COURT OF APPEALS
DECISION
DATED AND RELEASED

October 24, 1995

No. 94-1733

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

AMMANN AND WHITNEY, INC.,

Plaintiff-Respondent,

v.

THOMAS ROSKOS, D.O., M.D.
and ANGELA HALL, D.C.,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Thomas Roskos, D.O., M.D., and his wife, Angela Hall, D.C., appeal from a summary judgment dismissing their counterclaim for contract and negligence damages arising from a contract with the consulting firm of Ammann and Whitney, Inc., to inspect and provide a cost analysis of a bluff erosion problem on Roskos and Hall's Village of Bayside property. We conclude that the trial court properly granted summary judgment dismissing

Roskos and Hall's counterclaim against Ammann and Whitney because, based upon the summary judgment materials, it is clear that Roskos and Hall cannot recover the relief they seek and there are no genuine issues of material fact in dispute. Accordingly, we affirm.

On November 8, 1989, Roskos signed an offer to purchase a home and property fronting Lake Michigan for $445,000. The offer to purchase was subject to a "14 day contingency upon approval of buyers' architect and consultation with foundation engineers with reference to retaining walls to premises." On November 9, the sellers made a counteroffer of $479,000, and prescribed removal of the architect/engineers contingency within 10 days of acceptance of the counteroffer. Roskos accepted the counteroffer on November 10, thereby triggering the ten-day period for removal of the inspection contingency.

On or about November 13, Roskos called the manager of Ammann and Whitney's Milwaukee office about retaining the firm to inspect and report upon the condition of the bluffs and retaining walls. The firm agreed to prepare an inspection report; however, the date it was to have been completed and delivered is in dispute. Ammann and Whitney agree that for purposes of this appeal, the date of November 18, 1989 should be used as the expected delivery date.

On November 15, Roskos's real estate agent, Leo Peters, contacted a licensed professional engineer, William Painter, to examine the property. Painter, who had performed work upon the property in 1976 and 1988, immediately reported that the construction, including rock and concrete revetments, was holding well and that there was no significant shoreline erosion. On the next day, November 16, without notice to Ammann and Whitney, Roskos voluntarily amended the contract of sale to remove the inspection contingency. The amendment, signed by Roskos and Hall, provided: "contingency of buyers architect and consultation with foundation engineer with reference to retaining walls on premises — Removed." During his deposition, Roskos testified that he understood the inspection contingency to mean that he was relying on the engineering report on the bluff in determining whether he wanted to purchase the property, and that the contingency was inserted to protect Roskos under the sales agreement until he received the

engineering report. Roskos testified about his understanding of removing the contingency:

> Q. What was your understanding?
>
> A. That all contingencies were waived.
>
> Q. Meaning that you then had a non-contingent obligation to purchase the property; is that correct?
>
> A. I believe that's what is says, yeah ....
>
> Q. Are there any documents which followed Exhibit No. 7 [The amendment to Contract of Sale] which reinstated any of the contingencies?
>
> A. Not to my recollection.

Thus, Roskos and Hall had a non-contingent contract to purchase the home and property for $479,000. Roskos and Hall eventually completed the purchase of the home, and in 1993, they sold the property for $675,000.

On November 22, 1989, Ammann and Whitney telephoned Roskos and informed him that the report was completed and ready for delivery. Roskos and Hall refused to pick up the report and refused to pay Ammann and Whitney for its services. In December 1990, Ammann and Whitney, at Roskos's request and despite his non-payment, forwarded the report to Roskos and Hall.

In November 1990, Ammann and Whitney filed an action against Roskos in small claims court seeking $312.75, plus costs, for the unpaid services. Roskos filed his answer and counterclaim against Ammann and Whitney seeking damages based upon breach of contract and negligence theory. Hall intervened, joining the negligence counterclaim against Ammann and Whitney.

Upon Ammann and Whitney's summary judgment motion, the trial court concluded that Roskos and Hall failed to establish that they had

suffered any damages resulting from Ammann and Whitney's alleged failure to provide timely the inspection report. Thus, the trial court granted Ammann and Whitney's motion for summary judgment, dismissing Roskos and Hall's counterclaim. Ammann and Whitney later voluntarily dismissed its original small claims action against Roskos. Roskos and Hall appeal from the summary judgment dismissing their counterclaim.

This court reviews a grant of summary judgment *de novo*. ***Burkes v. Klauser,*** 185 Wis.2d 309, 327, 517 N.W.2d 503, 511 (1994). Summary judgment is governed by § 802.08, STATS., and the rules for review have been frequently addressed. *See, e.g.*, ***Green Spring Farms v. Kersten,*** 136 Wis.2d 304, 315, 401 N.W.2d 816, 821 (1987). In reviewing a grant of summary judgment, this court first examines the complaint to determine whether a claim for relief has been stated. ***C.L. v. Olson***, 143 Wis.2d 701, 706, 422 N.W.2d 614, 615 (1988). If the pleadings meet this initial test, our inquiry shifts to the moving party's affidavits or other proof to determine whether a *prima facie* case for summary judgment has been presented. ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980). If the moving party has indeed made a *prima facie* case for summary judgment, we then examine the affidavits and other proof of the opposing party to discern whether there exists disputed material facts entitling the opposing party to a trial. ***Id***. After our review of the amended counterclaim and the summary judgment materials, we agree with the trial court that Roskos and Hall have failed to show that they suffered any damages from Ammann and Whitney's alleged untimely inspection report.

In the second amended counterclaim, Roskos seeks damages for breach of contract, and Roskos and Hall seek damages for negligence. Under both theories, the damage that they allegedly suffered was the alleged difference in the offered price of the property, minus the reduction of the $100,000 to $200,000 that the inspection report stated would have to be spent for erosion remedial measures. Essentially, Roskos and Hall alleged that had they timely received the inspection report, they would have demanded that the sellers of the property reduce the purchase price of the property in order to account for the additional expenses.

The underlying documents—the offer to purchase, the counteroffer and the contract—are unambiguous matters of record. Further, it is undisputed that Roskos and Hall removed the contingency agreement from

the property sales contract on November 16, thereby committing themselves to the purchase price of $479,000, at a minimum two days before Ammann and Whitney was expected to complete the inspection report on November 18. As such, the allegedly untimely report could not have caused the damages alleged in Roskos and Hall's counterclaim; that is, the reduction in the purchase price based upon their knowledge of the $100,000 to $200,000 for remedial measures estimated in Ammann and Whitney's report. By the terms of their amended sales contract for the home and property, Roskos and Hall were locked in at the price of $479,000, once they removed the contingency from that contract on November 16. Thus, even if Ammann and Whitney had completed and turned over its inspection report on November 18, it was too late for Roskos and Hall to reduce the purchase price of the home. Accordingly, as a matter of law, under both negligence and contract theory, Roskos and Hall could not recover the damages they seek in their amended counterclaim against Ammann and Whitney; thus, the causes of action are deficient. The trial court properly granted summary judgment dismissing the counterclaim. *See* ***Green Spring Farms,*** 136 Wis.2d at 315, 401 N.W.2d at 821. Further, because our resolution on this issue is dispositive, we need not address any other alleged errors raised by Roskos and Hall. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

By the Court.—Judgment affirmed.

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