some prominence to allow the trial court to address the issue and make a ruling.” *State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993). Because the Kleinschmidts did not adequately place this issue before the circuit court, we conclude that it is waived.

By the Court.—Judgment affirmed.

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

