

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 27, 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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0799-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DIANE M. SOMERS,

Plaintiff-Respondent,

v.

**JOSEPH LOUKOTKA,
JOHN TIBBITTS and
PRUDENTIAL PREFERRED PROPERTIES,**

Defendants-Appellants,

ABC INSURANCE COMPANY,

Defendant.

APPEAL from a judgment of the circuit court for Dodge County:
JOSEPH E. SCHULTZ, Judge. *Affirmed.*

Before Dykman, Sundby and Vergeront, JJ.

PER CURIAM. Joseph Loukotka, John Tibbitts and Prudential Preferred Properties appeal from a judgment awarding \$15,000 in damages to Diane M. Somers. The appellants acted as the seller's agents in Somers's purchase of a forty-nine-acre farm. Somers specified in her offer to purchase that the seller must remove all underground tanks. The appellants disclosed the existence of and arranged to remove only two such tanks, when there were in fact six. After a bench trial, the trial court found that the appellants had intentionally misrepresented the number of tanks, and awarded Somers the estimated cost of removing the four remaining tanks. The issue is whether Somers is entitled to damages, although no proof exists that the four additional tanks reduced the property's market value. We conclude that she is entitled to removal costs, and therefore affirm.¹

When the seller or seller's agent is liable for intentional misrepresentation "[t]he damages necessary to give the purchaser the benefit of the bargain will depend on the nature of the bargain and circumstances of each case.... [A]n alternative measure of recovery is the reasonable cost of placing the property received in the condition in which it was represented to be" *Ollerman v. O'Rourke Co., Inc.*, 94 Wis.2d 17, 53, 288 N.W.2d 95, 112 (1980). Here, the facts justified the trial court's selection of that alternative. Twice in her offer to purchase, Somers unequivocally made the seller's removal of all underground tanks a condition of the sale. That is the bargain she thought she made. The court could reasonably award as damages the cost of providing her with that bargain. No support exists for the appellants' contention that for fraudulent misrepresentation the court must choose the measure of damages resulting in the lowest award or, in this case, no award.

By the Court.— Judgment affirmed.

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

¹ This is an expedited appeal under RULE 809.17, STATS.