COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1926 **Cir. Ct. No. 2003SC7413**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

LATANYA RICHARDSON AND BRYAN BRABENDER,

PLAINTIFFS-RESPONDENTS,

V.

ROBERT DAVIS AND DARLENE DAVIS,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] In this small claims action arising out of a residential real estate sale, Robert and Darlene Davis appeal the circuit court's

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

judgment awarding damages to Latanya Richardson and Bryan Brabender (collectively, "Brabender") on Brabender's claims against the Davises for misrepresentation and false advertising. We affirm the judgment.

Background

¶2 In marketing their property, the Davises used a Multiple Listing Service (MLS) report which described the property as follows:

> Cream puff! This house has been overimproved & kept in immaculate condition by fastidious owners. You'll love the hardwood floors, large eat-in kitchen & updated space has been maximized with lower level rec room/playroom and office area. With all the work done, you enjoy your time relaxing and playing. Fenced private yard. Joint garage agreement. See it now before this house disappears!

¶3 The Davises had done extensive remodeling on the property, including a remodel of the bathroom, which included moving the tub, the toilet, and a wall. Robert Davis did all of the remodeling in the bathroom himself.

¶4 Brabender, who was in the market for a house that would require no remodeling, became interested in the Davises' property. The Davises made oral representations about the extensive remodeling, a key selling point for Brabender.

¶5 In the Davises' real estate condition report, they represented that they were not "aware" that the remodeling was done without required permits. The parties now agree, however, that the Davises' bathroom remodeling was done without required permits and inspections.

¶6 Brabender purchased the Davises' property in November 2000. After Brabender began noticing problems with the bathroom, he sued the Davises in small claims court. Brabender alleged, among other things, defective tub

plumbing; damage to a wall, wood molding, and floor tiles due to improper caulking; and substandard installation of the floor tiles.

¶7 The case was tried to the circuit court on theories of negligent misrepresentation, strict liability misrepresentation, and WIS. STAT. § 100.18 false advertising. The court ruled for Brabender on his negligent misrepresentation and false advertising claims, finding that the Davises' remodeling was not of the quality they represented it to be. The court awarded Brabender $5000 in damages and $3000 in attorney's fees. The Davises appeal.

¶8 We reference additional facts as needed below.

Discussion

¶9 False advertising under WIS. STAT. § 100.18 and common law misrepresentation are different causes of action with different elements. ***Kailin v. Armstrong***, 2002 WI App 70, ¶40, 252 Wis. 2d 676, 643 N.W.2d 132. The reach of § 100.18 is potentially broader. "The legislature has plainly chosen in § 100.18 to provide protection and remedies for false advertising that do not exist at common law." ***Id.***, ¶42. An advertisement may "violate WIS. STAT. § 100.18(1) without making 'untrue' statements as long as those statements can be properly characterized as deceptive or misleading." ***Meyer v. Laser Vision Inst., LLC***, 2006 WI App 70, ¶8, 290 Wis. 2d 764, 714 N.W.2d 223. For the reasons explained below, we uphold the circuit court's decision with respect to Brabender's statutory false advertising claim. This is sufficient to affirm the circuit court; therefore, we need not address whether the evidence is also sufficient to support a common law misrepresentation claim.

¶10 Brabender was required to prove three elements to prevail on his false advertising claim under WIS. STAT. § 100.18: (1) the defendant made a representation to "the public" with the intent to induce an obligation; (2) the representation was untrue, deceptive, or misleading; and (3) the representation caused the plaintiff a pecuniary loss. ***K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.***, 2007 WI 70, ¶19, 301 Wis. 2d 109, 732 N.W.2d 792.

¶11 The Davises do not argue that Brabender was not "the public." Similarly, the Davises do not argue that the statements on which Brabender's claim is based were made without the requisite intent to induce. Rather, the Davises' arguments largely pertain to whether the circuit court erred in finding that they made a representation that was false, deceptive, or misleading. The Davises also argue that Brabender's proof of damages was insufficient and that Brabender was not entitled to attorney's fees. For the reasons explained below, we reject the Davises' arguments.

Whether The Circuit Court Erred In Finding That The Davises Made A False, Deceptive, Or Misleading Representation

¶12 The statements on which Brabender based his claim against the Davises come from three possible sources: the real estate condition report, the MLS report, and the Davises' oral statements.

¶13 The Davises begin their arguments by focusing on the real estate condition report. They assert that their statement in the report that they were not "aware" of remodeling done without the required permits was true because, at the time they made the statement, they mistakenly believed that the remodeling did not require permits. In other words, the Davises assert that the standard that applies to any representation on the condition report is actual awareness. We do

not decide whether the Davises are correct in this regard because we conclude that the circuit court could reasonably find that the Davises engaged in false advertising apart from any statement in the condition report.[2]

¶14 The question of whether a statement is false, deceptive, or misleading for purposes of a false advertising claim is generally a question of fact for the fact finder, in this case the circuit court. *See* ***State v. American TV & Appliance of Madison, Inc.***, 146 Wis. 2d 292, 310, 430 N.W.2d 709 (1988). Thus, our standard of review is deferential. ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530. The question is not whether we would make the same finding that the circuit court did, but rather whether that finding is supported by the evidence and is not clearly erroneous. *See* ***id.***

¶15 We conclude that the circuit court's finding is supported by (1) the MLS report, which included statements that the Davises' house had been "overimproved" and "kept in immaculate condition" by "fastidious" owners and that "all the work [was] done"; (2) Brabender's testimony that the remodeling was part of the Davises' "sales pitch" and that the Davises made a point to assure Brabender that Brabender "wouldn't have to really do anything, that [Mr. Davis] had done all this extensive work," and that Brabender was "getting [the house] for a steal" because of the quality of the remodeling; and (3) testimony by Brabender's expert witness that the Davises' remodeling was, in fact, of substandard quality and not code compliant. Based on this evidence, the circuit

[2] In its decision denying the Davises' motion for reconsideration, the circuit court stated that it did not rely solely on the condition report.

court could find that the Davises made an untrue, deceptive, or misleading statement under WIS. STAT. § 100.18, namely, that the Davises represented that they had performed acceptable-quality remodeling on the house when, in fact, the remodeling was substandard and in violation of code.

¶16 The Davises offer three arguments for why the circuit court could not consider the MLS report. They do not directly address their oral statements to Brabender, but their first two arguments may indirectly address these oral statements as well. We reject all three arguments.

¶17 The Davises first argue that the circuit court could not consider the MLS report based on the following clause in the parties' accepted offer to purchase:

> **BUYER'S RELIANCE:** Buyers acknowledge that in purchasing the subject property they have relied solely on their own independent inspection … and analysis of the property and upon the warranties and representations of the Seller contained in the Offer to Purchase and in the Seller's Property Condition Reports. Buyers further acknowledge all of the following: 1) all representations, disclosures, and warranties which have been made to Buyers *are stated in writing* in this contract or in the Seller's Condition Reports ….

According to the Davises, this clause is an admission by Brabender that he did not rely on any statements outside the contract to purchase, including statements in the MLS report. This reliance argument misses the mark with respect to Brabender's WIS. STAT. § 100.18 claim, however, because Brabender was not required to prove reliance for that claim. *See* ***K&S Tool & Die***, 301 Wis. 2d 109, ¶36. Unlike common law misrepresentation claims, reasonable reliance is not generally the standard for a § 100.18 claim. ***Id.***

¶18 The Davises' second argument is that the MLS report is mere "puffery" and, therefore, cannot form the basis for liability. "Puffery has been defined as 'the exaggerations reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined.'" ***Tietsworth v. Harley-Davidson, Inc.***, 2004 WI 32, ¶41, 270 Wis. 2d 146, 677 N.W.2d 233 (citations omitted).

¶19 We have previously treated the question of whether a statement is puffery as a question of fact, *see* ***Lambert v. Hein***, 218 Wis. 2d 712, 724 n.4, 582 N.W.2d 84 (Ct. App. 1998), and we will do so here, particularly in the absence of argument to the contrary by the Davises. We uphold a circuit court's findings of fact unless they are clearly erroneous. *See* ***Royster-Clark, Inc.***, 290 Wis. 2d 264, ¶11. We acknowledge that the puffery question in this case is a close one. We conclude, however, that the evidence above supports the circuit court's finding that the Davises' statements on the whole went beyond mere puffery and that the court's finding was not clearly erroneous. *See* ***Radford v. J.J.B. Enters., Ltd.***, 163 Wis. 2d 534, 544-45, 472 N.W.2d 790 (Ct. App. 1991) (upholding jury verdict for misrepresentation, and rejecting the seller's argument that statements that a boat had a "sound hull" were mere puffery, when the hull turned out to have leaks).

¶20 The Davises' third argument is that they cannot be held liable based on the MLS report because they did not "create or contribute to the wording" of the report. However, "[t]he longstanding rule in Wisconsin is that '[t]he seller is bound to know that the representations made by … his authorized agent to induce a sale are true.'" ***Grube v. Daun***, 173 Wis. 2d 30, 66, 496 N.W.2d 106 (Ct. App. 1992) (citation omitted). Therefore, a "seller may be held liable for his or her agent's representations even if the seller had no knowledge the representations were made." ***Id.***

¶21 The Davises do not address ***Grube***, but rely on ***Ricco v. Riva***, 2003 WI App 182, 266 Wis. 2d 696, 669 N.W.2d 193. ***Ricco*** arguably departs from the rule set forth in ***Grube*** by suggesting, without reference to ***Grube***, that a seller's liability for an agent's misrepresentation may depend on whether the misrepresentation "emanated" from the seller or on whether the seller "contributed" to the misrepresentation. *See* ***Ricco***, 266 Wis. 2d 696, ¶37. We need not decide whether there is any inconsistency between ***Ricco*** and ***Grube*** because we conclude that ***Ricco*** is factually distinguishable from the situation before us. ***Ricco*** involved an underlying factual dispute regarding whether the agent made a statement directly contrary to information the seller provided to the agent. *See* ***Ricco***, 266 Wis. 2d 696, ¶37. The Davises' situation is different. The Davises are not suggesting that their agent made a statement in the MLS report contrary to information they provided to the agent. Moreover, the Davises are not suggesting that they were unaware of the MLS report's contents or that they disagreed with those contents. In short, the Davises have not persuaded us that ***Ricco*** applies to them or that the rule set forth in ***Grube*** does not.

¶22 The Davises make an additional argument that most of the "defects" for which Brabender seeks recovery did not exist at the time of the sale and, therefore, the Davises could not have disclosed them. In a closely related argument, the Davises note that Brabender's home inspector rated the construction on the house as "Quality Built" and the maintenance on the house as "Building Reflects Pride of Ownership."

¶23 We find this argument imprecise and incomplete because it does not address the more pertinent question of whether the "defects" complained of resulted from substandard workmanship performed prior to the sale, that is, defects that *did* exist at the time of the sale but that may not have been reasonably

detectible by Brabender or his home inspector. For example, the Davises characterize detached and cracked bathroom floor tiles as defects that did not exist at the time of the sale, but fail to account for evidence supporting a finding that the damage resulted from substandard bathroom caulking or substandard internal plumbing done by the Davises. Although there may have been conflicting evidence on this and similar points, the circuit court was entitled to resolve such conflicts in favor of Brabender.

Proof Of Damages

¶24 The Davises argue that Brabender failed to offer sufficient proof of damages. We disagree.

¶25 Brabender's expert initially estimated the cost of properly remodeling the bathroom at $7605. An affidavit submitted by the expert updated the total cost to $9895 at current prices. In addition, the expert gave testimony regarding an adjusted "ballpark" calculation of approximately $5000, after Brabender's counsel asked the expert to subtract out certain items.

¶26 The Davises argue that the measure of Brabender's damages is limited to the difference, if any, between the market value of the property at the time of purchase and the amount actually paid for the property, and that Brabender failed to offer evidence of any such difference. The Davises are incorrect, however, that this is the only permissible measure of damages. "[A]n alternative measure of recovery is the reasonable cost of placing the property received in the condition in which it was represented to be and the purchaser is not limited to the direct damage, that is, compensation based on the difference between real and represented value." ***Ollerman v. O'Rourke Co.***, 94 Wis. 2d 17, 53, 288 N.W.2d 95 (1980) (footnote omitted).

¶27 The Davises also argue that the expert's adjusted $5000 estimate was too vague. We need not address whether this estimate was too vague because the Davises have not persuaded us that the circuit court relied solely on that estimate. Rather, it appears that the court set damages based on all of the evidence before it and concluded that Brabender's damages nonetheless exceeded the jurisdictional limit of $5000. The Davises do not offer a reason why the circuit court was limited to considering the expert's adjusted estimate. Moreover, damages generally must be proven only with "reasonable certainty," not "mathematical precision," ***Eden Stone Co. v. Oakfield Stone Co.***, 166 Wis. 2d 105, 125, 479 N.W.2d 557 (Ct. App. 1991), and the standards for proving damages are, if anything, relaxed in the context of a false advertising claim, *see* ***Tim Torres Enters., Inc. v. Linscott***, 142 Wis. 2d 56, 72, 416 N.W.2d 670 (Ct. App. 1987).

¶28 The Davises also seem to be asserting that Brabender's proof of damages fails because Brabender cannot recover unless his damages resulted from code violations. The Davises do not develop or provide authority for this argument, however, so we consider it no further. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (court of appeals need not consider undeveloped arguments).[3]

Attorney's Fees

¶29 Finally, we uphold the circuit court's award of attorney's fees. The Davises' argument against attorney's fees is limited to an assertion that the fees

[3] We recognize that the Davises make arguments we have not addressed for why they should not have been liable for damages for an improperly vented bathroom fan, a slow-flushing toilet, and a leaky refrigerator. Even if we disregard those comparatively minor items of damages, however, the evidence was sufficient to support an award of damages exceeding $5000.

cannot stand if we reverse the circuit court's ruling on Brabender's false advertising claim, but we have now upheld that ruling.

By the Court.—Judgment affirmed.

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