

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 31, 2002

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. 01-2932
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-165

**IN COURT OF APPEALS
DISTRICT IV**

RONALD DELONG AND NANCY DELONG,

PLAINTIFFS-APPELLANTS,

v.

KENNETH HESS AND LINDA HESS,

DEFENDANTS-RESPONDENTS,

GENERAL MOTORS CORPORATION, INC.,

GARNISHEE-DEFENDANT.

APPEAL from a judgment of the circuit court for Rock County:
JAMES WELKER, Judge. *Reversed and cause remanded.*

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Ronald and Nancy DeLong appeal a summary judgment dismissing their complaint against Kenneth and Linda Hess. The

DeLongs purchased a home from the Hesses, and sued after learning of debris buried in the backyard. They asserted the Hesses were liable under various theories because of the Hesses' alleged failure to disclose the presence of the debris before the sale occurred. The dispositive issue is whether a reasonable fact finder could determine that the Hesses failed to disclose a material condition of the property. We conclude that a reasonable fact finder could so determine, and therefore reverse and remand for further proceedings.

¶2 There is no dispute that the Hesses dismantled an above ground swimming pool on the property and buried parts of it under what is now the DeLongs' backyard. It is also undisputed that the DeLongs did not learn of this until after they bought the property. The DeLongs assert that they dug a four foot test hole and discovered a pool liner, sand, leaf bags, broken pieces of concrete, large nails, and metal pool siding.

¶3 In support of their summary judgment motion, the Hesses provided testimony that only a minimal amount of debris was buried. They also submitted evidence that the buried debris did not affect the appearance of the yard nor raise safety concerns, and posed no threat of erosion or other environmental damage. Consequently, they argued that their proofs established that the debris was neither a defect nor a material condition that they were required to disclose to the DeLongs. The circuit court agreed and granted summary judgment.

¶4 We review a circuit court's grant of summary judgment independently. *Weigel v. Grimmert*, 173 Wis. 2d 263, 267, 496 N.W.2d 206 (Ct. App. 1992). Summary judgment is appropriate if the pleadings, together with the affidavits, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2)

(1999-2000).¹ The inferences to be drawn from the moving party's submissions should be viewed in the light most favorable to the party opposing the motion, and doubts as to the existence of a genuine issue of material fact are resolved against the moving party. *L.L.N. v. Clauder*, 209 Wis. 2d 674, 683-84, 563 N.W.2d 434 (1997).

¶5 A genuine issue of material fact remains concerning the Hesses' duty to disclose the buried debris. The duty to disclose a real estate condition exists when a reasonable purchaser would attach importance to the existence or non-existence of the condition in determining how to proceed in the transaction, or when the seller knows that this buyer would do so. *Ollerman v. O'Rourke Co.*, 94 Wis. 2d 17, 42, 288 N.W.2d 95 (1980). Here, if a fact finder determined that a substantial amount of debris was buried under the yard, it could reasonably infer that this fact would be important to a reasonable purchaser. It is beyond dispute that buried concrete, metal and other garbage might affect tree planting or other landscaping or interfere with undertakings to put a replacement pool or other structure in the affected area. Knowledge of the condition might therefore influence the decision to purchase the property or affect the price paid.

¶6 We note that in arguing the matter before the circuit court, the DeLongs contended that their burden did not include proving that the buried debris would concern a reasonable purchaser. We understand that this erroneous contention may have influenced the circuit court's decision. However, because we review summary judgments *de novo*, we do not conclude that the DeLongs'

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

erroneous circuit court argument need influence our review, except to point out that it constitutes a misstatement of law. *See Ollerman*, 94 Wis. 2d at 42, 288 N.W.2d at 107.

By the Court.—Judgment reversed and cause remanded.

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

