

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 13, 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. 01-3204
STATE OF WISCONSIN**

Cir. Ct. No. 97-CV-365

**IN COURT OF APPEALS
DISTRICT III**

**RICHARD WANTA AND CAROL WANTA, D/B/A WANTA
HOMES,**

PLAINTIFFS-RESPONDENTS,

V.

FREDERIC C. MUELLER AND BETH L. MUELLER,

**DEFENDANTS-THIRD-
PARTY PLAINTIFFS-APPELLANTS,**

V.

WANTA HOMES, INC. AND WILLIAMS REALTY, INC.,

**THIRD-PARTY DEFENDANTS-
RESPONDENTS,**

**CITIZENS SECURITY MUTUAL INSURANCE CO. AND ST.
PAUL FIRE AND MARINE INSURANCE CO.,**

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Marathon County:
RAYMOND F. THUMS, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Frederic and Beth Mueller appeal a summary judgment dismissing their third-party intentional and strict responsibility misrepresentation claims against Williams Realty, Inc., and their punitive damages claim against Richard and Carol Wanta.¹ The Muellers argue that there are genuine issues of material fact entitling them to a trial on both claims. We conclude that there are genuine issues of material fact on the misrepresentation claims. Therefore, we reverse the summary judgment in favor of Williams Realty. However, we conclude that the circuit court properly denied the Muellers' punitive damages claim against the Wantas. Therefore, we affirm the portion of the summary judgment dismissing the punitive damages claim.

BACKGROUND

¶2 In 1995, Wanta Homes, Inc., built a home in the Town of Schofield. The Wantas did not inhabit the property, but instead held it for sale. In early 1996 and prior to its sale, the home was damaged by water. The Wantas subsequently repaired the home at a cost of over \$45,000.

¶3 Carol Wanta is a real estate broker and became affiliated with Williams Realty in January 1996. After the water damage and subsequent repair,

¹ Richard and Carol Wanta are the owners of Wanta Homes, Inc.

Carol inquired whether it was necessary to disclose the water damage to potential buyers. The Wisconsin Realtors Association informed her that it was not necessary to disclose prior water damage where the damages were repaired.

¶4 In 1997, acting as a sales agent for Williams Realty, Carol assisted the Muellers in preparing an offer to purchase the property. Carol did not disclose the water damage and represented to the Muellers that she had no notice or knowledge of conditions affecting the home. She further informed the Muellers that the property was “new construction.”

¶5 The Wantas allowed the Muellers to move into the house prior to the scheduled closing date. The Muellers moved in on April 25, 1997. On May 1, the Muellers failed to appear for the scheduled closing. They refused to close on the house because they claimed that the house had substantial water damage.

¶6 On July 12, 1997, the Wantas filed a claim against the Muellers seeking damages arising from the Muellers’ refusal to close on the property. The Muellers filed a counterclaim alleging breach of contract, intentional and strict responsibility misrepresentation. They also sought compensatory and punitive damages. The Muellers subsequently filed a third-party lawsuit against Williams Realty alleging intentional and strict responsibility misrepresentation.

¶7 Williams Realty moved for summary judgment and argued that it did not breach any duty it owed the Muellers. Williams Realty argued that both the misrepresentation claims failed because it made no misrepresentations of fact by representing the home as new construction or by its silence about the prior water damage. The Wantas also moved for summary judgment seeking dismissal of the Muellers’ counterclaim.

¶8 The circuit court concluded that Williams Realty was not required to divulge the prior water damage because the house was new construction, and, because the repairs were made, there was no evidence that Williams Realty was aware of any adverse facts that would reduce the value of the property. As a result, the court granted Williams Realty's motion for summary judgment and dismissed the Mueller's misrepresentation claims.

¶9 The circuit court partially granted the Wantas' summary judgment motion. The court dismissed the Muellers' misrepresentation claims because the Wantas did not have a duty to disclose the water damage and subsequent repair. The court also determined that the Wantas' actions did not warrant the imposition of punitive damages. However, the court denied the Wantas' motion on the breach of contract claim.

STANDARD OF REVIEW

¶10 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). Pursuant to WIS. STAT. § 802.08(2), summary judgment must be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The inferences to be drawn from the underlying facts contained in the moving party's material 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).

DISCUSSION

I. WILLIAMS REALTY

¶11 The Muellers argue that there are genuine issues of material fact entitling them to a trial on their intentional and strict responsibility misrepresentation claims against Williams Realty for its silence about the prior water damage. The Muellers contend that a jury could reasonably conclude that the prior water damage was an occurrence that could significantly reduce the value of the home in the eyes of a competent licensee. They further contend that Williams Realty had an absolute duty to independently examine the house and then disclose the defects.

¶12 Three elements are common to intentional misrepresentation and strict responsibility misrepresentation: (1) the defendant must make a representation of fact; (2) the representation must be false; and (3) the plaintiff believed the representation and relied upon it to his or her detriment.² *Ollerman v. O'Rourke Co.*, 94 Wis. 2d 17, 24-25, 288 N.W.2d 95 (1980). Silence about a material fact can constitute misrepresentation of fact, but no liability arises from a failure to disclose information absent a duty to disclose. *In re Estate of Lecic*, 104 Wis. 2d 592, 604, 312 N.W.2d 773 (1981). Whether a duty to disclose exists is a question of law. *Ollerman*, 94 Wis. 2d at 27.

² Intentional misrepresentation exists where the seller makes a misrepresentation of fact that he or she believes to be false or carelessly misrepresents a fact without regard to its truth. *Whipp v. Iverson*, 43 Wis. 2d 166, 169, 168 N.W.2d 201 (1969). Strict responsibility exists where the misrepresentation is made on the seller's personal knowledge or under circumstances in which he or she necessarily ought to have known the truth or untruth of the statement. *Id.* at 169-70.

¶13 WISCONSIN ADMIN. CODE CH. 24 governs the conduct and ethical practices for real estate licensees. WISCONSIN ADMIN. CODE § RL 24.07(2), requires realtors to disclose “all material adverse facts that the licensee knows and that the party does not know or cannot discover through a reasonably vigilant observation”

¶14 WISCONSIN ADMIN. CODE § RL 24.02(1) defines “adverse fact” as follows:

(1) “Adverse fact” means any of the following:

(a) A condition or occurrence that is generally recognized by a competent licensee as doing any of the following:

1. Significantly and adversely affecting the value of the property.
2. Significantly reducing the structural integrity of improvements to real estate.
3. Presenting a significant health risk to occupants of the property.

According to Williams Realty, the issue is whether it recognized the prior water damage as having a significant adverse effect on the property’s value. Therefore, according to Williams Realty, the analysis must focus on Williams Realty’s knowledge.

¶15 The circuit court agreed and concluded:

[T]hey basically did what I think they have to do. And the two most important points that I think set forth that they should be dismissed is that Carol Wanta advised Williams Realty that the repairs were being made to a significant amount, and also that they sought the legal opinion stating that they did not have to divulge. There could be an argument as to whether or not that legal opinion is right or not, but Williams Realty relied on it, and I don’t think that Williams Realty has the independent duty to inspect the property to determine whether or not what’s been stated is

correct or not correct. Because the representations to Williams Realty is that there had been a significant amount of repairs paid for by insurance and that insurance was paying for those repairs, which had been completed more than a year before the Muellers took occupancy.

¶16 We conclude, however, that there is a factual issue. WISCONSIN ADMIN. CODE § RL 24.07(2) required Williams Realty to disclose “all material adverse facts that the licensee knows and that the party does not know or cannot discover” The definition of “adverse fact” is phrased in terms of an objective test—what a “competent licensee” would recognize as affecting the value of property or its structural integrity. Here, the circuit court examined Williams Realty’s actual knowledge. This is a subjective determination. The question whether a “competent licensee” would recognize the water damage as affecting the value of the property or its structural integrity is not answered by focusing solely on Williams Realty’s knowledge. On this record, the answer is disputed. Therefore, we reverse the summary judgment in favor of Williams Realty and remand to the circuit court.

II. PUNITIVE DAMAGES

¶17 The Muellers argue that there are genuine issues of material fact entitling them to a trial on their punitive damages claim. It is well established that the circuit court determines whether the evidence establishes a proper case for the allowance of punitive damages and whether to submit the issue to the jury. *Bank of Sun Prairie v. Esser*, 155 Wis. 2d 724, 735, 456 N.W.2d 585 (1990). The court’s determination is a question of law that we review independently. *Loehrke v. Wanta Builders, Inc.*, 151 Wis. 2d 695, 701, 445 N.W.2d 717 (Ct. App. 1989).

¶18 Punitive damages are in the nature of “a demand arising out of a single injurious occurrence,” a “theory of relief arising out of the same transaction

or occurrence,” a “remedy.” *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 266, 294 N.W.2d 437 (1980) (citations omitted). Punitive damages are warranted where evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff. WIS. STAT. § 895.85(3). The party claiming punitive damages must show an “evil intent deserving of punishment or of something in the nature of special ill-will or wanton disregard of duty or gross or outrageous conduct.” *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 697, 271 N.W.2d 368 (1978).

¶19 The circuit court did not “see any willful, wanton type of acts on that behalf, on their behalf because of the fact that they didn’t divulge the damage.” As a result, the court concluded that the imposition of punitive damages was unwarranted and dismissed the punitive damages claim.

¶20 Upon discovery of the water damage to the property, the Wantas made the necessary repairs to remedy the situation. The Wantas then contacted the Wisconsin Realtors Association in order to determine whether the prior water damage had to be disclosed. The Wantas were informed that it was not necessary to disclose the water damage. The record indicates that the Muellers had an opportunity to inspect the home before the preparation of the offer to purchase and were allowed to move in prior to the closing date. The Wantas’ actions were not made with evil intent or in wanton disregard of their duties as sellers of the property.

¶21 Additionally, the Muellers fail to explain how the Wantas’ actions were oppressive or outrageous or how their conduct was undertaken with fraud or malice. The Muellers simply argue that the circuit court decided an issue of fact by determining that punitive damages were not warranted. However, the Muellers

and the Wantas do not dispute what the Wantas' conduct was, but rather the legal implications of that conduct. Because the material facts are undisputed, and only one reasonable inference can be drawn from these facts, the circuit court correctly dismissed the punitive damages claim. See *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980).

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

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

