COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3010 **Cir. Ct. No. 2007CV2979**

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

PATRICK J. KELLER AND MARGARET J. KELLER,

PLAINTIFFS-RESPONDENTS,

V.

DENNIS GASZAK AND LAURIE GASZAK,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Affirmed and cause remanded with directions.*

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

¶1 PER CURIAM. Dennis and Laurie Gaszak appeal from a judgment that they failed to disclose basement cracks and a bulging wall when Patrick and Margaret Keller purchased their home. The Gaszaks argue that because there was no expert testimony as to cause, existence of a defect, and necessary repairs, their

motion for a directed verdict should have been granted at the conclusion of the Kellers' presentation of evidence to the jury. We conclude that there was sufficient evidence to submit the case to the jury and affirm the judgment, but we remand to the circuit court for a determination of reasonable appellate attorney fees.

¶2 When the Kellers purchased the Gaszaks' home in 2001, the real estate condition report completed by the Gaszaks indicated that they knew of no "defects in the basement or foundation (including cracks, seepage and bulges)." The Gaszaks had lived in the home eleven years. The Gaszaks had constructed two rooms in the basement with walls built in front of the basement foundation. In 2006 the Kellers removed the walls and discovered cracks that had been patched and bulging along the south wall of the foundation. They commenced this suit and a jury trial was held. At the close of the Kellers' case, the Gaszaks moved for a directed verdict and an order of dismissal. The motion was denied. The jury awarded the Kellers $12,000 in damages after finding that the Gaszaks made a misrepresentation of fact that they were unaware of any defects in the property. The Gaszaks filed a post-verdict motion for judgment notwithstanding the verdict, to change verdict answers, or for a new trial. That motion was also denied. Judgment was entered for $49,279.94, representing treble damages under WIS. STAT. § 895.446 (2007-08),[1] attorney fees under WIS. STAT. § 100.18(11)(b)2., and costs.

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

¶3 A motion to dismiss at the close of plaintiff's evidence in a trial to the jury challenges the sufficiency of the evidence. WIS. STAT. § 805.14(3). When considering the correctness of the trial court's action on a motion for a directed verdict, we, like the trial court, must view the evidence in the light most favorable to the party against whom the motion is made. ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 783, 541 N.W.2d 203 (Ct. App. 1995). However, because the trial court "has such superior advantages for judging of the weight of the testimony and its relevancy and effect," we give deference to its ruling and will reverse the ruling on a motion for dismissal only if it is clearly wrong.[2] ***Id.*** at 783-84 (quoting ***Olfe v. Gordon***, 93 Wis. 2d 173, 186, 286 N.W.2d 573 (1980)).

¶4 The Gaszaks first focus on damages. Cost of repairs or the diminution in value is the measure of damages in this type of case. ***Ollerman v. O'Rourke Co., Inc.***, 94 Wis. 2d 17, 52-53, 288 N.W.2d 95 (1980) (damages can be determined by the "benefit of the bargain rule" or an alternative measure of the reasonable cost of placing the property received in the condition in which it was represented to be). The Gaszaks contend that Margaret Keller's testimony that the house was worth $20,000 less than what they paid for it was inadequate to permit submission of the case to the jury and to support the award of damages. We do not agree.

[2] It is not entirely clear whether the Gaszaks also argue that their postverdict motion should have been granted. To the extent they do, the standard of review is nearly identical. A motion to change answers on a special verdict form challenges the sufficiency of the evidence to sustain the jury's answers. *See* WIS. STAT. § 805.14(5)(c). When a challenge is to the sufficiency of the evidence to support the jury's verdict, "the standard is the same for the trial court and for this court on appeal: whether there is any credible evidence, or reasonable inferences based on that evidence, to support the verdict." ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 784, 541 N.W.2d 203 (Ct. App. 1995). Where, as here, the jury's findings have the approval of the trial court, we afford special deference to a jury determination. ***Morden v. Continental AG***, 2000 WI 51, ¶40, 235 Wis. 2d 325, 611 N.W.2d 659.

¶5 "In Wisconsin, the general rule is that a non-expert owner may testify concerning the value of their property, regardless of whether it is realty or personalty." ***D'Huyvetter v. A.O. Smith Harvestore Prods.***, 164 Wis. 2d 306, 323, 475 N.W.2d 587 (Ct. App. 1991). On cross-examination Margaret confirmed that her estimate was not based on any real estate experience or market studies and that it represented her "feeling, a guesstimate." On redirect she indicated that her estimate considered what it was going to cost to fix the basement and the need to disclose the foundation defects to prospective buyers. The lack of expert training only goes to weight of the evidence which was exclusively within the province of the jury to determine. ***D.L. Anderson's Lakeside Leisure Co., Inc. v. Anderson***, 2008 WI 126, ¶¶67-68, 314 Wis. 2d 560, 757 N.W.2d 803; ***Swedowski v. Westgor***, 14 Wis. 2d 47, 55 n.11, 109 N.W.2d 549 (1961). Additionally, the jury heard from a foundation repair person that in 2007 it would cost $8,800 to repair a foundation wall that is two to three inches out of plumb by excavating to the footing, straightening and waterproofing the wall, installing new drain tile, backfilling with stone, and chipping out all cracks on the interior to retuck those points. Their repair person testified that the cost of material went up almost fifty percent since 2007 to the date of trial. Sufficient credible evidence was presented to make a damage determination so that the decision to submit the case to the jury was not clearly wrong and the award of damages can be sustained.

¶6 The Gaszaks' repeated theme is that there was no expert testimony directly about the cracks and bulging of the south foundation wall. The jury heard the repair person's testimony that there is a possibility of collapse once a foundation wall is out of plumb by two and one-half to three inches. He explained that once a wall is out of plumb by one inch structural integrity is gone and the recommended course of repair is excavation and straightening and support of the

wall. He also opined that a home with a foundation wall out of plumb by two to three inches cannot be sold and repairs have to be made first. It was not necessary that an expert identify the south wall as needing repairs; the jury could determine the extent of the problem of the south wall and its consequences from other evidence.[3]

¶7 Likewise the Gaszaks' complaint that there was no expert testimony about the cause of the bulging south foundation wall or how long it had been in that condition is unavailing. Causation is not an element of the claim of misrepresentation. The Kellers were not required to establish the cause of the defect, only that the Gaszaks were aware of it and had misrepresented that they were unaware of any defects in the property. Cracks on the wall were patched and patching was evidence of awareness of cracks. The jury could reject Dennis Gaszak's testimony that he had not observed any cracks in the foundation. The jury heard how the walls of the rooms constructed by the Gaszaks in the basement concealed the cracks and bulging. As the trial court specifically observed, there was evidence from which the jury could infer that the room walls were constructed for the purpose of shielding the foundation wall from view.[4] Expert testimony is not necessary concerning matters of common knowledge or those within the realm of ordinary experience and when the jury is able to draw its own conclusions from the evidence. ***Racine Cnty. v. Oracular Milwaukee, Inc.***, 2010 WI 25, ¶28, 323

[3] The Gaszaks do not dispute that there was sufficient evidence that the south foundation wall was cracked and bulging.

[4] It is disingenuous for the Gaszaks to repeatedly suggest that the result is simply inequitable because the Kellers' did not discover the bulging foundation wall until five and one-half years after purchasing the property when there was evidence to suggest that the room walls had been built for the very purpose of concealing the cracks and bulge.

Wis. 2d 682, 781 N.W.2d 88. Applying common knowledge and observation the jury could determine whether the south wall of the Kellers' foundation was defective, whether the Gaszaks were aware, and whether defects should have been disclosed. The cry of foul for a lack of expert testimony does not serve the Gaszaks well.

¶8 The Kellers were allowed attorney fees under WIS. STAT. § 100.18(11)(b)2., a fee shifting provision. As requested in their brief, they are also entitled to reasonable appellate attorney fees. ***Radford v. J.J.B. Enters., Ltd.***, 163 Wis. 2d 534, 551, 472 N.W.2d 790 (Ct. App. 1991). We remand to the circuit court for a determination of reasonable appellate attorney fees. [5]

By the Court.—Judgment affirmed and cause remanded with directions.

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

[5] Counsel for the Gaszaks has not included pinpoint cites for case citations as required by WIS. STAT. RULE 809.19(1)(e), and the incorporation of THE Bluebook: A UNIFORM SYSTEM OF CITATION R3.2(a), at 67 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010). Counsel for the Kellers has not provided a table of cases which is arranged alphabetically as required by RULE 809.19(1)(a). For these violations of the rules of appellate procedure, we penalize each counsel $25. *See* RULE 809.83(2). Within fourteen days of the date of this opinion, counsel for the appellants and respondents shall submit payment of the $25 penalty to the clerk of this court and shall not charge the penalty to any client.