COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2009

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. 2008AP977 **Cir. Ct. No. 2005CV143**

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

WED DEVELOPMENT LLC, P/K/A WED DEVELOPMENT LLC,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

ABC INSURANCE,

DEFENDANT-THIRD-PARTY PLAINTIFF,

RE/MAX REALTY 100 AND BUNCH & ASSOCIATES,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS,

V.

WILLIAM F. HONEYAGER, D/B/A HONEYAGER REALTORS AND ELAINE A. HONEYAGER,

THIRD-PARTY DEFENDANTS-RESPONDENTS,

DEF INSURANCE COMPANY,

THIRD-PARTY DEFENDANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. RE/MAX Realty 100 and Bunch & Associates (collectively RE/MAX) appeal from a judgment in favor of WED Development, LLC, for the sum it expended in settling a lawsuit against WED and William and Elaine Honeyager filed by Stephanie and Jason Barwick, clients of RE/MAX. WED cross-appeals from the judgment challenging the remittitur of the jury's damage verdict. We reject RE/MAX's claims that a directed verdict should have been granted, the economic loss doctrine bars recovery, and it was error to permit proof of the settlement amount and attorney fees as damages. We reject both parties' argument that the remittitur of damages was improper. We affirm the judgment.

¶2 The Honeyagers are both members of WED and licensed real estate brokers. In April 2003, WED owned residential property and listed it for sale with Elaine acting as the seller's real estate agent. The Barwicks expressed an interest in purchasing the property and retained Daniel Bunchkowski, a RE/MAX agent, to act as a buyer's broker. When the Barwicks' offer to purchase was accepted, a home inspection was conducted. The inspector encountered a bat in the attic and terminated his inspection of the attic at that point. The inspector told the Barwicks about seeing a bat in the attic. Bunchkowski's assistant, Dan Kallas, was also present during the home inspection and testified he did not hear anything about a bat in the attic.

¶3 After the Barwicks purchased the residence, they discovered that it was infested with bats and the attic was covered with bat dung. The Barwicks

sued WED and the Honeyagers, claiming they had knowledge of the bat infestation but did not disclose it. After mediation, the lawsuit was settled for $40,000.

¶4 WED then commenced this action against RE/MAX based on the failure to notify WED of the bat found in the attic. The matter was tried to a jury over three days. The jury found that RE/MAX was causally negligent and that WED/Honeyagers were not. It also found that WED/Honeyagers did not make a factual representation that there were no bats at the property. The jury awarded $74,000 in damages. On motions after verdict, the trial court determined that the damage award was not supported by the evidence and gave WED the option of a new trial on damages only or taking entry of a judgment for $57,000, "the highest amount of damages supported by the evidence." Judgment was entered for $57,000 plus costs and disbursements.

¶5 RE/MAX first argues that as a matter of law, Elaine Honeyager, as the listing real estate agent, was negligent with respect to her duty to inspect the property and that it was entitled to a directed verdict on the question of whether WED/Honeyagers were causally negligent.[1]

> A motion for a directed verdict should be granted only where the evidence is so clear and convincing that a reasonable and impartial jury properly instructed could reach but one conclusion. When a jury verdict is attacked, the reviewing court inquires only whether there is any credible evidence that under any reasonable view supports the verdict.

[1] WED argues that RE/MAX waived the claim by not specifically arguing for a directed verdict as to Elaine Honeyager's negligence. Even if RE/MAX's motion "to enter a directed verdict on all issues on behalf and in favor of the defendant RE/MAX and Mr. Bunchkowski" was not specific enough to preserve the right to a directed verdict, in its motion after verdict RE/MAX raised the issue and requested the jury's answer be changed. The issue is not waived.

Liebe v. City Fin. Co., 98 Wis. 2d 10, 18-19, 295 N.W.2d 16 (Ct. App. 1980) (footnotes omitted).

¶6 As the listing agent, Elaine had a duty to "conduct a reasonably competent and diligent inspection of accessible areas of the structure and immediately surrounding areas of the property to detect observable, material adverse facts." WIS. ADMIN. CODE § RL 24.07(1)(a), (b) (Nov. 2007). WED's expert witness explained that the duty to inspect does not include areas accessible only by use of a ladder. *See* § RL 24.07(1)(d). The expert indicated that Elaine was not required to inspect the attic by use of a ladder.[2] Thus, it cannot be said that the jury could reach just one conclusion—that Elaine had a duty to and failed to inspect the attic and discover the infestation of bats. There was competing evidence on Elaine's knowledge of there being bats in the attic and so a jury question existed on that as well. Additionally, evidence that Elaine was not required to inspect the attic and her denial of any prior knowledge of a bat in the attic is sufficient evidence to support the jury's finding that WED and the Honeyagers were not negligent.

¶7 RE/MAX argues that the economic loss doctrine bars WED's action against it and also precluded any recovery by the Barwicks against WED thus

[2] RE/MAX unfairly misrepresents the record when it states that WED's expert ultimately opined that "the listing agent, Elaine Honeyager, was negligent and the buyer's broker (RE/MAX) was not negligent." The record citation for this statement does not contain direct evidence that the expert concluded that the listing agent was negligent. Rather, the referenced testimony refers to the expert's deposition where RE/MAX attempted to redefine the expert's opinion that any broker that was aware of the bat was negligent in not assuring all parties were notified of the condition to include the "listing agent as we've defined it." Not enough of the deposition transcript was offered into evidence to explain what "as we've defined it" means. Indeed, at trial the expert recalled that the small portion of the deposition utilized at trial followed multiple pages of going around and around the point. Although the deposition was admitted as an exhibit at trial, the trial exhibits are not part of the record.

making WED's settlement payment to the Barwicks unnecessary. Whether the economic loss doctrine bars claims in a certain case presents a question of law that is subject to de novo review. ***Below v. Norton***, 2008 WI 77, ¶19, 310 Wis. 2d 713, 751 N.W.2d 351. The doctrine "is a judicially created doctrine that seeks to preserve the distinction between contract and tort," and serves to preserve the parties' opportunity to allocate risk by contract. ***Id.***, ¶24 (citation omitted). Thus, parties to a contract can only pursue contract remedies when asserting an economic loss claim. ***Kaloti Enters., Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶28, 283 Wis. 2d 555, 699 N.W.2d 205. In the case of a residential real estate transaction, the economic loss is the house's inadequate value because it is allegedly inferior. *See* ***Below***, 310 Wis. 2d 713, ¶25.

¶8 ***Below*** holds that the economic loss doctrine bars the buyer's common law claims for intentional misrepresentation against the seller in the context of a residential real estate transaction. ***Id.***, ¶¶26, 40. Although the Barwicks could not recover on intentional misrepresentation claims against WED, they maintained a viable cause of action under WIS. STAT. § 100.18 (2007-08)[3] for false advertising, which also covers fraudulent representations made to a prospective purchaser. *See* ***Below***, ¶43 (purchaser of residential real estate is protected by § 100.18 from the false representations of a home seller). RE/MAX simply ignores that the Barwicks' amended complaint asserted a § 100.18 claim specifically on the bat infestation problem. We reject RE/MAX's assertion that WED made a settlement it never had to reach.

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶9 There is no contractual relationship between RE/MAX and WED. Because the economic loss doctrine confines parties to their contractual remedies, it does not apply when there was no opportunity for the parties to negotiate contractual protection. *See* ***Daanen & Janssen, Inc. v. Cedarapids, Inc.***, 216 Wis. 2d 395, 409-10, 573 N.W.2d 842 (1998) (to prevent nullifying the contracts between parties in the chain of product distribution, the economic loss doctrine bars one party in the distributive chain from recovering economic losses in tort from another party in that chain even in the absence of contractual privity between those parties). This is not a case where there is a chain of distribution of a defective product such that the absence of a direct contractual relationship can be ignored. WED had no opportunity to contractually protect itself. Moreover, the economic loss doctrine does not apply to claims arising from the provision of services (in contrast to the provision of goods). ***Insurance Co. of N. Am. v. Cease Elec. Inc.***, 2004 WI 139, ¶¶36-37, 276 Wis. 2d 361, 688 N.W.2d 462. WED alleges professional negligence by RE/MAX with regard to the service RE/MAX provided as the seller's broker. The economic loss doctrine does not bar WED's claim for a breach of the professional duty of care owed to all parties to the transaction.

¶10 RE/MAX next argues that the $40,000 settlement figure should not have been utilized as an element of WED's damages because WED could have mitigated its damages by going to trial on the Barwicks' claims and the $40,000 amount bears no reasonable relationship to the Barwicks' actual damages. RE/MAX suggests that the question is whether the settlement amount is a valid measure of damages. The record does not include a transcript of the summary judgment hearing where the court ruled on RE/MAX's claim that the settlement did not represent a proper measurement of damages. We cannot review what is

not before us. It is the obligation of the appellant to present this court with the record necessary for resolution of each issue raised; if the record is incomplete, we may assume it supports the trial court's ruling. *See* ***Galatowitsch v. Wanat***, 2000 WI App 236, ¶23 n.8, 239 Wis. 2d 558, 620 N.W.2d 618. We deem it sufficient to observe that it was an undisputed fact that WED settled the Barwicks' claims for $40,000 and evidence of the settlement was relevant. *See* WIS. STAT. § 904.02. The question of whether WED mitigated its damages or overpaid was one for the jury. RE/MAX had the burden of proof on the failure to mitigate damages.[4] ***Kuhlman, Inc. v. G. Heileman Brew. Co., Inc.***, 83 Wis. 2d 749, 752, 266 N.W.2d 382 (1978). RE/MAX does not suggest that it was precluded from establishing that less than a $40,000 settlement was possible or that claims other than the bat infestation problem contributed to the amount of the settlement. It was not error to permit the settlement amount to be considered as an element of WED's damages.

¶11 The evidence at trial was that WED was billed approximately $17,000 in attorney fees for defense of the Barwick lawsuit and that it paid only about $11,000 of that sum. RE/MAX argues that because Wisconsin follows the "American rule"[5] with respect to the recovery of attorney fees, WED's attorney fees should not have been an element of its damages. Whether the attorney fees were recoverable is a mixed question of fact and law and we independently review the legal conclusion required in the determination. *See* ***Meas v. Young***, 142 Wis. 2d 95, 101, 417 N.W.2d 55 (Ct. App. 1987).

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[4] RE/MAX withdrew its request for a jury instruction on the mitigation of damages.

[5] The "American rule" is that "parties to litigation are generally responsible for their own attorney's fees unless recovery is expressly allowed by either contract or statute, or when recovery results from third-party litigation." ***DeChant v. Monarch Life Ins. Co.***, 200 Wis. 2d 559, 571, 547 N.W.2d 592 (1996).

¶12 A judicially created exception to the "American rule" permits recovery of attorney fees "where the wrongful acts of the defendant have involved the plaintiff in litigation with others, or placed him in such relation with others as to make it necessary to incur expense to protect his interest." ***Hall v. Gregory***, 2007 WI App 112, ¶17, 300 Wis. 2d 725, 731 N.W.2d 649 (quoting ***Weinhagen v. Hayes***, 179 Wis. 62, 65, 190 N.W. 1002 (1922)); ***Meas***, 142 Wis. 2d 95 at 101. The jury determined that RE/MAX was negligent and committed a "wrongful act." That act caused WED to be involved in litigation with the Barwicks and to incur attorney fees to protect itself in that litigation. The exception to the "American rule" applies and permits WED to recover the attorney fees it incurred in the Barwick litigation. RE/MAX's contention that exceptional circumstances must exist to apply the exception or the "American rule" will be nullified ignores that a prerequisite to application of the exception is that the attorney fees claimed must be expended in litigating against a third party. ***Hall***, 300 Wis. 2d at 725, ¶18. The "American rule" only prevents WED from recovering from RE/MAX the attorney fees it incurred in this litigation.

¶13 Both parties challenge the trial court's postverdict determination that the $74,000 damage award was not supported by the evidence and that a new trial on damages could be avoided by WED's acceptance of a $57,000 award. WED argues the trial court erred in determining that the damage award was excessive and thereby limiting the type of damages WED could recover. RE/MAX argues that the trial court failed to undertake a reasoned process in determining a reasonable amount of damages. RE/MAX contends that the maximum reasonable recovery is $14,600, representing the Barwicks' actual bat remediation expenses of $3600 and WED's attorney fees of $11,000.

¶14 The trial court did not expressly state that the damage award was excessive. Rather, it decided to remit the award because it was not supported by the evidence. *See* WIS. STAT. § 805.14(5)(c). The award can be set aside as excessive because it "is too large to be supported by the evidence" or "where it is clear 'that the amount awarded must necessarily reflect an allowance for the effects of injury not sufficiently proved....'" ***Wester v. Bruggink***, 190 Wis. 2d 308, 326, 527 N.W.2d 373 (Ct. App. 1994) (quoting ***Makowski v. Ehlenbach***, 11 Wis. 2d 38, 42-43, 103 N.W.2d 907 (1960)). *See also* ***Powers v. Allstate Ins. Co.***, 10 Wis. 2d 78, 87, 102 N.W.2d 393 (1960) (damage award "excessive in that the evidence will not support the same"). We review the trial court's decision for a proper exercise of discretion. ***Wester***, 190 Wis. 2d at 326. The trial court is charged to review the evidence bearing on damages in the light most favorable to the plaintiff. ***Id.*** We will not find an erroneous exercise of discretion if there exists a reasonable basis for the trial court's determination after resolving any direct conflicts in the testimony in favor of the plaintiff. ***Id.*** at 327.

¶15 WED suggests that the jury's damage award can be sustained as including damages for the inconvenience, aggravation, and humiliation the Honeyagers went through as a result of the Barwick lawsuit. Although WED sets forth a thorough review of the evidence and the circumstances of the Barwick lawsuit, it does not point to any evidence suggesting inconvenience, aggravation, or humiliation of the Honeyagers or, more importantly, WED as a separate entity. WED's assertion in its cross-appellant's brief that the Honeyagers were at risk of losing their real estate broker licenses is not supported by any evidence. The trial court observed that case was tried and argued with the settlement amount and attorney fees as the only elements of damages. No argument was made in front of the jury for any sum of damages but the settlement amount and attorney fees. The

jury may have had sympathy for the Honeyagers but that alone cannot support the damage award. *See* ***Olson v. Siordia***, 25 Wis. 2d 274, 285-86, 130 N.W.2d 827 (1964) (sympathy cannot be a substitute for proof of damage). We conclude that the trial court properly exercised its discretion in determining that the damage award was not supported by the evidence and therefore was excessive.

¶16 Under WIS. STAT. § 805.15(6), upon finding the damage award excessive, the trial court "shall determine the amount which as a matter of law is reasonable." The determination is a matter committed to the trial court's discretion and if there is a reasonable basis for the trial court's determination as to the proper amount, it will be sustained. ***Badger Bearing v. Drives & Bearings***, 111 Wis. 2d 659, 672, 331 N.W.2d 847 (Ct. App. 1983). RE/MAX suggests that the trial court failed to exercise its discretion because the determination of the maximum amount of damages supported by the evidence cannot be equated to a determination of what is a reasonable amount. This is a matter of semantics only. The trial court stated that it was setting "reasonable damages" at $57,000 and that it was the amount "reasonably supported by the evidence." It acknowledged that a jury could award another lower number. The trial court found that the damages consisted of two components: the settlement amount and the billed attorney fees. As to the attorney fees, the trial court found that despite having only paid $11,000 of the fees, WED was obligated for entire $17,000 bill. Implicit in the determination that $57,000 represents the only amount of damages proven at trial is the determination that an award in that amount is reasonable. The trial court did not erroneously exercise its discretion in setting the remitted amount of damages at $57,000.

¶17 No costs to either party.

By the Court.—Judgment affirmed.

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