

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 19, 2003

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. 01-1171
STATE OF WISCONSIN**

Cir. Ct. No. 98-CV-681, 99-CV-181

**IN COURT OF APPEALS
DISTRICT II**

KRIER REALTY, INC.,

PLAINTIFF-RESPONDENT,

v.

EDWARD KUBRICKY AND RUDOLPH KUBRICKY,

DEFENDANTS-APPELLANTS,

MILWAUKEE MUTUAL INSURANCE COMPANY,

INTERVENOR-RESPONDENT.

KELVIN HINZ,

PLAINTIFF-RESPONDENT,

v.

RUDOLPH KUBRICKY AND EDWARD KUBRICKY,

DEFENDANTS-APPELLANTS,

WAYNE STREFF,

DEFENDANT,

**RURAL MUTUAL INSURANCE COMPANY,
INTERVENOR-RESPONDENT.**

APPEAL from orders of the circuit court for Sheboygan County:
GARY LANGHOFF, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Edward and Rudolph Kubricky have appealed from several orders entered in these consolidated circuit court actions. They appeal from the trial court's order granting summary judgment to the respondent, Kelvin Hinz, on his complaint against the Kubrickys, and from the order granting summary judgment dismissing their counterclaims against Hinz. They also appeal from the order granting summary judgment dismissing their counterclaims against Krier Realty, Inc.¹ Because we conclude that material issues of fact exist for trial, the orders are reversed and the matter is remanded for further proceedings.

¶2 Both of these actions arise from a failed real estate transaction between the Kubrickys and Wayne Streff for the sale of the Kubrickys' farm. The Kubrickys entered into a listing contract with Krier on April 21, 1998, for the sale of their farm. On April 27, 1998, they received an offer to purchase from Streff. After counteroffers were made first by the Kubrickys and then by Streff, the

¹ Based upon the trial court orders granting summary judgment, Milwaukee Mutual Insurance Company, which insured Krier, and Rural Mutual Insurance Company, which insured Hinz, were also dismissed from the actions. They have not filed briefs on appeal, but have joined in the arguments of Krier and Hinz.

Kubrickys accepted Streff's counteroffer, agreeing to sell their farm for \$185,000. Closing was set for June 30, 1998.

¶3 In late May and early June 1998, after the sales agreement was signed by the Kubrickys and Streff, but before the date scheduled for closing, Hinz entered the Kubrickys' property, applying chemical treatments of fertilizer and herbicide, and planting a soybean crop. Closing never occurred on June 30, 1998, or at any time thereafter. When Hinz attempted to harvest the soybean crop in August 1998, the Kubrickys refused to let him on the property.

¶4 On December 21, 1998, Krier filed its complaint against the Kubrickys. Krier alleged that it entered into a listing contract with the Kubrickys on April 21, 1998, that an agreement was reached to sell the farm for \$185,000, that Krier performed all of its obligations under the contract, and that the Kubrickys refused to proceed to closing without cause. Krier demanded a real estate commission of approximately \$11,000, plus compensatory and punitive damages for libel.

¶5 In an answer and amended answer, the Kubrickys admitted that they refused to proceed with the sale, but denied that Krier performed all of its obligations under the contract or provided services to the Kubrickys in a competent manner. They denied that they cancelled the contract without cause, or that a valid and enforceable contract was reached with Streff. They alleged counterclaims against Krier for breach of fiduciary duty, negligence, breach of contract, tortious interference with business, and injury to property.² They alleged

² The Kubrickys also alleged counterclaims for nuisance and emotional distress. However, they withdrew those claims at the summary judgment hearing held on January 16, 2001.

that Krier was negligent and breached the listing contract and its fiduciary duty by failing to exercise reasonable care and skill in assisting them with the sale of the property. They alleged that Krier failed to advocate and protect the Kubrickys' interests during negotiations with Streff, failed to negotiate a sales contract to the advantage of the Kubrickys, and failed to provide the Kubrickys with the benefit of Krier's skill, knowledge and judgment in effecting the sale of the property.

¶6 In March 1999, Hinz also filed a complaint against the Kubrickys.³ He alleged that based upon the sales agreement entered into between Streff and the Kubrickys, Streff offered to rent him sixty acres of the Kubrickys' farm in May 1998. Hinz alleged that Streff told him that the Kubrickys had approved the rental of the land, and that he could proceed to spray and fertilize the land. Hinz alleged that he commenced farming the land in late May 1998, and continued activities, including planting soybeans, into early June 1998. He alleged that in August 1998, he received a letter from counsel for the Kubrickys, denying him access to the land and threatening to bring charges of trespass if he entered the land. Based upon the Kubrickys' refusal to permit him to harvest the soybean crop, Hinz alleged breach of contract by them and conversion. He claimed damages arising from the lost crop.

¶7 In their answer to Hinz' complaint, the Kubrickys denied ever telling Streff or Hinz that they agreed to Hinz' rental of the farmland, and denied giving Hinz permission to farm, spray or fertilize on their land. In a counterclaim against Hinz, the Kubrickys alleged that prior to Hinz' entry upon their farm, the land had

³ Hinz' complaint was also filed against Streff. Streff did not appear, and judgment was subsequently entered in Hinz' favor against Streff.

been used to grow hay, and that they had never applied commercial pesticides, herbicides, or chemicals to their property. They alleged that when Hinz sprayed chemicals on the property, he killed their hay crop and altered the ecosystem on the property so that it would not be eligible for organic status for three years. They alleged that Hinz' entry onto the property was trespass and damaged their property.

¶8 Subsequently, Krier filed a motion for summary judgment dismissing the Kubrickys' counterclaims. The Kubrickys in turn moved for an order granting summary judgment dismissing Krier's claims against them, and allowing them to go to trial on their claims for damages. Hinz also moved for summary judgment, seeking judgment on his claim against the Kubrickys, and dismissal of the Kubrickys' counterclaims against him.

¶9 Lengthy and numerous briefs, affidavits, and deposition excerpts were filed by the parties. After a hearing, the trial court issued a memorandum decision granting summary judgment dismissing the Kubrickys' counterclaims against Krier and Hinz, and granting summary judgment in favor of Hinz on his claims. The trial court denied the Kubrickys' motion for summary judgment dismissing Krier's claims against them, determining that material issues existed for trial on those claims.

¶10 In dismissing the Kubrickys' counterclaims against Krier, the trial court concluded that they had rescinded the contract and that, by electing rescission, they were foregoing their claims for breach of fiduciary duty, negligence, and breach of contract. Based upon its determination that nothing in the record supported a finding that Krier knew of the lease arrangement between Streff and Hinz, the trial court also determined that the Kubrickys could not

recover from Krier for the alleged damage to their farm from the application of chemicals.

¶11 In granting summary judgment to Hinz and dismissing the Kubrickys' counterclaims against him, the trial court concluded that the Kubrickys were aware that Hinz was applying herbicide to their land and planting crops. Based upon its determination that they did nothing to prevent Hinz from preparing the land or planting the crop, the trial court concluded that the Kubrickys were equitably estopped from claiming that Hinz trespassed or damaged their land. The trial court concluded that Hinz justifiably relied on the Kubrickys' inaction, and that their inaction could be characterized as tacit approval of Hinz' farming operation on their land.

¶12 The trial court denied the Kubrickys' motion for summary judgment dismissing Krier's claims against them. It determined that material issues of fact existed for trial as to those claims, including Krier's alleged entitlement to a commission.

¶13 Subsequently, the trial court denied a motion for reconsideration by the Kubrickys. At the March 12, 2001 hearing on the motion for reconsideration, Krier agreed to voluntarily dismiss its claims against the Kubrickys with prejudice.

¶14 We review a trial court's grant or denial of summary judgment de novo. *Waters v. U.S. Fid. & Guar. Co.*, 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985). "[S]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995). We will reverse a decision granting summary judgment if the trial court incorrectly decided legal issues or

material facts are in dispute. *Coopman v. State Farm Fire & Cas. Co.*, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). In our review we, like the trial court, are prohibited from deciding issues of fact; our inquiry is limited to determining whether a material factual issue exists. *Id.*

¶15 On summary judgment, the burden is on the moving party to establish the absence of a genuine disputed issue as to any material fact. *Kraemer Bros., Inc. v. U.S. Fire Ins. Co.*, 89 Wis. 2d 555, 565, 278 N.W.2d 857 (1979). The court must view the evidence, or the inferences therefrom, in the light most favorable to the party opposing the motion. *Id.* at 567. Any reasonable doubt as to the existence of a factual issue must be resolved against the moving party. *Maynard v. Port Publ'ns, Inc.*, 98 Wis. 2d 555, 563, 297 N.W.2d 500 (1980).

¶16 It is also axiomatic that the trial court may not base its ruling on its assessment of the weight of the evidence or the witnesses' credibility. *Pomplun v. Rockwell Int'l Corp.*, 203 Wis. 2d 303, 306-07, 552 N.W.2d 632 (Ct. App. 1996). Summary judgment is generally inappropriate when matters of complex factual proof need to be resolved before legal issues can be decided. *See, e.g., Peters v. Holiday Inns, Inc.*, 89 Wis. 2d 115, 129, 278 N.W.2d 208 (1979). It is also inappropriate when difficult legal questions are presented which are better resolved after a determination of the underlying facts, *see Hilkert v. Zimmer*, 90 Wis. 2d 340, 342-43, 280 N.W.2d 116 (1979), or when the totality of the facts and the circumstances surrounding them must be developed before the ultimate issue in the case may be resolved, *see Rollins Burdick Hunter of Wis., Inc. v. Hamilton*, 101 Wis. 2d 460, 471-72, 304 N.W.2d 752 (1981).

¶17 Applying these standards here, we conclude that the trial court erred in granting summary judgment dismissing the Kubrickys' counterclaims against

Krier and Hinz, and erred in granting summary judgment in favor of Hinz on his claims against the Kubrickys. We will address the Kubrickys' counterclaims against Krier first.

¶18 In its motion for summary judgment, Krier contended that the Kubrickys elected their remedy and forfeited any claim for monetary damages when they refused to close on the real estate transaction with Streff. It asserts that a party may either rescind a contract or affirm it and seek damages, but may not do both. Based on excerpts from the Kubrickys' depositions in which they failed to articulate damages other than a \$25 water well test fee and damage to their land from Hinz' spraying, Krier also contends that the counterclaims were properly dismissed because the Kubrickys suffered no damages arising from Krier's conduct.

¶19 The trial court in effect adopted these positions, determining that the factual issues underlying the failed real estate transaction did not have to be determined in considering the Kubrickys' counterclaims against Krier because the Kubrickys rescinded the contract and suffered no meaningful damages as a result of Krier's conduct. However, even if, as acknowledged by the Kubrickys, they refused to close on the sale to Streff, this court cannot say, as a matter of law, that they cannot prevail on any claims arising from Krier's responsibilities under the listing contract.

¶20 Based upon the summary judgment record, we conclude that material issues of fact exist as to whether the Kubrickys had a right to withdraw from the contract with Streff, and whether Krier adequately fulfilled its responsibilities to the Kubrickys under the listing contract. Similarly, at the

summary judgment stage, it cannot be determined that the Kubrickys suffered no damages as a result of Krier's conduct.

¶21 It is undisputed that the sales agreement between the Kubrickys and Streff contained an inspection contingency which required Streff to deliver an inspection report and notice of defects to the Kubrickys and Krier. The inspection contingency gave the Kubrickys the right to cure any defects by delivering notice of election to cure to Streff within ten days of his notice. The agreement provided that it was null and void if Streff gave notice of defect to the Kubrickys and they did not timely deliver a notice of election to cure.

¶22 The Kubrickys contend on appeal that issues of fact exist as to whether a new septic system was required, whether Streff gave them timely notice of the alleged defect in the septic system in compliance with the agreement, and whether Streff was willing to waive the alleged defect in the septic system and close.

¶23 Although the Kubrickys extensively discuss whether a valid and enforceable contract existed between the Kubrickys and Streff, or whether there was a failure of a condition precedent under the sales agreement, these issues are not determinative of whether the trial court properly granted summary judgment dismissing the Kubrickys' counterclaims against Krier. Nevertheless, we conclude that the factual issues surrounding the sales agreement between the Kubrickys and Streff are relevant to the consideration of the Kubrickys' counterclaims, including their claims of negligence, breach of the listing contract, and breach of fiduciary duty.

¶24 In their affidavits, the Kubrickys denied that their septic system was defective. They also denied receiving a written inspection report prior to the

closing date indicating that a new mound septic system was required, and that the existing system was defective.

¶25 A deposition from Dale Krier indicated that the Krier file contained a letter from Schwartz Septic Service indicating that the Kubrickys' septic system was not up to code. However, the letter was dated December 15, 1998, nearly six months after the scheduled closing date. Dale conceded that he did not remember receiving anything else from Schwartz.

¶26 The Krier file also contained a note indicating that Streff was willing to assume the cost of a new septic mound. However, both Dale Krier and Bob Mayer, the agent who handled the sale for Krier, acknowledged that Streff never signed a written amendment to the sales agreement which was contained in Krier's file. The unsigned amendment indicated that Streff was aware that the septic system was not up to code and agreed to accept the septic system as is. A note in the file indicated that Streff was unwilling to sign the amendment.

¶27 The deposition testimony of the Kubrickys indicates that they were concerned about closing the sale absent an agreement in writing from Streff stating that he would accept the septic system as is. The Kubrickys expressed concern that if the closing proceeded and they were held responsible for a new septic mound, the sale price of \$185,000 would in effect be discounted by thousands of dollars. Although the Kubrickys acknowledged that Krier communicated that Streff would pay \$185,000 and take care of the costs associated with the septic system if the Kubrickys would close, they indicated that they were not willing to take such a step absent written confirmation that Streff would pay for the septic mound. They also indicated that they retained counsel who wrote to Krier and

asked for written confirmation that Streff would pay for the septic system, but that they never received it.

¶28 Facts are thus in dispute as to whether a new mound system was required, whether the Kubrickys were given proper notice of the alleged defects in the septic system, and whether Streff agreed to pay for the septic system if the Kubrickys agreed to close. Moreover, these factual issues are material to the Kubrickys' counterclaims. They impact whether Krier fulfilled its fiduciary and contractual duties, or was negligent in failing to submit or obtain inspection reports for the Kubrickys, in counseling them or communicating with them when issues arose as to the adequacy of the septic system, or in seeking written confirmation from Streff that he would assume the cost of the septic system and thus protecting the Kubrickys from a potential post-closing claim that they were liable for the cost of a new septic system. Moreover, at this juncture it cannot be determined that the Kubrickys suffered no damages as a result of Krier's alleged deficiencies, since the deal might have been closed if it had been better handled, and the Kubrickys might have avoided incurring attorney's fees when they requested written confirmation of Streff's alleged oral agreement to accept the septic system as is.

¶29 These factual issues must be resolved before the validity of the Kubrickys' counterclaims can be properly evaluated.⁴ The order for summary judgment dismissing the Kubrickys' counterclaims must therefore be reversed.

⁴ By identifying these factual issues, we do not intend to limit the evidence or arguments which can be presented by the Kubrickys in support of their counterclaims. We merely determine that material factual issues exist which render summary judgment inappropriate.

¶30 Material issues of fact also exist as to the claims and counterclaims between the Kubrickys and Hinz. Factual issues concerning the nature of their relationship clearly exist. In his affidavit in support of his motion for summary judgment, Hinz averred that he was given permission to spray, fertilize, and plant the soybean crop by both Streff and the Kubrickys as of May 1998. In contrast, depositions from the Kubrickys indicated that Hinz fertilized and burned sixty-eight acres of hay on their land without their consent or prior knowledge. They averred that they did not rent the land to Hinz, and did not meet him before he applied herbicides and planted his crop. Rudolph Kubricky specifically stated that he never met Hinz before Hinz appeared on the property with his sprayer early one morning when the Kubrickys were still in bed. According to Rudolph, Hinz pulled into the yard when the sprayer broke down, and there was only one five-acre field left to spray. He indicated that sixty acres had already been sprayed, and that “up to that time there was nobody come to ask us if he can.”

¶31 These factual disputes must be resolved before the respective liabilities of Hinz and the Kubrickys can be determined. We note that the trier of fact may find that the Kubrickys agreed to Hinz’ rental of the land before spraying and planting began, and that they are therefore liable as alleged by Hinz.

¶32 Hinz argues that the Kubrickys are equitably estopped from denying liability to him because even though they deny authorizing Streff to rent the land to him, they were aware agricultural operations were going on and did nothing to stop either the spraying or the planting. However, as already discussed, the Kubrickys indicated in their affidavits that they did not know spraying was going on until sixty acres had already been sprayed and burned.

¶33 Equitable estoppel requires action or inaction by one party which induces reliance by another party to his or her detriment. *Mercado v. Mitchell*, 83 Wis. 2d 17, 26-27, 264 N.W.2d 532 (1978). A party's reliance on another's conduct must be reasonable. *Gonzalez v. Teskey*, 160 Wis. 2d 1, 14, 465 N.W.2d 525 (Ct. App. 1990). Although a trial court may sometimes apply the doctrine of equitable estoppel on a motion for summary judgment, *Phillips Petroleum Co. v. Taggart*, 271 Wis. 261, 73 N.W.2d 482 (1955), the ultimate determination of whether to apply estoppel involves the exercise of the trial court's discretion, *Gonzalez*, 160 Wis. 2d at 13. A proper exercise of discretion in this situation requires full knowledge of the material facts.

¶34 The facts surrounding the Kubrickys' relationship with Hinz must be fully developed before any ruling in equity or otherwise can properly be made. The trier of fact must determine what, if any, agreements were made and by whom. Before a determination can be made by the trial court that any reliance by Hinz on actions or inactions of the Kubrickys was reasonable, the nature of their interaction must be factually determined.

¶35 The trial court's orders granting summary judgment are therefore reversed, and the matter is remanded for further proceedings consistent with this decision.

By the Court.—Orders reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

