

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 19, 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. 2006AP1200**

**Cir. Ct. No. 2005CV79**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**DAVID J. LAMBERT,**

**PLAINTIFF-APPELLANT,**

**V.**

**FRED F. KLEINHEINZ AND MICHAEL R. KLEINHEINZ,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Rusk County:  
EUGENE D. HARRINGTON, Judge. *Affirmed.*

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

¶1 PER CURIAM. This suit arises out of an agreement settling previous litigation between the parties. David Lambert argues the court erred in dismissing this most recent suit because he has a valid breach of contract claim and is entitled to money damages. We conclude Lambert waived his contract

claim and his argument that he is entitled to damages based on his reliance interest. We therefore affirm the judgment.

### **BACKGROUND**

¶2 This litigation involves the abortive sale of an approximately 235-acre parcel on the Chippewa River in Rusk County. Fred and Michael Kleinheinz are the original owners of the parcel. On April 9, 2003, Lambert offered to purchase the property for \$3.16 million. The offer ended in litigation, with each side filing a separate lawsuit against the other.

¶3 On October 25, 2004, the parties agreed to settle the two lawsuits and signed an agreement to that effect. The agreement gave Lambert the right to purchase the land for \$2 million provided closing occurred by February 25, 2005. The February 25 deadline was extended, eventually to April 22, 2005. However, Lambert was unable to secure the financing needed to purchase the property.

¶4 Lambert then filed this suit on July 7, 2005. Lambert alleged five claims. The claims included a breach of contract claim and a claim of strict responsibility misrepresentation. Both alleged the Kleinheinzes had failed to inform Lambert of pending Department of Natural Resources (DNR) actions. The breach of contract claim alleged the Kleinheinzes had breached the settlement agreement by failing to inform Lambert of the DNR actions. The misrepresentation claim alleged Lambert had been induced to enter into the settlement agreement by false statements about the DNR actions made by the Kleinheinzes.

¶5 The matter was set for trial on March 14-15, 2006. In a pretrial statement filed March 3, Lambert stated he was narrowing his legal theory to strict responsibility misrepresentation. He also stated he would limit his remedy to

rescission of the settlement agreement and reinstatement of his original lawsuit. In his opening statement at trial, Lambert referred the court to his pretrial statement and repeated his arguments that Lambert had entered into the settlement agreement based on the Kleinheinzes' misrepresentations and that he was entitled to rescind that agreement. Lambert did not mention any claim for breach of the settlement agreement.

¶6 At the close of Lambert's case in chief, the Kleinheinzes moved for a directed verdict and renewed their motion to dismiss. They argued Lambert had failed to prove he was entitled to rescind the settlement agreement as a remedy. The court agreed Lambert had failed to prove he was entitled to rescission. However, before granting Kleinheinzes' motion, the court asked Lambert whether he had any money damages. After some discussion, the court concluded Lambert had no damages and dismissed the suit.

### DISCUSSION

¶7 On appeal, Lambert argues the court erred in dismissing his breach of contract claim and incorrectly failed to take his reliance damages into account.<sup>1</sup> We conclude Lambert has waived his arguments by failing to raise them at the circuit court.

¶8 In order to preserve an issue for appeal, a party must raise it "with sufficient prominence such that the trial court understands that it is being called upon to make a ruling." *Bishop v. City of Burlington*, 2001 WI App 154, ¶8, 246

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<sup>1</sup> Lambert does not take issue with the court's conclusion that he is not entitled to rescission as a remedy.

Wis. 2d 879, 631 N.W.2d 656. In addition, we generally do not consider arguments raised for the first time on appeal. *State v. Hansford*, 219 Wis. 2d 226, 243 n.16, 580 N.W.2d 171 (1998). These rules are based on our reluctance to blindside circuit courts with reversals based on theories that did not originate in their forum. *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476.

¶9 Lambert first argues the court erred by dismissing his suit because he has a valid breach of contract claim. However, as noted above, Lambert’s pretrial statement specifically limited the issues at trial to his strict responsibility misrepresentation claim and his proposed rescission remedy. Lambert fails to point to anything in the record where he attempted to change that impression.<sup>2</sup> Instead, he argues the court “invited” him to bring his breach claim after the court concluded rescission was not available as a remedy.

¶10 Lambert mischaracterizes the court’s statement. The court never mentioned reinstatement of any of Lambert’s other claims. Rather, after the court concluded Lambert was not entitled to rescission, the court asked Lambert whether he was “prepared to go forward today with the appropriate evidence to show that [he] suffered monetary loss.” The court and the parties then discussed whether Lambert had any money damages. Assuming Lambert could have revived his contract claim at that point, this exchange was insufficient to inform the circuit

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<sup>2</sup> Lambert argues his opening statement noted a breach of contract claim. However, Lambert in his opening was referring to the breach of contract claim in his prior suit, not a claim for breach of the settlement agreement.

court that it was called upon to make a ruling on whether evidence supported a breach of contract claim. *See Bishop*, 246 Wis. 2d 879, ¶8.<sup>3</sup>

¶11 Lambert also argues the court erred by concluding he has no damages. On appeal, Lambert argues he is entitled to reliance damages—that is, damages that will place him in the position he would have been in had the contract not been made. *See Reimer v. Badger Wholesale Co.*, 147 Wis. 2d 389, 395, 433 N.W.2d 592 (Ct. App. 1988).

¶12 Again, Lambert raises this argument for the first time on appeal. In his brief, he concedes that “[f]or some reason, neither the Circuit Court nor David Lambert’s counsel considered the damages that David Lambert is entitled to based on his ‘reliance interest.’” Because Lambert never asserted a reliance theory at the circuit court, he waived that argument, and we decline to address it. *See Hansford*, 219 Wis. 2d at 243 n.16.

*By the Court*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

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<sup>3</sup> Lambert also argues he did not waive this argument because he did not voluntarily and intentionally relinquish his right to proceed with his contract claim. *See Preston v. Meriter Hosp., Inc.*, 2005 WI 122, ¶16, 284 Wis. 2d 264, 700 N.W.2d 158. However, *Preston* reaffirms the general rule that failure to properly preserve a claim in circuit court waives that claim. *Id.*

