

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 28, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP752

Cir. Ct. No. 2004CV2774

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

GERHARDT LAMBRECHT AND LUANN LAMBRECHT,

PLAINTIFFS-APPELLANTS,

V.

DON BELMAN HOMES, INC.,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-RESPONDENT,**

V.

BLIFFERT LUMBER AND FUEL COMPANY,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Gerhardt and Luann Lambrecht appeal from a judgment dismissing their action against Don Belman Homes, Inc. to recover damages for allegedly defective siding used in the construction of the Lambrechts' home. We conclude that the evidence supports the trial court's findings and affirm the judgment.

¶2 The Lambrechts purchased a spec home from Belman and took possession of the home on October 10, 1996. A one-year warranty on materials and workmanship was included in the purchase. Shortly after moving in, Gerhardt Lambrecht read an article about a large class action settlement for homeowners whose homes were sided with Louisiana-Pacific Inner-Seal siding because the siding soaked up and retained moisture, causing excessive expansion and contraction, cracking, buckling, and rotting. Gerhardt contacted Belman inquiring if his home was sided with Inner-Seal. He was told it was not.

¶3 In 1998, the story of defective Inner-Seal siding caught Gerhardt's attention again when Wisconsin homeowners were discovering rot, mildew, mushrooms, and holes in their Inner-Seal siding. Gerhardt contacted Belman again and was again told that his home had not been sided with Inner-Seal.

¶4 In March 1999, Gerhardt found a piece of scrap siding in his garage. The siding was labeled as Inner-Seal siding. Gerhardt contacted Belman and was told his home was sided with Smart Lap.

¶5 In May 2004, the Lambrechts found their siding to be deteriorating. They contacted Louisiana-Pacific to ascertain if their home was sided with Inner-Seal. A Louisiana-Pacific inspector came to the Lambrechts's home in September and confirmed that the home was sided with Inner-Seal. The time for the Lambrechts to join the class action suit against Louisiana-Pacific had passed.

¶6 The Lambrechts filed this action against Belman alleging intentional, negligent, and strict responsibility misrepresentation. A trial was held to the court. The trial court found that Belman misrepresented that the home was not sided with Inner-Seal siding. However, it concluded that the Lambrechts did not reasonably rely on the representation when they had a piece of siding in hand identified as Inner-Seal siding.¹ The Lambrechts appeal the dismissal of their action.

¶7 The Lambrechts first argue that the trial court misconstrued Belman's one-year warranty as requiring physical damage to the home within one year and not applicable to hidden defects. They also claim that the trial court failed to consider the misrepresentation as tolling the applicable statute of limitations so they may recover under the warranty. We need not address claims related to the warranty because the Lambrechts failed to meet their burden of proof that the siding was a hidden or inherent defect in their home.²

¶8 The trial court found that not until April or May 2004 was there any notice that there was a problem with the siding on the Lambrechts' home. It further found that there was no evidence of any defective condition in the siding prior to that time. The trial court's findings will not be set aside unless clearly erroneous. WIS. STAT. § 805.17(2). The trial court, not the appellate court,

¹ The trial court found that when the Lambrechts discovered the piece of siding in their garage labeled as Inner-Seal they had over three years to make a claim in the class action suit.

² The parties disagree on whether the Lambrechts stated a cause of action for breach of contract or warranty. The complaint did not state such a claim. The trial court did not formally rule on the Lambrechts' effort to put in evidence on that claim and then amend the complaint to conform to the proof at trial. *See* WIS. STAT. § 802.09(2) (2003-04). The trial court ruled that the statute of limitations had expired on a breach of contract claim.

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

resolves conflicts in the testimony and serves as the arbiter of the credibility of witnesses. *Global Steel Products Corp. v. Ecklund Carriers, Inc.*, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

¶9 The trial court’s finding that there was no evidence of a hidden defect or inherent defect is not clearly erroneous. Other than evidence that Inner-Seal siding was the subject of a class action lawsuit, there was no expert testimony that Inner-Seal siding was inherently defective. Gerhardt’s brother, a siding contractor, explained how the siding needed to be replaced and called the siding a “bad product.” However, an inspection of the siding three years after installation showed no defects or problems. Belman merely acknowledged that the siding was subject to the class action lawsuit when asked if the siding was defective.³ The only information about the class action lawsuit came from the news articles that prompted the Lambrechts’ inquiries. The first article indicated that the manufacturer maintained that the problems with Inner-Seal stemmed from faulty installation. Initially it was believed that only one to two percent of homes with Inner-Seal siding developed problems. The later article repeated that there was no admission of fault by manufacturers. It also reported that some builders had no problems with Inner-Seal siding they utilized and that installation could be the source of the problem.

¶10 There was no proof of an inherent and hidden defect in the Inner-Seal siding. Thus, it does not matter if the warranty is interpreted to cover a hidden defect that does not manifest itself within the one-year coverage period.

³ The allegation in Belman’s third-party complaint against his siding supplier that the Inner-Seal siding was defective is not an evidentiary admission. The third-party complaint was not litigated because the supplier defaulted.

We need not address the Lambrechts' contract interpretation or statute of limitation arguments.

¶11 We turn to the Lambrechts' misrepresentation claims.⁴ “All misrepresentation claims share the following required elements: 1) the defendant must have made a representation of fact to the plaintiff; 2) the representation of fact must be false; and 3) the plaintiff must have believed and relied on the misrepresentation to his detriment or damage.” *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶13, 270 Wis. 2d 146, 677 N.W.2d 233. Strict liability misrepresentation also requires: (1) the representation be made on the defendant's personal knowledge or under circumstances in which he or she necessarily ought to have known the truth or untruth of the statement; and (2) the defendant must have an economic interest in the transaction. *Ollerman v. O'Rourke Co.*, 94 Wis. 2d 17, 25, 288 N.W.2d 95 (1980). Claims based on strict-responsibility misrepresentation require that the buyer's reliance be justifiable. *Lambert v. Hein*, 218 Wis. 2d 712, 731, 582 N.W.2d 84 (Ct. App. 1998). A negligent misrepresentation additionally requires that the defendant: (1) had a duty of care or a voluntary assumption of a duty; and (2) failed to exercise ordinary care in making a misrepresentation or in ascertaining the facts. *Ollerman*, 94 Wis. 2d at 25. A claim based on negligent misrepresentation inquires whether the plaintiff was negligent in relying upon the representation. *Lambert*, 218 Wis. 2d at 731.

¶12 Here the critical finding is that the Lambrechts did not reasonably rely on Belman's 1999 representation that their home was not sided with Inner-

⁴ The Lambrechts dismissed their intentional misrepresentation claim at the close of evidence.

Seal. That finding is not clearly erroneous because in March 1999 Gerhardt found a piece of siding labeled as Inner-Seal. Gerhardt did not inform Belman that he had found the labeled siding. Gerhardt removed the label from the siding and kept it in his homeowner's file. That file included the news articles that gave information on how to contact Louisiana-Pacific about the siding or potential claims. The Lambrechts took no action after finding that piece of siding. Without reasonable reliance, both misrepresentation claims fail.⁵

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

⁵ The lack of reasonable reliance supports the trial court's finding that the Lambrechts' negligence in relying on the statement that their house was not sided with Inner-Seal exceeded Belman's. We summarily conclude that the trial court's finding that Belman did not have an economic interest with respect to the identification of the siding is not clearly erroneous.

