

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 10, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 93-2499

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

ELWYN O. JARVIS,

Plaintiff-Respondent,

v.

**JAMES F. GONRING, individually and on
behalf of all others similarly situated,**

**Defendant-Third Party Plaintiff-
Appellant-Cross Respondent,**

**LARRY J. RATZEL and
GREGORY GRAMLING, JR.,**

Cross Respondents,

v.

**MIDWEST INVESTORS GROUP, INC.,
OAKTON HOMES, INC.,
HENRY E. HALVERSON
and SCOTT HERRICK,**

Third Party Defendants,

WARMINGTON & WARMINGTON, S.C.
and THOMAS E. WARMINGTON,

Third Party Defendants-Respondents-
Cross Appellants.

APPEAL and CROSS-APPEAL from judgments and an order of the circuit court for Milwaukee County: ROBERT W. LANDRY, Reserve Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Sullivan, Fine and Schudson, JJ.

SULLIVAN, J. James F. Gonring appeals from a summary judgment awarding Elwyn O. Jarvis \$20,000 plus costs and statutory fees, in Jarvis's Chapter 551, STATS., action (the "Jarvis action") against Gonring for securities law violations. Gonring also appeals from a summary judgment dismissal of his third-party complaint (the "Gonring action") against Warmington & Warmington, S.C., and Thomas E. Warmington (collectively, Warmington) for intentional misrepresentation, negligent misrepresentation, and securities law violations. Warmington cross-appeals from an order denying its motion for trial court frivolous costs against Gonring arising out of his third-party complaint. Finally, Gonring moves this court for appellate costs, *see* § 809.25, STATS.; and sanctions pursuant to RULE 809.83(1) and (2), STATS., and § 802.05(1)(a), STATS.

Gonring presents one issue arising out of the Jarvis action—whether the trial court erred in granting summary judgment in Jarvis's favor because Jarvis's complaint fails to state a claim against Gonring under § 551.59, STATS. Gonring presents essentially one issue arising out of the Gonring action—whether the trial court erred in granting summary judgment dismissal because his third-party complaint against Warmington does state a claim under all three pleaded causes of action, and because genuine issues of material fact remain. Finally, Warmington raises one issue in its cross-appeal—whether the trial court erroneously exercised its discretion in denying Warmington's motion for frivolous costs against Gonring.

We reverse the judgment in the Jarvis action because we conclude that Jarvis's complaint fails to state a claim under Chapter 551, STATS., and, accordingly, we remand this matter to the trial court with directions to dismiss Jarvis's complaint. We affirm the trial court's dismissal of Gonring's third-party complaint against Warmington in the Gonring action because his third-party complaint fails to state any claims for relief. We affirm the trial court's order denying Warmington's motion for frivolous trial court costs. Finally, we deny Gonring's motion for appellate costs.

I. BACKGROUND

In 1989, Henry Halverson and Robert Keller approached Gonring, a tax accountant and licensed securities agent and real estate broker, about his possible participation in a limited partnership that Halverson and Keller were forming. The general partner of the limited partnership was to be Midwest Investors Group, Inc., a corporation. The limited partnership proposed to acquire and develop a mobile home park in Dane County, Wisconsin. Halverson and Keller also solicited Gonring to help find other potential investors for the project. While Gonring stated he was personally interested in the venture and that he might be able to locate other investors, he first wanted more information about it.

Gonring was then informed that Attorney Thomas E. Warmington and Warmington & Warmington, S.C., had been retained to draft all the necessary documents. Eventually, several investors, including Jarvis, executed a limited partnership agreement, and provided a \$70,000 total investment, of which Jarvis contributed \$20,000.

In February 1990, Halverson informed Gonring that Keller had died and that Keller had spent all of the investors' money. Gonring also learned that the limited partnership had never actually been formed. He demanded that Halverson and Warmington obtain information on the location of the investors' money and the nature and extent of any disbursement of the funds. Halverson and Warmington denied any wrongdoing. Gonring later discovered that all of the investors' funds purportedly had been disbursed to various parties, including Warmington and Halverson.

In December 1990, Jarvis filed a complaint against Gonring alleging that during December 1989 and/or January 1990, Gonring, while acting as Jarvis's accountant, learned that Jarvis had "surplus money"; that Gonring presented Jarvis with a "pro forma" for the "Meadowview Project"; and that Gonring then "advise[d] and represent[ed]" that Jarvis "should invest in an investment security" in the mobile home development project. The complaint further alleged that Gonring "induced" Jarvis "to purchase an interest in the ... limited partnership in the amount of \$20,000." Further, the complaint alleged that Gonring "represented to" Jarvis that Jarvis "would receive a full refund of all monies paid or invested by [Jarvis] in the event that the partnership did not acquire it's [sic] lands, or in the event that rezoning could not be obtained." Further, Jarvis alleged that he never received from Gonring "any confirmation of his investment, any executed copy of any limited partnership agreement, any certificate of limited partnership, or any other evidence of the investment security for which he ... paid." Jarvis also alleged that he demanded that Gonring return his investment, but that Gonring "failed, neglected, and refused to return" his funds. Accordingly, the complaint finally alleged:

That the purported sale of the subject Limited Partnership Interest ... was in violation of Chapter 551 of the Wisconsin Statutes, and in violation of Administrative Rules enacted in conformity therewith and pursuant thereto, and that [Jarvis] is entitled to have and recover of [Gonring] under and pursuant to the provisions of Section 551.59 of the Wisconsin Statutes, [Jarvis's] actual out of pocket loss, ... together with [Jarvis's] actual costs, disbursements and attorney fees ... and statutory interest...

Gonring answered that he was not a party to the alleged sale of any limited partnership interest; that the complaint failed to state a claim against him; that he had not advised, directed, induced, or procured Jarvis's actions; that Jarvis's execution of the Limited Partnership Agreement was based solely upon Jarvis's prior investigations; and that any loss Jarvis suffered resulted from his own acts because he had an equal opportunity and means of ascertaining the truth of the representations involving the alleged investment.

In October 1991, Gonring filed a third-party action against Warmington for intentional misrepresentation, fraudulent conspiracy and misrepresentations and misappropriation of funds, and violation of the Wisconsin Uniform Securities Law. Warmington answered the third-party complaint denying the causes of action.

In March 1993, Jarvis filed a motion for summary judgment in the Jarvis action, and in April 1993, Warmington filed a motion for summary dismissal of the Gonring action. After a hearing upon the motion, the trial court rendered an oral decision granting Jarvis's motion for summary judgment, stating:

The question, of course, is whether Gonring had a legal duty towards Jarvis by reason of his licensed status as a broker and solicited these moneys [sic] from Jarvis in a nonexistent limited partnership. It was a limited partnership plan that had never ripened into an actual legal entity. It is my conclusion that he had that duty and obligation to Jarvis and that by reason of the breach of his duty in accepting these moneys [sic] and then depositing them into an illegal stranger, to [Keller] from a technical standpoint, where it was apparently misused and was no longer available to Jarvis, it was never restored by the chief investor and head of Midwest, Keller, who is now dead.

The trial court also granted Warmington's motion for summary dismissal of the third-party complaint, stating:

I'm satisfied that the record at this particular time fails to establish that there is grounds for any fraud, conspiracy or security violation on the part of Warmington and, as a consequence, relief is being granted to that firm and that individual in the form of a dismissal of the cause against those parties.

The trial court also denied Warmington's previously filed motion for frivolous costs against Gonring. The trial court entered separate judgments on both the Jarvis action and the Gonring action and a separate order denying Warmington's frivolous cost motion.

II. STANDARD OF REVIEW

Summary judgment is appropriate when the facts are undisputed. *Hoglund v. Secura Ins.*, 176 Wis.2d 265, 268, 500 N.W.2d 354, 355 (Ct. App. 1993); § 802.08(2), STATS. When reviewing summary judgment, we apply the same methodology as the trial court. *Hoglund*, 176 Wis.2d at 268, 500 N.W.2d at 355. First, the complaint is examined to determine if it states a claim for relief. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). If the complaint states a claim, and if the answer joins issue, the court looks to the affidavits, answers to interrogatories, admissions, depositional excerpts and other documents to determine whether they state evidentiary facts creative of a fact issue for trial and whether movant is entitled to judgment. *Id.*

III. APPLICATION – THE JARVIS ACTION

Gonring argues that the trial court erred in granting summary judgment in Jarvis's favor because Jarvis's complaint fails to state a claim upon which relief can be granted. We agree with Gonring and reverse.

We first need to determine whether Jarvis's complaint sets forth a basis for relief. In determining whether the complaint states grounds for relief, we look to § 551.59(1)(a), STATS.,¹ which imposes civil liability upon “any

¹ Section 551.59, STATS., provides in relevant part:

Civil liabilities. (1)(a) Any person who offers or sells a security in violation of s. 551.21, 551.31, 551.41 or 551.55 or any rule relating thereto, or any condition imposed under s. 551.26 or 551.27 or any order under this chapter of which the person has notice is liable to the person purchasing the security from him or her. The person purchasing the security may sue either at law or in equity to

person” who offers or sells a security in violation of §§ 551.21, 551.31, 551.41 or 551.55, or any rule relating to these statutes or any condition imposed under §§ 551.26 or 551.27, STATS., or any order under Chapter 551 of which the person has notice. Jarvis does not state, in his complaint or appellate brief, which provision of § 551.59(1)(a) he relies upon. This court, therefore, is left with the burden to analyze the facts of the complaint to determine which, if any, of the § 551.59 violations are alleged.

(..continued)

recover the consideration paid for the security, together with interest at the legal rate under s. 138.04 from the date of payment, and reasonable attorney fees, less the amount of any income received on the security, upon the tender of the security, or for damages if the person no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it and interest at the legal rate under s. 138.04 from the date of disposition. Tender shall require only notice of willingness to exchange the security for the amount specified. Any notice may be given by service as in civil actions or by certified mail addressed to the last-known address of the person liable.

(b) A person who offers or sells a security in violation of s. 551.41 (2) is not liable under par. (a) if the purchaser knew of the untrue statement of a material fact or omission of a statement of a material fact or the person sustains the burden of proof to establish that he or she did not know and in the exercise of reasonable care could not have known of the untrue statement or omission.

(2)(a) Any person who purchases a security in violation of s. 551.41 (2) is liable to the person selling the security to him or her, who may sue either at law or in equity to recover the security and reasonable attorney fees, plus any income received by the purchaser thereon, upon tender of the consideration received, or for damages and reasonable attorney fees if the purchaser no longer owns the security. Damages are the excess of the value of the security when the purchaser disposed of it, plus interest at the legal rate under s. 138.04 from the date of disposition, over the consideration paid for the security. Tender requires only notice of willingness to pay the amount specified in exchange for the security. Any notice may be given by service as in civil actions or by certified mail to the last-known address of the person liable.

From our review, we conclude that Jarvis's complaint alleges, in the most general terms, a cause of action based on an offer to sell a security in violation of § 551.41(2), STATS. Section 551.41, STATS., provides:

Sales and purchases. It is unlawful for any person, in connection with the offer, sale or purchase of any security in this state, directly or indirectly:

- (1) To employ any device, scheme or artifice to defraud;
- (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
- (3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

Chapter 551, STATS., is essentially disclosure legislation and is enforced as such by the Commissioner of Securities. Private actions for fraud in the offer or sale of securities may be filed even though the security may be exempt from registration. Hence, although § 551.41, STATS., does not in itself create a private right of action, § 551.59(1), STATS., nevertheless provides a civil remedy for violation of § 551.41(2). *Colonial Bank & Trust Company v. American Bankshares Corp.*, 478 F. Supp. 1186, 1190 (1979). Wilfulness is an element of this statutorily created tort. *Id.*

Jarvis's complaint alleges that Gonring made an untrue statement of material fact that Meadowview, a limited partnership, had an interest in Dane County real estate. It is undisputed that Meadowview was never established; that no person acting on behalf of the putative partnership ever acquired an interest; that the statement was wilfully made; and that Jarvis relied upon the statement to his detriment.

Gonring's answer, however, denies that he advised Jarvis to purchase a security² in Meadowview, and denies he stated that Meadowview had an interest in land in Dane County or that it was an existent partnership. Further, Gonring denies making any misrepresentation.

We conclude that the pleadings raise no issue of misrepresentation as to Meadowview's ownership interest in Dane County real estate. Section 551.59(1)(b), STATS., denies recovery under the section if the purchaser (in this case, Jarvis) knew of the misrepresentation. Paragraph VII of Jarvis's complaint asserts that he knew that the partnership had not acquired an interest in real estate—it provided that Jarvis would recover his payment if the land were not acquired or upon failure of rezoning.

Further, the complaint itself makes manifest Jarvis's knowledge that the partnership had not been created because the form of the partnership agreement was not executed. More importantly, at Jarvis's insistence, Paragraph 29, providing for refund in event of rezoning failure, was added to the form of the partnership agreement. Paragraph 26 of the partnership agreement, however, provides that its written terms are complete and supersede any private understandings. From his complaint, it is clear that Jarvis understood that the agreement was unexecuted and, therefore, felt free to add another term to it.

We conclude that the complaint, limited to a demand for damages under Chapter 551, fails to allege a violation of § 551.41(2), STATS., and fails to assert any other basis for civil relief under § 551.59(1), STATS. Accordingly, the summary judgment granted in Jarvis's favor must be reversed.

IV. APPLICATION – THE GONRING ACTION

² The definition of “security” found in § 551.02(13)(a), STATS., includes “limited partnership interest” or any right to purchase an interest.

We next turn to the summary judgment dismissal of Gonring's third-party complaint against Warmington.³ After alleging preparations by Keller, Halverson and himself to establish the limited partnership, Gonring alleged that Keller and Halverson engaged Warmington to draft a limited partnership agreement which ostensibly would be presented to potential limited partners-investors. Gonring's third-party complaint alleges that Warmington drafted documents, including the limited partnership agreement; and, that during a discussion of the documents, Warmington assured Gonring that they would "be duly filed and that the proper certificate obtained." This assurance included Paragraph 29, which pertains to a limited partner's refund in event rezoning was not secured. Warmington completed the form of agreement which he delivered to Gonring on January 9, 1990. Gonring presented the contract to potential investors, including Jarvis. They invested a total of \$70,000. When Keller died in February 1990, the partnership still had not been formed.

Gonring's complaint alleged that Warmington, upon demand, refused to account to the investors. Gonring's complaint, therefore, sought recovery against Warmington for intentional misrepresentation as to: (1) the existence of the partnership; and (2) the existence of an interest in land by the partnership or someone acting on its behalf. The third-party complaint also sought recovery against Warmington under Chapter 551, STATS. It is undisputed that the partnership never came into being and that no property had been acquired by option or otherwise on its behalf. Warmington filed an answer which denied any agreement with Keller whatsoever and alleged that the sole purpose of his retainer with Gonring was to draft a form of partnership agreement and incidental documents.

The first element of an action for intentional misrepresentation is a statement of fact made knowingly false or without care of its falsity. See *Grube v. Daun*, 173 Wis.2d 30, 54, 496 N.W.2d 106, 114 (Ct. App. 1992). Additionally, the first element for civil relief under § 551.42(2), STATS., is the existence of an untrue statement of a material fact. Under either theory, however, Warmington's uncontroverted affidavit establishes that he was retained only to prepare a partnership agreement at the insistence of Gonring and that he made

³ Although Warmington's motion is denominated a motion for summary dismissal, the parties have treated it as a motion for summary judgment, and we do likewise.

no representation about the existence of a partnership or its acquisition of a real estate interest.

Upon summary judgment, statements of evidentiary fact supersede allegations contained in pleadings. *Leszczynski v. Surges*, 30 Wis.2d 534, 539, 141 N.W.2d 261, 265 (1966). Affidavits must be made on personal knowledge and must set forth such evidentiary facts as would be admissible in evidence. Section 802.08(3), STATS. Warmington's affidavit establishes that: (1) Warmington played no part in the incorporation of the general partner, Midwest Investors Group, Inc.; (2) Warmington never represented Keller in any capacity; (3) Warmington had no knowledge of Keller's interest in the general partnership and played no part in the election of its corporate officers; and (4) Warmington never discussed the realty interest for the limited partnership with Gonring, has never seen the land, and was aware of no document which supposedly vested the general partner with an interest in the land. These uncontroverted statements of evidentiary fact raise a total defense against Gonring's claims of misrepresentation and Chapter 551 violations. The trial court properly granted summary judgment dismissing Gonring's third-party complaint.

V. APPLICATION – THE CROSS-APPEAL

Warmington argues that the trial court erroneously exercised its discretion in denying its motion for frivolous costs. Warmington's appellate brief complains of several improper filings and charges Gonring with malevolent motivation in certain of his pleadings' allegations. No motion for costs under § 814.025, STATS., on these grounds was made in the trial court. Hence, the record contains no findings under sub. (3) which this court may review. It also seeks, pursuant to RULE 809.25(3), STATS., a determination that Gonring's unsuccessful motion to strike a portion of Halverson's affidavit was frivolously brought. Aside from the fact that the argument is attenuated, we deem the matter *de minimis* and decline to consider it further.

VI. FRIVOLOUS APPELLATE COSTS

At the conclusion of his reply brief, Gonring moved for appellate costs pursuant to RULE 809.25, STATS., for bad faith filing of his cross-appeal; for sanctions pursuant to RULE 809.83(1) and (2), STATS., for dilatory motions to expand the record and extend time; and for sanctions pursuant to § 802.05(1)(a), STATS. These motions are not supported by argument, citation to authority, or to the record. *See* RULE 809.19(1)(e), STATS. Furthermore, Gonring's failure to raise the issue in his brief-in-chief prevented Warmington from arguing the issue. We deny all of the motions.

VII. SUMMARY

In sum, we reverse the trial court's summary judgment in favor of Jarvis and remand the matter to the trial court with directions to dismiss Jarvis's complaint. We affirm the judgment granting summary dismissal of Gonring's third-party complaint. We affirm the trial court order denying Warmington's motion for frivolous trial costs. Finally, we deny all of Gonring's appellate motions.

By the Court.—Judgments and order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

No. 93-2499 (D)

SCHUDSON, J. (*dissenting*). I agree that the trial court erred in granting summary judgment for Jarvis. I do not agree, however, that the record compels this court to require the dismissal of Jarvis's action, or to foreclose further litigation of Gonring's third-party action.

“[A] complaint should be dismissed as legally insufficient only if ‘it is quite clear that under no conditions can the plaintiff recover.’” *Morgan v. Pennsylvania Gen. Ins. Co.*, 87 Wis.2d 723, 731, 275 N.W.2d 660, 664 (1979) (citation omitted). In my estimation, such clarity is not present in this case. Although Jarvis might agree with the majority's statement “that the pleadings raise no issue of misrepresentation as to Meadowview's ownership interest in Dane County real estate,” majority slip op. at 11, he bases his complaint on other representations that, he says, induced him to invest. For example, he specifically contends that he was falsely assured that his \$20,000 would be returned if acquisition and zoning of the property did not come about.

Moving to the next stage of analysis, we can see that summary judgment for either Jarvis or Gonring in the original action would be inappropriate. As Gonring writes in his brief to this court:

It appears evident that there are material differences in the factual allegations of the parties with respect to the issues presented as to their relationship to each other in their investigation and decisions as to the proposed investment; the nature of their discussions thereon; the extent and justification of Jarvis' individual reliance thereon; the nature and extent of Jarvis' own investigation and decision making; and upon the nature and extent of Jarvis' reliance upon the conduct, actions and defaults of the other parties in the proposed transaction.

Similarly, material factual issues remain regarding Gonring's third-party complaint against Warmington. Gonring's complaint adequately alleged Warmington's participation in several ways. For example, the complaint states:

[I]n answer to Gonring's concerns as to the interest to be held by any investor and the safety of the investor's contribution to the proposed partnership, Warmington made specific reference to paragraph 29 of the agreement and assured Gonring that the necessary documents for the limited partnership ... would be duly filed and the proper certificate obtained.

Paragraph 29 of the Limited Partnership Agreement provided: "In the event the Dane County real estate cannot be rezoned for a mobile home park, the Limited Partners shall receive a reimbursement of initial capital contribution." Gonring's third-party complaint also alleged that Warmington falsely represented the status of the partnership and the potential for land acquisition and rezoning and further, that after it was discovered "that Keller had spent all of the investors' money," the partners received no reimbursement and "Warmington refused to account to the investors in any manner."

The pleadings and submissions in this case present a spaghetti-like tangle of material factual disputes. They were not resolved by the summary judgment submissions on either the Jarvis action or the Gonring third-party action. Therefore, a trial was required. Accordingly, I respectfully dissent.