

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 14, 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

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

No. 95-1707

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**VAN BUREN MANAGEMENT, INC.,
a Wisconsin corporation and
JOEL S. LEE,**

Plaintiffs-Respondents,

v.

**JOSEPH W. CHECOTA and
UNIVERSAL MEDICAL BUILDINGS
LIMITED PARTNERSHIP,
a Delaware limited partnership,**

Defendants-Appellants.

APPEAL from orders of the circuit court for Milwaukee County:
MICHAEL P. SULLIVAN, Judge. *Affirmed.*

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

PER CURIAM. Joseph W. Checota and Universal Medical Buildings Limited Partnership appeal from an order denying their motion to modify a finding of fact made in a prior order and from the prior order which

originally contained the challenged finding of fact. Checota argues that the trial court erred when it made a finding that Joel S. Lee did not make a misrepresentation. Because the trial court did not err in rendering this finding of fact, we affirm.

I. BACKGROUND

This matter arises from a failed venture between Lee and his company, Van Buren Management, Inc., and Checota and Universal Medical. Lee and Checota had joined together in an attempt to develop several downtown properties. The two, however, disagreed regarding how to proceed with the project and parted ways. Subsequent to the parting, Checota sued Lee, alleging that Lee had misled Checota into investing in the venture. Lee sued Checota, alleging that Lee had been "squeezed out" of the project. The two separate suits were consolidated and eventually settled in December 1993.

In April 1994, the trial court entered an order dismissing the case, but preserved certain limited powers over the settlement pursuant to the terms of the settlement agreement. In February 1995, Checota discovered that Lee had allegedly misrepresented the purchase price of one of the properties. Checota alleged that Lee had said he had paid \$6.9 million, when in fact he had only paid \$5.84 million. On the basis of this, and pursuant to § 806.07, STATS., Checota moved to vacate the stipulation and order for dismissal.

The trial court denied the motion, relying upon its finding that Lee did not make a misrepresentation. In rendering this finding, the trial court reasoned that documentation reflecting the correct purchase price had been turned over pursuant to a discovery request and that three separate documents reflecting the \$5.84 million price were marked as exhibits at Lee's deposition.

In April 1995, Checota filed a motion requesting the court to modify this decision. Specifically, Checota wanted the court to remove the finding of fact that Lee had not made a misrepresentation. Without conducting a hearing, the trial court denied Checota's motion, ruling that it would not remove or modify this finding of fact, which was made on the basis of the totality of the record. Checota now appeals.

II. DISCUSSION

Checota claims the trial court erred in refusing to modify its order containing the challenged finding of fact.¹ Checota argues that the trial court erred in making the finding that Lee did not misrepresent the purchase price of one of the properties. Checota claims that in making this finding, the trial court went beyond the scope of the § 806.07, STATS., motion.

Whether the trial court erred in deciding the § 806.07, STATS., motion is reviewed under the erroneous exercise of discretion standard. *Wisconsin Public Serv. Corp. v. Krist*, 104 Wis.2d 381, 394-95, 311 N.W.2d 624, 631 (1981). Further, our review regarding a trial court's findings of fact is limited to whether the findings are clearly erroneous. Section 805.17(2), STATS.

Checota filed his § 806.07, STATS., motion on the basis that the stipulation and order for dismissal should be vacated because it was procured by fraudulent means. Checota alleged that the fraudulent means consisted of a misrepresentation that Lee had made regarding the purchase price of a property, and that Checota had relied on in consenting to the settlement. Specifically, Checota claimed that Lee had represented that the purchase price of the property was \$6.9 million, when it was actually \$5.84 million. In denying the § 806.07 motion, the trial court ruled:

Lee made no such misrepresentation.... The settlement in this case was a process that involved negotiations entered into between late December of 1993 and April of 1994 when this judge signed the challenged order and judgment. Prior to that time -- at a deposition of Joel Lee on November 23, 1993, when the case was still set for trial in early January, 1994 -- at least three documents were marked that referenced a sale price

¹ Checota indicates that he is also challenging the trial court's order denying its § 806.07(1)(c), STATS., motion to vacate the stipulation and order for dismissal. Checota does not, however, challenge this order *in toto*. Checota's challenge is limited to the finding of fact that Lee did not make a misrepresentation, which is contained within the order. Accordingly, we address only this issue in the text of this opinion.

of the 731 North Jackson Street property as 5.8 million dollars.

....

The court concludes there were sufficient submissions to the Checota Group to alert it to any error in the price Lee claimed was paid for the 731 North Jackson Street property. That the Checota Group did not find the discrepancy is their own responsibility, not Lee's.

After this order was rendered, Checota filed an additional motion to modify this order. The modification Checota requested was that the statement "Lee made no such misrepresentation" be removed. In response to this motion, the trial court issued a second order, which provided in pertinent part: "[The sentence] will stand. It was based on the *totality of the submissions to the court by both parties*. In other words, it was a finding of fact based on the competing affidavits of the respective individuals, as well as the documentation reviewed by the court."

Based on the foregoing, we reject Checota's claim that this finding went beyond the scope of the motion. Checota specifically presented this issue to the trial court. Checota, in essence, asked the trial court to decide whether Lee made the misrepresentation. The trial court made the finding that Lee did not make a misrepresentation based on the totality of the record. This finding was the basis for the trial court's decision to deny Checota's § 806.07, STATS., motion. Further, there is evidence in the record to support the finding, namely the documents turned over during discovery and utilized during the Lee deposition reflecting the correct price of the property. Accordingly, this finding was not clearly erroneous.²

² Checota also argues that it was improper for the trial court to make this finding because it decided a disputed issue of fact which should have been left to a jury to decide. We are not persuaded. Checota submitted this issue to the trial court to decide pursuant to its § 806.07, STATS., motion. In order to grant or deny that motion, the trial court was required to make a finding regarding whether the settlement was entered into because of the alleged fraudulent misrepresentation made by Lee. Checota cannot complain about a ruling which he invited. Moreover, this was not a summary judgment motion where a trial court is not permitted to make

In addition, we are not persuaded by Checota's argument that the trial court's finding was too broad, i.e., that the finding should have stated that there is evidence that Lee misrepresented the correct price, but that Checota did not reasonably rely on it or simply that there was no fraud. To prove misrepresentation, five factors are required: (1) that the person made a misrepresentation; (2) that the representation was untrue; (3) that the person making the representation knew it was untrue; (4) that the statement was made to induce another to act upon it; and (5) that the person to whom the statement was made justifiably relied on it. See *Whipp v. Iverson*, 43 Wis.2d 166, 169-70, 168 N.W.2d 201, 203-04 (1969).

Rather than addressing each element separately, the trial court made the general finding that no misrepresentation existed. The basis for this finding was that Checota could not justifiably rely on Lee's price quote because there was documentation to the contrary. The trial court was correct in finding that, absent this factor, there was legally no misrepresentation. The fact that the trial court could have addressed each factor individually is of no import. In addition, the fact that a more general finding—that there was no fraud—may have been sufficient under the facts of this case, does not render the more specific finding regarding misrepresentation erroneous.

By the Court. – Orders affirmed.

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

(..continued)
findings of fact.