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STATE OF WISCONSIN
SUPREME COURT

Elias 'Louis' Pagoudis,
Hanna Pagoudis,
Sead Properties, LLC and
Kearns Management, LLC,

Plaintiff-Appellant,

v. Appeal No. 2020AP225

Marcus Keidl, and
Russell K. Berg d/b/a Intervest Inspections,

Defendants,

Amy Keidl a/k/a Amy Jo Weyker,

Defendant-Respondent-Petitioner.

On appeal from the Circuit Court of Washington County,
the Honorable Todd K. Martens, presiding,
Circuit Court Case No. 2019 CV 492

AMICUS CURIAE BRIEF OF THE WISCONSIN REALTORS® ASSOCIATION

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Introduction

Since 1992, Wis. Stat. ch. 709[1] has required sellers to make certain disclosures. 30 years after its enactment, the statute continues to set forth the disclosures of owners of real estate predicated on a prospective buyer or person in connection with the sale of the property, receiving the real estate condition report (RECR).

The modern real estate transaction may look slightly different with the inclusion of limited liability companies (LLCs), trusts and assignments. But no matter how evolved the transaction may look from the outside, the foundation is the same: there is a seller, a buyer, and an RECR.

This Court's decision will clarify two key issues impacting real estate transactions and businesses statewide: 1) Whether a seller should be held liable to subsequent buyers on information provided in an RECR in a previous transaction and 2) if commonly owned LLCs should be treated as separate entities. Therefore, this brief focuses on those discussions.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise indicated.

LAW AND ARGUMENT

I. SELLER LIABILITY SHOULD NOT EXTEND BEYOND THE CONTRACTUAL RELATIONSHIP.

In today's real estate market, some purchasers have become savvy about how they purchase a property. For instance, offers may be written with the buyer as an entity, a trust, or including language reserving the right to assign the agreement to another which may include an entity, trust, or individual. An offer assigned by an individual to an LLC (owned by the individual) followed by a transfer to another LLC (also owned by the individual) months after closing, are very specific facts that should not be used to create statewide precedence.

a. Assignments are commonly used in real estate transactions and the parties to the contract are known

The practice of buyers assigning their interests under the offer to purchase to another buyer and delegating the performance of their contractual duties, has been increasing in popularity over recent years. Purchasers wanting to reserve the potential option to assign the rights under the contract to another is a result of investor purchasers, individual purchasers considering placing the property

in a trust or entity, and in a very competitive housing market with limited housing inventory, purchasers reserving the right to "sell" their contract to the highest bidder.

The seller's consent is required if the offer to purchase prohibits assignment.[2] The pre-printed language of the state-approved (WB) offers to purchase does not prohibit buyers from assigning the contract to another, buyers may assign.

One clear way a contract can be assigned unilaterally to another is by using a phrase like "and/or assigns" in the offer to purchase. In this case, Louis Pagoudis (Louis)/Buyer 1 wrote an offer, "Louis or assigns," on the home of Amy Keidl (Amy) and assigned contract rights to Sead Properties, LLC (Sead)/Buyer 2. Sead/Buyer 2 closed on the property. However, Sead/Buyer 2 then transferred the property to Kearns Management, LLC (Kearns) months after closing.

In an assignment, the seller knows which buyer closed on the property and therefore has reasonable expectation as to the party that may have legal rights to make post-closing claims relating to the transaction. It is unreasonable to expand a seller's liability to a

[2] Jesse S. Ishikawa, *When are Real Estate Purchase Agreements Assignable?* (July 28, 2009), https://www.reinhartlaw.com/knowledge/real-estate-purchase-agreements-assignable/#:~:text=Unless%20the%20real%20estate%20purchase,consent%2C%20the%20agreement%20is%20assignable.

third party the seller had no contractual relationship with based on the seller's RECR from a previous transaction.

b. The RECR is for prospective, actual, or anticipated buyers to the sale

Generally, Wis. Stat. ch. 709 requires owners of properties that include one-to-four dwelling units as well as vacant land to complete a RECR. The RECR is the statutorily created form for sellers to provide written responses about the condition of the property, so prospective buyers can be more informed about the property as they contemplate writing an offer to purchase.

The RECR is intended to be given to prospective buyers and the purchaser of the property. Typically, the buyer receives the RECR prior to writing the offer to purchase and is incorporated in the WB offers to purchase, "dated (insert date), which was received by Buyer prior to Buyer signing this Offer and which is made part of this Offer by Reference…" See WB-11 Residential Offer to Purchase lines 107-108[3].

If the buyer does not receive the RECR prior to writing the offer, Wis. Stat. § 709.02 requires the seller to furnish the RECR no later than 10 days after acceptance of the offer. If the seller does not provide the RECR within the 10 days or provides the RECR within

[3] References to the WB-11 Residential Offer to Purchase is to the 2020 version.

10 days after the buyer has submitted the offer and discloses a defect, the buyer has a two-business day right to rescind. *Id.*

Wis. Stat. § 709.03 creates the residential RECR form and begins with a disclaimer, "IT IS NOT A WARRANTY OF ANY KIND BY THE OWNER …." Item A6 reinforces the form is intended to be given to prospective buyers and any person with any actual or anticipated sale of the property.

> A6. The owner discloses the following information with the knowledge that, **even though this is not a warranty, prospective buyers** may rely on this information in deciding whether and on what terms to purchase the property. The owner hereby authorizes the owner's agents and the agents of **any prospective buyer** to provide a copy of this report, and to disclose any information in the report, **to any person in connection with any actual or anticipated sale of the property**."

Emphasis added.

Wis. Stat. § 709.035, furthers clarifies the RECR is to be shared with prospective buyers by requiring the owner to amend the RECR prior to acceptance of an offer, as to any information the owner becomes aware of that would change a response on the RECR. Nowhere in Wis. Stat. ch. 709 does it represent the RECR is intended for anyone other than prospective buyers or any person related to the "actual or anticipated sale."

It is outrageous for the seller to expect the RECR they gave at the time of the sale, would make them legally responsible to future buyers. Sellers of real estate should not be held liable to

subsequent purchasers or transferees for alleged misrepresentation in an RECR as part of a previous sale.

c. Reliance on the RECR by subsequent buyers is unreasonable as a matter of law

In *Malzewski*, the court of appeals found that buyers who close the transaction without exercising their right to a home inspection, waive the right to sue on a contract or warranty claim based on the seller's representations in the RECR because their reliance on the RECR is unreasonable as a matter of law. *Malzewski v. Rapkin, 2006 WI App 183 ¶ 14, 296 Wis. 2d 98, 723 N.W.2d 156 (citing Lambert v. Hein,* 218 Wis. 2d 712, 726-730, 582 N.W.2d 84, 90-92 (Ct. App. 1998)). The buyers couldn't prove reasonable or justifiable reliance upon the seller's RECR representations because they failed to exercise their right to have a home inspection. *Id. at ¶ 18, 19, 20 & 22.* If buyers in *Malzewski* cannot prove reasonable justifiable reliance on the seller's RECR in a transaction in which they were a party, then subsequent buyers cannot prove reasonable reliance on the seller's RECR from a previous transaction.

II. WIS. STAT. § 100.18 FALSE ADVERTISING CLAIMS BASED ON THE RECR DO NOT APPLY TO SUBSEQUENT BUYERS.

Wis. Stat. § 100.18 covers fraudulent representations made to even one prospective purchaser. *Below v. Norton,* 2008 WI 77 (citing *K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 2007 WI 70, ¶¶ 21, 23, 301 Wis.2d 109, 732 N.W.2d 792). Wis. Stat. § 100.18 applies to statements made before the offer. In *Below* this Court held, statements to a potential buyer may constitute a statement made to "the public" for the purposes of § 100.18.

Wis. Stat. § 100.18 applies to an RECR completed by a seller in a transaction involving a prospective buyer or party to the contract at the time of the sale. Wis. Stat. § 100.18 would not apply to statements made after the contract was formed, because the prospective buyer is no longer "the public," but has a particular relationship with the seller. See *Kailin v. Armstrong*, 2002 WI App 70, 252 Wis. 2d 676, 643 N.W.2d 132. In *Kailin* the court determined claims under Wis. Stat. § 100.18 is limited to untrue, deceptive, or misleading representations made prior to the acceptance of the offer.

Wis. Stat. § 100.18 does not apply to claims of false advertising made by subsequent buyers based on an RECR completed by a seller in a different transaction.

III. WISCONSIN SHOULD NOT ADOPT THE RESTATEMENT SECOND OF TORTS §533.

In this case, the court of appeals was the first Wisconsin court to adopt the RESTATEMENT (SECOND) OF TORTS § 533 (1977).

> The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it **if the misrepresentation, although not made directly** to the other, is **made to a third person** and the maker **intends or has reason to expect that its terms will be repeated** or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.

To allow subsequent buyers to sue sellers based on a previous RECR when there is not a direct contractual relationship between them, would open the floodgates for indefinite seller liability. If this Court were to adopt the RESTATEMENT (SECOND) OF TORTS § 533, sellers would need to consider whether the risk of infinite liability is worth the reward of selling the property? Any reasonable seller would respond with a resounding no.

Individuals primarily create LLCs for tax and legal protection, and it is common for individuals to have more than one LLC. LLCs

should be treated as a separate entity, even if they are owned by the same person.

The court of appeals decision placed great weight on the common ownership of the two LLCs, when stating, "[h]ere, there was no remote buyer, just a short series of related-party transfers between Louis and the two LLCs he owned." In one short sentence, the court of appeals stripped the LLCs of the armor afforded by their very creation. "It seems inescapable that Amy would expect that any misrepresentation made to Louis personally were made to those entities which he owned." After closing on their property, reasonable sellers do not contemplate the myriad possibilities of who the property might be sold or transferred to in the future, or if the RECR provided in their original transaction would be the basis of a lawsuit by a subsequent buyer.

By adopting the RESTATEMENT (SECOND) OF TORTS § 533 in response to the specific facts in this case, the court of appeals simultaneously created unlimited seller liability and removed the legal protections of every LLC that has common ownership.

IV. COMMONLY OWNED LIMITED LIABILITY COMPANIES (LLCS) SHOULD BE TREATED AS SEPARATE LEGAL ENTITIES.

a. LLCs are created and are a regular part of Wisconsin business practice

A Wisconsin LLC is governed by Wis. Stat. ch. 183. Effective January 1, 1994, the Wisconsin's Limited Liability Company Act, allowed the blend of the flexibility of a partnership and liability protection of a corporation. The tax and legal benefits, along with the ease to create LLCs at the Wisconsin Department of Financial Institutions, encouraged small businesses and entrepreneurs to embrace LLCs.

Since the creation of Wisconsin LLC Law, "LLCs have come to dominate entity formations in Wisconsin and the United States: they comprise nearly 90 percent of new Wisconsin entities." Joseph W. Boucher and Andrew J. Kramer, *Fiduciary Duties of LLC Members and Managers*, (January 2018), Wisconsin Lawyer, https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=26086#a. As of 2005, more than 100,000 LLCs were created in Wisconsin[4] and nationally there are

[4] Joseph W. Boucher and George R. Kamperschroer, *The First LLC Case*, (September 2005), Wisconsin Lawyer, https://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=78&Issue=9&ArticleID=988.

approximately more than 2.5 million LLCs[5]. The potential implications this case has on LLCs is substantial.

b. The treatment of LLCs must be consistent regardless of the ownership

Wisconsin clarifies when an LLC acquires property is not the property of the individual member. "All property originally transferred to or subsequently acquired by or on account of a limited liability company is property of the limited liability company and not of the members individually. Wis. Stat. § 183.0701(1). When Sead transferred the property to Kerns, it became property of the LLC, not of Louis.

Furthermore, when Sead acquired the property through the purchase, the interest vested in the LLC, not Louis. "[A]ny interest so acquired shall vest in the limited liability company rather than in the members individually." Wis. Stat. § 183.0701(3).

"By far the biggest selling point to becoming an LLC is that the members of the LLC generally are not personally liable for the LLC's liabilities." Renee M. Meh, *When Nonlawyers "Represent" LLCs*, (March 2009) Wisconsin Lawyer, https://www.wisbar.org/NEWSPUBLICATIONS/WISCONSINLAWYER/PAGES/article.aspx?Volume=82&Issue=3&ArticleID=1869. The

[5] See https://s-corp.org/our-history.

creation of LLCs, assignments and transfers to LLCs don't happen by accident. The steps to create LLCs, assign rights under contracts and transfer property to an LLC, are made for tactical business and legal decisions.

Commonly owned LLCs cannot "have their cake and eat it too." Commonly owned LLCs cannot choose when they want the benefit of LLC, and then step out of those protections to best serve their needs.

To allow LLCs, in any circumstance, to step out of the cloak of the LLC protection when convenient, will flip the entire LLC structure on its head, causing devasting consequences for Wisconsin's small business owners and entrepreneurs.

c. Other states have enacted statutes to create structure to benefit individuals with more than one LLC

There is a nationwide movement recognizing the commonality of individuals having more than one LLC to conduct business. Currently, 14 states have statutory framework recognizing an individual's ability to have a series of LLCs. See https://howtostartanllc.com/form-a-series-llc/. Alabama, Delaware, District of Columbia, Illinois, Indiana, Iowa, Kansas, Missouri, Montana, Nevada, Oklahoma, Tennessee, Texas and Utah have adopted statutory treatment allowing LLCs to have a "parent"

LLC and a series of "child" LLCs that branch off from the "parent." Under this structure, each LLC continues to receive the same legal and tax protection and allows the LLCs to streamline taxes, reduce paperwork, separate entities, and allow autonomy for each LLC to act as its own entity.

While Wisconsin has not adopted this concept, the evidence is indisputable that the LLC structure will only become more prevalent moving forward. To allow an LLC to have protections for taxes and legal liability but allow the LLC to abandon those protections out of convenience when commonly owned, is counter to the entire purpose of LLCs.

Many real estate licensees have LLCs to conduct their business. This Court's decision in determining whether LLCs owned by the same individual are treated as separate legal entities will have far-reaching legal implications, affecting numerous small businesses, including the real estate industry.

V. PUBLIC POLICY DOES NOT SUPPORT THE RESULT OF ADOPTING THE RESTATEMENT (SECOND) OF TORTS § 533.

In 2021, there were 90,169 home sales[6] in Wisconsin. Considering the thousands of residential transactions that occur annually, the majority of which include an RECR, should give this Court pause when deciding to adopt new legal principles, such as the RESTATEMENT (SECOND) OF TORTS § 533.

Real estate, including residential real estate sales, is an economic driver to Wisconsin's economy. In 2019, Wisconsin real estate comprised 15.8% of Wisconsin's Gross Domestic Product[7].

If the residential real estate market becomes affected by laws or principles that result in sellers choosing not to sell property due to fear of infinite liability to third parties, Wisconsin's economy will suffer.

Adopting the RESTATEMENT (SECOND) OF TORTS § 533 would create irrational results by: making Wisconsin more litigious, increasing costs for sellers to defend litigation, eliminating reasonable expectation for sellers as to liability, and establishing

[6] https://www.wra.org/Resources/Property/Wisconsin_Housing_Statistics/.
[7] Dr. Mark J. Eppli, Ph.D., *Special Report: The Impact of Real Estate on Wisconsin's Economy* (October 2019), https://www.wra.org/PressRelease/EconomicReport/.

perpetual opportunity for litigation from third parties alleging misrepresentations involving an RECR.

If this Court upheld the court of appeals decision, legal counsel would likely advise sellers to refuse to complete an RECR, and have the buyer waive the right to receive the RECR. By refusing to give an RECR, the seller would potentially eliminate a future claim of subsequent buyers and transferees suing based on the RECR.

Incentivizing sellers to provide less information about the condition of the property is counter to public policy. Good precedence is not shaped by accepting new legal principles to address the deceitful actions of a few.

Conclusion

Certainty in understanding risk associated with the sale of real property as well as the legal treatment of commonly owned LLCs, is of great importance to the economy, property owners, businesses, the legal community, and the real estate industry throughout Wisconsin. For the reasons stated, this Court should not hold sellers liable in perpetuity to third parties based on the RECR from the original transaction, should not adopt the RESTATEMENT (SECOND) OF TORTS § 533, and should treat LLCs as separate legal entities regardless of ownership.

Dated this 16th day of February, 2022.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2954 words.

s/s_____
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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding any appendix, that complies with the requirements of Wis. Stat. § 809.19(12).

The context, text and format of the electronic copy of the brief are identical to the original paper copy of the brief filed with the Court on today's date.

A copy of this certification was included with the paper copies of this brief field with the Court and served on all parties and counsel of record.

Dated this 16th day of February, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that:

I have caused three true and correct copies of this Amicus Curiae Brief to be served on counsel by placing the same in U.S. mail, first class postage, on this date:

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