

A PRE-CLOSING PROFESSIONAL INSPECTION IS ESSENTIAL TO PRESERVE REMEDIES FOR HOME DEFECTS

A recent Wisconsin Court of Appeals decision, *Malzewski v. Rapkin*, 2006 WI App 183, demonstrates the importance of obtaining a professional inspection prior to closing on a residential home transaction. Failure to do so may, under certain circumstances, prohibit a buyer from asserting otherwise available remedies against a home seller if a defect is discovered after the sale.

In *Malzewski*, prospective buyers of a home received a Real Estate Condition Report from sellers disclosing a defect in the basement/foundation. Sellers explained that “[d]uring heavy rainstorms, there might be a little seepage in the walls/floors. The seller has regraded to correct this when it has happened.”

Buyers’ Offer to Purchase incorporated the language from the Real Estate Condition Report listed above, contained a home inspection contingency and further conditioned their purchase of the home upon the right to do a walk-through within three working days of acceptance. Sellers accepted Buyers’ Offer to Purchase. Immediately prior to the closing, Buyers exercised their right to do a walk-through of the home. Upon noticing no visible defects, Buyers waived their right to conduct a home inspection despite having knowledge of foundation seepage and closed on the sale.

The following summer, Buyers noticed that paint had begun to peel on the basement walls and pre-existing cracks on the basement walls opened. An engineer was hired to investigate the foundation and concluded that the cracks had been present for many years, were failing and needed to be fixed. The cost to repair the foundation walls was estimated to be \$25,600.

Buyers sued Sellers under contract, tort and statutory theories, seeking money damages or, alternatively, rescission of the sale and restitution. During the discovery process, Sellers admitted to their awareness of multiple 12-foot long, three-eighths inch wide cracks that they had filled with masonry caulk 10 to 20 times during their ownership of the home. Sellers also admitted to painting the walls 5 times and touching them up after they had filled-in the cracks with caulk from time-to-time. Sellers never, however, had a professional inspect the home’s basement to provide an opinion or to get a repair estimate.

Buyers' claims were dismissed on summary judgment by the trial court. The trial court decided as a matter of law that it would not allow Buyers' claims to continue where there was no showing that Sellers had any subjective knowledge as to the significance of the basement cracks and where Buyers waived their right of inspection despite being informed of foundation seepage merely to save a few hundred dollars on a home inspection.

The Court of Appeals held that the trial court was correct in dismissing most of Buyers' claims since, in order to recover damages under breach of contract, breach of warranty, misrepresentation or theft-by-fraud theories, Buyers were required to show that they reasonably relied to their detriment upon an affirmation of fact from the Sellers.

The court added that Buyers acted unreasonably as a matter of law when they waived their right to have the home inspected prior to closing on the property. The Court of Appeals deemed that the language in Sellers' Real Estate Condition Report concerning seepage in the walls and floors of the basement was enough to put Buyers on notice, at least to the extent that they should have conducted further investigation by hiring a registered home inspector.

The court did, however, think one of Buyers' claims raised a factual issue that should have been reserved for determination by a jury. Specifically, Buyers' deceptive advertising claim under section 100.18, Wis. Stats., was returned to the trial court for a trial on the issue of whether Sellers' representation that the only problem with the basement was slight seepage was a violation of Wisconsin's deceptive advertising statute where Buyers waived their right to have the property inspected.

Despite the survival of Buyers' deceptive advertising claim, Malzewski stresses the importance, both in the eyes of a court and potentially a jury, of conducting a professional home inspection prior to purchasing a home. To ignore one's right to conduct such an inspection may be deemed unreasonable in the eyes of a court or jury and may foreclose remedies that would otherwise be available to buyers with claims relating to unknown home defects.

For further information on Malzewski and other cases and issues relating to home defect claims and defenses, contact John R. Schreiber of O'Neil, Cannon, Hollman, DeJong S.C.