COURT OF APPEALS
DECISION
DATED AND RELEASED

June 18, 1996

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. 94-2990

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

FREDERICK SPIVEY, JR.
and SUE E. SPIVEY,

Plaintiffs-Appellants,

v.

WILLIAM G. OTTO,

Defendant-Respondent,

WELCOME HENRY SCHALMO,
KATHLEEN R. SCHALMO and
ROTH & TAPLIN, INC.,
a Wisconsin Corporation,

Defendants.

APPEAL from a judgment of the circuit court for Milwaukee County: GEORGE A. BURNS, JR., Judge. *Reversed and cause remanded*.

Before Sullivan, Fine and Schudson, JJ.

SULLIVAN, J. Frederick Spivey, Jr. and Sue E. Spivey appeal from a summary judgment dismissal of the third claim for relief in their amended complaint for conspiracy to defraud in the sale of a home on the part of William G. Otto. Because we conclude from the pleadings and materials submitted on summary judgment that material issues of fact exist, we reverse and remand for a new trial.

I. BACKGROUND.

The Spiveys purchased a single-family home in the City of West Allis from Welcome Henry Schalmo and Kathleen R. Schalmo. Their complaint alleges that the Schalmos intentionally misrepresented the condition of the house, and that it was beset with structural and rot-related defects affecting its structural integrity and rendering it uninhabitable. As to William G. Otto, Ms. Schalmo's father, the third claim for relief alleges that he conspired with the Schalmos to facilitate their fraud upon the Spiveys.

Evidentiary facts presented on the motion for summary judgment show that the Spiveys and Schalmos entered into a residential offer to purchase and acceptance, and that one of its provisions required the Schalmos to provide a property condition report to the Spiveys. The Schalmos submitted the report on May 13, 1989. It expressly represented that no mildew or rot damage to the property existed. In reliance upon the report, the Spiveys closed the purchase on September 29, 1989. On April 8, 1991, the Spiveys and their building contractor applied to the City of West Allis for a permit to construct two additional rooms to the home. On May 30, while the improvement was under construction, the City building inspector noted on the building application the existence of rotting floor joists that had been repaired by nailing two-by-fours next to the rotting joists.[1] The inspector stopped work on the additions because of the degree of rotting and the ineffectiveness of the repair. Another private contractor examined the house and concluded that the rot to the joists was so extensive that the house was in danger of collapse.

[1] The house had no basement. The attempted repair was found in the crawl space just below the floor of the house.

Ultimately, the Spiveys abandoned the property; it was foreclosed and the house razed. The Spiveys later instituted this action.

II. ANALYSIS.

"Summary judgment is appropriate to determine whether there are any disputed factual issues for trial and `to avoid trials where there is nothing to try.'" ***Caulfield v. Caulfield,*** 183 Wis.2d 83, 91, 515 N.W.2d 278, 282 (Ct. App. 1994) (citation omitted). When we review a motion for summary judgment, we apply the same methodology as the trial court, but we do not accord the trial court's conclusion any deference. ***Kotecki & Radtke, S.C. v. Johnson,*** 192 Wis.2d 429, 436, 531 N.W.2d 606, 609 (Ct. App. 1995). The methodology is oft repeated:

> [W]e first examine the pleadings to determine whether they state a claim for relief. If the pleadings state a claim and the responsive pleadings join the issue, we then must examine the evidentiary record to analyze whether a genuine issue of material fact exists or whether the moving party is entitled to judgment as a matter of law. Further, "[o]n summary judgment, we must draw all justifiable inferences in favor of the non-moving party, including questions of credibility and of the weight to accorded particular evidence."

Bay View Packing Co. v. Taff, 198 Wis.2d 654, 674, 543 N.W.2d 522, 529 (Ct. App. 1995) (citation omitted).

The third claim for relief found in the amended complaint alleges that Otto intentionally and voluntarily acted with the Schalmos to misrepresent the extent of defects in the house and acted to conceal them. It alleges that Otto acted with the Schalmos maliciously or in wanton, wilful or reckless disregard of the Spiveys' rights to make the misrepresentations. We conclude that the complaint states a cause of action for conspiracy to intentionally misrepresent. Otto's answer to the third claim for relief of the amended complaint denied the

allegations and put the Spiveys to their proof of their allegations, thereby joining issue.

In ***Onderdonk v. Lamb,*** 79 Wis.2d 241, 247, 255 N.W.2d 507, 510 (1977), the supreme court determined that a claim for civil conspiracy damages must allege: (1) the formation and operation of the conspiracy; (2) the wrongful act or acts in furtherance of it; and (3) the resultant damage. The trial court relied upon ***Maleki v. Fine-Lando Clinic Chartered S.C.,*** 162 Wis.2d 73, 469 N.W.2d 629 (1991), where the supreme court stated that proof of a conspiracy must consist of more than suspicion or conjecture that the elements of a conspiracy existed. ***Id***. at 84-85, 469 N.W.2d at 633-34. The Court stated that if circumstantial evidence supports equal inferences of lawful and unlawful action, then a claim of conspiracy damages under § 134.01 is not proven. ***Id***. at 85, 469 N.W.2d at 634. The trial court erred in applying ***Maleki***.

A next-door neighbor, Craig Aschenbach, who later purchased the property, testified in his deposition that prior to the date of the contract, he observed Otto and the Schalmos take sheets of plywood and two-by-fours into the house. He testified that after purchasing the property, he took videotapes of the premises while tearing it down. Aschenbach testified:

Q.I see. So you think that the Schalmos repaired the flooring in the front section of the floor?

A.No question about it.

Aschenbach testified further that a gap of four inches existed between the floor of the front bedroom and the main support wall and that the new two-by-fours were placed in the bedroom "to mask a real bad problem." The complaint and Aschenbach's deposition testimony support a factual scenario that Otto helped the Schalmos to conceal rot in the joists by a hidden repair, proving circumstantial damages arising from a conspiracy. We conclude that this testimony evidences the formation of a conspiracy and of wrongful acts in its furtherance.

Accordingly, the trial court erred in its application of ***Maleki*** to this matter. In ***Maleki***, the supreme court evaluated a jury verdict and determined that the element of maliciousness in the context of civil conspiracy must be proven by something more than equal inferences drawn from circumstantial evidence. In this case, however, we must determine whether the summary judgment documents present a genuine issue as to a material fact and, if not, whether the movant is entitled to judgment. Section 802.08(2), STATS. We are not concerned with the sufficiency of evidence to support a verdict, but whether a trial should be held because of conflicting evidence. In the summary judgment materials a genuine issue of material fact was raised respecting Otto's role in the alleged conspiracy. Otto's conduct raises competing inferences: (1) whether he innocently helped his daughter and son-in-law repair their home; or (2) whether he knowingly participated in the formation and furtherance of a conspiracy. The Spiveys are entitled to have these competing inferences resolved by a trier of fact. *See* ***Lecus v. American Mut. Ins. Co. of Boston***, 81 Wis.2d 183, 189-90, 260 N.W.2d 241, 244 (1977) (competing inferences of whether owner and driver of a car were members of the same household under an auto liability policy raised fact issue on summary judgment requiring trial). We must reverse and remand for a trial.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.

No. 94-2990 (D)

SCHUDSON, J. (*dissenting*). Although the issue may be a relatively close one, I conclude that the trial court correctly granted summary judgment to Otto.

The first element of civil conspiracy is "[t]he *formation* and operation of the conspiracy." ***Onderdonk v. Lamb***, 79 Wis.2d 241, 247, 255 N.W.2d 507, 510 (1977) (emphasis added). Further, the conspiracy must be "knowingly formed." WIS J I—CIVIL 2802. "'To act or participate knowingly' means to act or participate voluntarily and intentionally and not because of mistake, accident, or other innocent reason." ***Id.*** Nothing in the summary judgment submissions offers any evidence that Otto said or did anything to knowingly participate in any conspiracy.

If a man carries lumber into his daughter's house and assists his son-in-law in re-enforcing joists or repairing a floor, on what basis would anyone surmise that he is knowingly forming a conspiracy with his daughter and son-in-law to later misrepresent the condition of the house to a potential buyer? "To prove a conspiracy, a plaintiff must show more than a *mere suspicion or conjecture* that there was a conspiracy or that there was evidence of the elements of a conspiracy." ***Maleki v. Fine-Lando Clinic Chartered, S.C.***, 162 Wis.2d 73, 84, 469 N.W.2d 629, 633 (1991) (emphasis added). Even at summary judgment, "mere suspicion or conjecture" does not convert Otto's carpentry into an act that allegedly forms any conspiracy.

Accordingly, I respectfully dissent.