

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 1, 2008

David R. Schanker
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. 2007AP217

Cir. Ct. No. 2004CV460

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

FOUR STAR PROPERTIES, INC.,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

MARK C. WOYCHIK AND PAULA H. WOYCHIK,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS,

THOMAS A. MCCORMACK,

DEFENDANT.

APPEAL and CROSS-APPEAL from judgments of the circuit court for St. Croix County: EDWARD F. VLACK, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Four Star Properties, Inc. appeals from judgments dismissing its action against Mark and Paula Woychik to remove clouds on title to real estate, and granting the Woychiks' counterclaim for damages based on Four Star's misrepresentations and construction delays caused by Four Star's failure to complete a certified survey. The Woychiks cross-appeal the judgment awarding them one-fourth of their attorney fees, and have filed a motion to be awarded the attorney fees incurred in this appeal and cross-appeal. Except for the award of one-fourth of the Woychiks' attorney fees, we affirm the judgments. We reverse the judgment for attorney fees and remand the matter for the court to reconsider the percentage of attorney fees. We also direct the court to include in the judgment all of the reasonable attorney fees the Woychiks incurred as a result of this appeal and cross-appeal.

BACKGROUND

¶2 Four Star subdivided and sold lots from an eighty-acre parcel without first recording a survey, contrary to county ordinance. Its newspaper advertisement proclaimed "Great building site which has already been perked." Bernard Seidling, Four Star's representative, told Mark Woychik the property perked for a conventional septic system. He also told Woychik the survey would be completed within a few weeks. The Woychiks decided to purchase a five-acre lot adjacent to the town road. The land contract, drafted by Seidling, contained a metes and bounds description because the survey had not been completed. As a result, the contract was not recordable. In addition to lack of a survey, the drafter of the instrument was not identified.

¶3 A month later, the Woychiks requested to swap their property for another lot. Seidling drafted a new land contract similar to the original contract.

It also provided “access to this parcel is via an easement.” The contract did not specify the location of the easement and was not recordable because it failed to identify the drafter or the parcel identification number, and there was no survey.

¶4 Seidling had several concept drawings prepared depicting lot configurations and different locations of the easement. The county did not approve the concepts. The Woychiks made demands for a survey and a recordable land contract. They expressed a desire to build a \$15,000 easement road but were unwilling to invest that amount until they had a recordable instrument that granted access and identified the location of the easement.

¶5 The Woychiks eventually filed an Affidavit of Interest against the eighty-acre parcel because the location of their easement was not identified. When Four Star finally completed the survey for the subdivision and the county approved the map, Four Star discovered the Affidavit of Interest and sought to have it removed. At that time, Four Star had still not provided the Woychiks with a recordable land contract or a recordable easement. When Four Star was unable to complete sales of other parcels due to the Affidavit of Interest as well as a title defect for the western two rods of the eighty-acre parcel, Seidling attempted to have the Woychiks withdraw the Affidavit of Interest by drafting a quitclaim deed relinquishing any interest in the eighty-acre parcel, the effect of which would be to leave their parcel landlocked. The Woychiks agreed to release the Affidavit of Interest once they were given a recordable land contract for their lot and an easement. Seidling drafted two new land contracts, neither of which contained the same terms and conditions as the Woychiks’ unrecorded land contract. Both deeds contained the wrong legal description and conveyed the wrong lot. The contracts purported to convey title by quitclaim deed rather than the warranty deed called for in the Woychiks’ initial contracts. Seidling claimed to have drafted a

third land contract that addressed the Woychiks' concerns. The trial court did not believe Seidling's assertion that he ever gave that contract to the Woychiks, and that finding, based on Seidling's credibility, is not clearly erroneous. *See* WIS. STAT. § 805.17(2).¹

¶6 Four Star brought this action to compel removal of the Affidavit of Interest. The Woychiks counterclaimed for the delay in construction and increased construction costs, the cost of an extra soil test, and the loss of the west two rods promised in the land contract. On motion before trial, the court entered an order that limited the Woychiks' interest to lot 3 plus two extra rods to account for the title defect along with an easement across lot 1.

¶7 The remaining claims were tried to the court. The court rejected Four Star's slander of title claim, finding the Woychiks had a valid basis for recording the Affidavit of Interest. It found the affidavit was negligently drafted, but the negligence did not cause Four Star's loss of sales or other damages. On the Woychiks' counterclaims, the court found Four Star liable for misrepresentation and awarded the Woychiks actual damages plus twenty-five percent of their attorney fees.

DISCUSSION

¶8 Four Star challenges the sufficiency of the evidence to support several of the trial court's findings. Whether the record contains sufficient evidence to support the findings is a question of law. However, we must search

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

the record for any evidence that supports the findings. *Stan's Lumber, Inc. v. Flemming*, 196 Wis. 2d 554, 565, 538 N.W.2d 849 (Ct. App. 1995). The trial court's findings will be upheld unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶9 Four Star first challenges the finding that it made misrepresentations concerning the perk test. It argues that the advertisement "Great building site which has already been perked" is literally correct because it does not indicate the result of the perk test. We conclude that the evidence supports the finding that the advertisement misrepresented the property. A reasonable buyer would have believed the building site passed the perk test and this "great building site" would be suitable for a lawful, conventional septic system. In addition, Mark Woychik testified that Seidling verbally represented the property was suitable for a conventional system. Although the court did not specify whether it found intentional misrepresentation or strict liability misrepresentation, its comments show that it found intentional misrepresentation, and the record supports that finding.

¶10 Four Star next argues the Woychiks' construction delay was not caused by Four Star's delay in filing the certified survey map because the Woychiks testified they were not able to get financing. Therefore, Four Star argues, even if the map had been completed, the Woychiks could not have commenced construction. The Woychiks adequately established that Four Star's violations caused the construction delays. The trial court found that without a recordable land contract and easement, the Woychiks could not obtain a building permit or begin construction. The bank would not lend money to fund the construction without proof of the Woychiks' recorded ownership. The Woychiks

could not record the land contract because, for platted property, a metes and bounds description cannot be recorded. *See* WIS. STAT. § 236.34(3).

¶11 Four Star further contends that Mark Woychik agreed to pay the \$704 cost for testing the property and, based on that separate agreement, the court should not have compelled Four Star to pay that amount. Despite Four Star's claim that the site had already been perked, an additional soil test was needed. Mark Woychik testified that he asked Seidling why an additional test was necessary if it had already been perked, and Seidling merely responded that it would save Woychik money to have the test done as scheduled rather than paying for his own test. Woychik reluctantly agreed to pay for the test that was necessitated by Four Star's initial misrepresentation. The court equitably rescinded Woychik's separate agreement to pay the \$704 necessitated by Four Star's misrepresentation. *See Schnuth v. Harrison*, 44 Wis. 2d 326, 339, 171 N.W.2d 370 (1969).

¶12 Four Star next argues that it still has a cloud on its title and the trial court failed to remedy the Woychiks' negligent recording of the Affidavit of Interest that overstated its interest in the eighty-acre parcel. By pretrial order, the court narrowed the scope of the Affidavit of Interest. The court reasonably provided no remedy for the negligent drafting because Four Star did not establish damages. Although Four Star identified potential sales that were not completed due to the cloud on title, those transactions could not have been legally completed for lack of an approved and recorded survey. Four Star did not establish any losses based on contracts that would have been legally enforceable.

¶13 Finally, Four Star argues that the trial court improperly awarded the Woychiks one-fourth of their attorney fees. Four Star argues the trial court did not

specifically find intentional conduct as required by WIS. STAT. § 895.80 (2003-04) (renumbered WIS. STAT. § 895.446). Although the court did not make an explicit finding, this court may search the record for credible evidence to sustain the judgment. See *Trinity Lutheran Church v. Dorschner Excavating, Inc.*, 2006 WI App 22, ¶31, 289 Wis. 2d 252, 710 N.W.2d 680. This court may assume that a missing finding on an issue was determined in favor of the judgment. See *Sohns v. Jensen*, 11 Wis. 2d 449, 453, 105 N.W.2d 818 (1960). Four Star's intent can be inferred from its conduct. See *Pachucki v. Republic Ins. Co.*, 89 Wis. 2d 703, 708, 278 N.W.2d 898 (1979). The misrepresentation that the building site had been perked along with Seidling's oral representation that the property perked for a conventional septic system shows a deliberate effort to deceive potential purchasers. Four Star's assertion that the survey would be finished in a few weeks when the Woychiks actually waited three years also constitutes an intentional misrepresentation based on evidence that Seidling would not spend the money on a survey until he knew there were buyers for the lots. Seidling also knew that the land contracts he gave the Woychiks were not recordable and knew the consequences of not recording instruments of conveyance. Providing the Woychiks with replacement land contracts with the wrong legal description and providing only a quitclaim deed further underscore Four Star's intent to perpetrate a fraud. The record strongly supports the trial court's implicit finding of intentional misrepresentation and fraudulent behavior.

¶14 The trial court's rationale for awarding the Woychiks only one-fourth of their attorney fees cannot be determined. The Woychiks prevailed on all of the claims that were litigated. While the court has discretion to award attorney fees and may reduce the fees if the case involves claims where fees are not recoverable, the court did not adequately identify which attorney fees are not

related to Four Star's intentional misrepresentations. Although a portion of the fees were incurred defending against Four Star's slander of title and negligence claims, Four Star did not prevail on those claims and its misrepresentations appear to be directly related to the defense. The trial court did not identify any meaningful way to segregate attorney fees related to the defense against Four Star's claims from the fees arising from the Woychiks' counterclaims. On remand, the court shall make more explicit findings in support of its decision to award one-fourth of the attorney fees or it shall amend the award of attorney fees. In addition, it shall award the Woychiks all of the reasonable attorney fees incurred in this appeal and cross-appeal.

By the Court.—Judgments affirmed in part; reversed in part and cause remanded.

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

