COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2142 **Cir. Ct. No. 2004CV282**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

S&C BANK,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

WISCONSIN COMMUNITY BANK AND HEARTLAND FINANCIAL USA,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from judgments of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed in part; reversed in part, and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PETERSON, J. This case arises from the sale of a bank branch. S&C Bank bought the Eau Claire branch of Wisconsin Community Bank.

Heartland Financial USA is Wisconsin Community's parent company, and some of Heartland's officers were involved in the sale.

¶2 As part of the sale, S&C paid for and acquired most of Wisconsin Community's loan portfolio for the Eau Claire branch. Three of those loans were to a borrower that defaulted soon after the sale. Those defaulted loans are the subject of this lawsuit.

¶3 S&C brought claims for tort misrepresentation against Heartland and breach of contract against Wisconsin Community. After a bench trial, the circuit court awarded S&C $2.1 million in damages against both Heartland and Wisconsin Community, but declined to award punitive damages against Heartland. Heartland and Wisconsin Community appeal, and S&C cross-appeals.

¶4 We conclude S&C's tort claims against Heartland, including the intentional misrepresentation claim that is the subject of its cross-appeal, are barred by the economic loss doctrine. We therefore reverse the judgment against Heartland and remand with directions to dismiss S&C's tort claims. However, Wisconsin Community's challenges to the court's fact findings underlying S&C's contract claim and the method the court used to award damages on that claim are without merit. We affirm the judgment against Wisconsin Community.

BACKGROUND

¶5 Wisconsin Community is a wholly owned subsidiary of Heartland. In early 1999, Wisconsin Community opened a branch in Eau Claire. In June 1999, Wisconsin Community made two loans—a $1.5 million term note and a $1.8 million line of credit—to August Lotz, Inc., and Universal Comfort, Inc. (collectively, August Lotz). The two companies were closely held corporations

involved in the same business and operated by the same two principals, Mark Schlichter and Mark Barton.

¶6 Schlichter and Barton were unwilling to sign personal guarantees for the loans. They did, however, sign loan agreements listing them as unlimited guarantors, followed by the statement that "guarantees of the above are required only if debt to equity ratio of August Lotz exceeds 4.0:1.0." Schlichter and Barton signed the loan agreements as officers of August Lotz, but did not execute any separate personal guarantees.

¶7 In March 2001, August Lotz asked Wisconsin Community to increase its line of credit by $500,000, to $2.3 million. Wisconsin Community ultimately agreed, but structured the $2.3 million loan as a $350,000 term loan plus a $1.95 million line of credit.[1] The loan agreements for both loans stated that "personal guarantees of Mark E. Schlichter and Mark S. Barton are required only if debt to net worth of August Lotz Co., Inc., and Universal Comfort, Inc., exceeds 4.0 to 1.0."

¶8 In May 2001, Wisconsin Community told Schlichter and Barton it wanted them to sign springing personal guarantees. A springing guarantee is a personal guarantee that automatically comes into effect if a specified event occurs. Wisconsin Community wanted springing guarantees that would be triggered if the debt to net worth ratio of August Lotz exceeded 4:1.

[1] Loan agreements for the line of credit and term loan are dated April 29 and May 2, 2001, respectively.

¶9 Schlichter and Barton balked, claiming the guarantees were a new loan term. On July 17, 2001, Wisconsin Community sent Schlichter and Barton a proposed letter agreement purporting to clarify the loan agreements. Schlichter and Barton signed the letter, but only after making a number of handwritten changes. They also added a typewritten paragraph stating in part, "We believe any personal guaranties required … should be limited to a mutually acceptable dollar amount."

¶10 In March 2002, Wisconsin Community renewed August Lotz's $1.95 million line of credit. The loan agreement included the same guarantee term as the loan agreement from the previous year: "personal guarantees of Mark E. Schlichter and Mark S. Barton are required only if debt to net worth of August Lotz Co., Inc. and Universal Comfort, Inc. exceeds 4.0 to 1.0." Like the other loan agreements, Schlichter and Barton signed the March 2002 loan agreement as officers of August Lotz.

¶11 In September 2002, S&C gave Heartland a written "expression of interest" in purchasing the Wisconsin Community Eau Claire branch. The expression of interest proposed that S&C would buy the assets of the Eau Claire branch for the face value of its loan portfolio plus a $2.75 million premium.[2] S&C reserved the right to choose which loans to purchase. S&C also wanted to limit its exposure on loans to any single borrower to $3 million.

¶12 S&C then reviewed the Wisconsin Community loan files. S&C examined the loan agreements and other loan documents for each loan to determine information such as current balance, interest rate, amount outstanding,

[2] The proposed purchase price also included other factors not relevant here.

the borrower's financial condition, and the risk associated with the loan. In its review of the August Lotz files, S&C examined the loan agreements and loan committee minutes, and based on that information concluded Schlichter and Barton had conditionally guaranteed the August Lotz loans. S&C decided to include the August Lotz loans and all but one of the other Eau Claire branch loans in its purchase.

¶13 On October 11, 2002, S&C and Wisconsin Community signed a purchase agreement for the Eau Claire branch, including the August Lotz loans. The agreement included a number of warranties by Wisconsin Community. In addition, Wisconsin Community agreed to accept responsibility for loan amounts exceeding $3 million through participation agreements.[3] This would limit S&C's exposure on loans to any one borrower to $3 million.

¶14 Charles Bullock, Chief Executive Officer of S&C, signed the agreement for S&C. John Schmidt, Vice President and Chief Financial Officer of Heartland, signed the agreement for Wisconsin Community. Schmidt apparently did not hold any official position with Wisconsin Community. Schmidt's signature line identified his title as "VP-CFO."

¶15 After the agreement was signed, S&C and Wisconsin Community began the process of preparing the paperwork for closing. One of the documents needed at closing was the participation agreement for the August Lotz loans. The S&C employee preparing the agreement was informed by a Wisconsin Community employee that the loans were personally guaranteed by Schlichter and

[3] A participation agreement is an agreement splitting ownership of a loan. In this case, under the participation agreement S&C owned $3 million of the loan, and Wisconsin Community owned the remainder.

Barton. As a result, the participation agreement stated the collateral for the August Lotz loans included personal guarantees by Schlichter and Barton.

¶16 On December 13, 2002, Wisconsin Community signed the participation agreement. Two days later, the parties closed on the sale, with S&C paying Wisconsin Community approximately $33 million. At closing, Wisconsin Community certified the warranties contained in the October 11 agreement were also true as of the closing date.

¶17 In February 2003, August Lotz requested additional financing. S&C and Wisconsin Community[4] agreed to a short extension of the existing loan in order to analyze the new application. By the time the loan extension ended, in late April 2003, August Lotz had exhausted its entire $1.95 million line of credit. It told S&C it needed to borrow another $300,000 to continue in business. At that point, S&C first learned Schlichter and Barton had never executed personal guarantees for the loan.

¶18 S&C concluded the best way to minimize its losses was to keep August Lotz in business and sell it as a going concern. To that end, S&C loaned August Lotz additional cash and kept Schlichter and Barton as managers. S&C also released Schlichter and Barton from claims based on personal guarantees for the loans or based on past salaries and bonuses they had paid themselves.[5] Ultimately, August Lotz was sold in June 2004 for just under $750,000.

[4] Because Wisconsin Community still owned a portion of the loans, both banks had to agree to the extension.

[5] The agreement stated that between January and June 2003 Schlichter and Barton paid themselves $150,000 in salary and approximately $508,000 in bonuses.

¶19 S&C filed this action in May 2004. S&C alleged a breach of warranty claim against Wisconsin Community and claims for strict liability, negligent and intentional misrepresentation against Heartland.[6] The breach of warranty claim alleged Wisconsin Community had breached its warranties in the October 11 purchase agreement by failing to disclose that Schlichter and Barton had never signed personal guarantees. In its claim against Heartland, S&C claimed Heartland failed to disclose the lack of guarantees, and this made "other representations" by Heartland misleading. The complaint did not specifically identify those "other representations."

¶20 The matter was tried in a six-day bench trial in December 2005. At the conclusion of the trial, the court made forty-eight pages of fact findings. It found for S&C on its breach of warranty claim against Wisconsin Community and its claims for negligent and strict liability misrepresentation against Heartland. The court rejected S&C's claim for intentional misrepresentation and request for punitive damages. The court awarded damages of just under $2.1 million against each defendant and specified that payment by either Wisconsin Community or Heartland would satisfy the obligation.

DISCUSSION

I. S&C's misrepresentation claims against Heartland

¶21 Heartland makes two arguments on the tort misrepresentation claims: (1) any representations by Schmidt were not made on behalf of Heartland; and (2) the claims are barred by the economic loss doctrine. Because we conclude

[6] The complaint also included a claim under Article 9 of the Uniform Commercial Code. That claim is not at issue in this appeal.

the tort claims are barred by the economic loss doctrine, it is unnecessary to address Heartland's first argument. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

¶22 The economic loss doctrine is a judicially created doctrine designed to "preserve the boundary between tort and contract." ***Grams v. Milk Prods., Inc.***, 2005 WI 112, ¶13, 283 Wis. 2d 511, 699 N.W.2d 167. It is "based on an understanding that contract law and the law of warranty, in particular, is better suited than tort law for dealing with purely economic loss in the commercial arena." ***Daanen & Janssen, Inc. v. Cedarapids, Inc.***, 216 Wis. 2d 395, 404, 573 N.W.2d 842 (1998). Whether the economic loss doctrine applies to a given set of facts is a question of law reviewed without deference. ***Linden v. Cascade Stone Co.***, 2005 WI 113, ¶5, 283 Wis. 2d 606, 699 N.W.2d 189.

¶23 The key difference between contract and tort law for purposes of the economic loss doctrine is that contract law allows sellers and purchasers to allocate risks between them. ***Grams***, 283 Wis. 2d 511, ¶17. If the purchaser chooses, it can contract to pay the seller a premium for a comprehensive warranty. More likely, the purchaser will opt to negotiate a limited warranty—or perhaps no warranty at all—and pay less for the product. In that situation, the purchaser can use its savings to insure against any potential loss or simply accept the risk itself. ***Id.***

¶24 Tort law takes the opposite approach. Because tort law is intended to protect society, tort law assigns responsibility "wherever it will most effectively reduce the hazards to life and health" posed by the loss. ***Id.***, ¶18 (citation omitted). Tort law, then, is designed for cases where public policy demands that the court, not the parties, assign responsibility for a loss. Because the economic

loss doctrine bars tort remedies, it is best understood as applying when "society has no special interest" in overturning the risk allocation negotiated by the parties. ***Id.***, ¶19.

¶25 In this case, the loss in question is purely economic: a monetary loss resulting from a bad loan. A contract negotiated by sophisticated commercial parties governs the transaction. The contract includes specific warranties governing this situation. Indeed, S&C's tort theory against Heartland is that the warranties in the October 11 agreement were false and were made by one of Heartland's officers. It is therefore the *warranty itself* that is the basis of the tort claim. S&C and Wisconsin Community specifically allocated the precise risk at issue here in their contract.

¶26 S&C argues an exception to the economic loss doctrine applies: fraud in the inducement. The elements of that exception are:

> (1) there was an intentional misrepresentation …; (2) the misrepresentation occurred before the contract was formed; and (3) the fraud was extraneous to, rather than interwoven with, the contract.

Kaloti Enters., Inc. v. Kellogg Sales Co., 2005 WI 111, ¶42, 283 Wis. 2d 555, 699 N.W.2d 205 (citations omitted). A misrepresentation is extraneous to the contract when it "concerns matters whose risk and responsibility did not relate to the quality or the characteristics of the goods for which the parties contracted or otherwise involve[s] performance of the contract." ***Id.***

¶27 As for the first element, S&C was successful at trial on its negligent and strict liability misrepresentation claims, but not on its intentional misrepresentation claim. Second, the alleged misrepresentation was part of the

contract. It therefore was made at the same time—not before—the contract was formed. Finally, it is difficult to imagine a misrepresentation more interwoven with a contract than this one—a warranty in the contract itself. S&C's intentional misrepresentation claim does meet the first criteria, but not the other two, since it is also based on the warranties in the October 11 agreement.

¶28 S&C also argues a broader exception should apply here because it was not in privity of contract with Heartland. However, the economic loss doctrine is not limited to parties who are in privity of contract. ***Daanen & Janssen***, 216 Wis. 2d at 413. Instead, the economic loss doctrine prevents parties from making an "end run" around the contracts they have negotiated by suing third parties, such as manufacturers, who are one step removed from the contracting parties. ***Id.*** at 414.

¶29 S&C argues it had no opportunity to negotiate a warranty with Wisconsin Community because all of its dealings prior to the sale were with Heartland, not with Wisconsin Community. However, Heartland owned Wisconsin Community, and simply completed the sale through that entity. Even though S&C negotiated with Heartland officials rather than Wisconsin Community officials, S&C still had a full opportunity to negotiate the terms of the agreement. S&C did in fact negotiate the warranties it felt were necessary; indeed, its tort claims are actually based on the warranties it negotiated.[7]

[7] S&C also complains an exception to the economic loss doctrine should apply because its contractual remedies are inadequate. S&C does not cite any authority for this argument, and, as Heartland points out, contractual remedies are exactly what S&C bargained for when it bargained for a warranty. This argument is also belied by the equal damages awarded on the two claims.

¶30 Finally, S&C argues for a broader exception based on ***Brew City Redevelopment Group, LLC v. The Ferchill Group***, 2006 WI App 39, 289 Wis. 2d 795, 714 N.W.2d 582, *aff'd*, 2006 WI 128, 297 Wis. 2d 606, 724 N.W.2d 879. The tort claim in ***Brew City***, however, was not a misrepresentation claim. ***Id.***, ¶18. In ***Brew City***, we held that claims for malicious injury—claims based on "harm for the sake of the harm"—were not barred by the economic loss doctrine because "inflicting harm for the sake of harm is not something that the law would reasonably expect to be addressed in contract terms." ***Id.***, ¶19 (citations and quotations omitted). Because ***Brew City*** did not involve misrepresentation, we did not apply—much less expand—the ***Kaloti*** exception for fraud in the inducement in that case.

II. S&C's contract claim against Wisconsin Community

¶31 In the October 11 agreement, Wisconsin Community made two warranties relevant here:

> All loans have been made and maintained in the ordinary course of business, in accordance with [Wisconsin Community's] customary lending standards and written loan policies and in compliance with all applicable laws and regulations, other than minor discrepancies that do not affect the enforceability or collectability of any Loan.
>
> ….
>
> None of the foregoing representations and warranties, and none in any financial information or written statement furnished or to be furnished to [S&C] pursuant to this Agreement, contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements made therein, in light of the circumstances in which they are made, not misleading.

¶32 The circuit court found these warranties were breached in three ways.[8] First, the court found that in May 2001, the Wisconsin Community loan committee approved $500,000 in additional credit to August Lotz on the condition that Schlichter and Barton execute conditional guarantees. However, Wisconsin Community agreed to extend the credit without signed guarantees. This was contrary to Wisconsin Community's written procedures and Wisconsin law, both of which required all loan terms be approved by the loan committee. This also breached Wisconsin Community's warranty that its loans were "made and maintained in the ordinary course of business…."

¶33 Second, the court found that Wisconsin Community's forms required personal guarantees be executed before funds were disbursed. This was done in all other loans with personal guarantees in Wisconsin Community's portfolio, and waiting to execute conditional guarantees until the condition was met made "no sense." Disbursing funds before guarantees were executed was therefore contrary to Wisconsin Community's written loan policies, since no written loan policy allowed Wisconsin Community to defer execution of a conditional guarantee until the condition was met.

¶34 Finally, the court found that the March 2002 loan agreement stated conditional guarantees were required under certain conditions. This was misleading absent some indication that no guarantees had been executed, and instead the parties had signed the July 17, 2001 letter agreement, which made Schlichter's and Barton's obligations substantially more ambiguous. By not

[8] The circuit court also found other breaches of the October 11 agreement, including breaches related to the December 2002 participation agreement The three breaches listed here are the breaches central to S&C's claim.

disclosing the letter agreement or other surrounding circumstances, Wisconsin Community breached its warranty not to omit facts necessary to keep other documents in the loan files from being misleading. The court found that had S&C known Schlichter and Barton had not signed conditional guarantees, it would not have purchased the August Lotz loans.

¶35 The parties agree these findings are reviewed under the clearly erroneous standard.[9] The findings combine findings of historical fact with findings—sometimes implicit ones—on the meaning of the contract terms. Findings of historical fact are upheld unless clearly erroneous. WIS. STAT. § 805.17(2).[10] In addition, when extrinsic evidence is used to construe an ambiguous contract provision, the meaning of the provision is a question of fact. ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 177-78, 557 N.W.2d 67 (1996).

¶36 Wisconsin Community argues the court's findings are clearly erroneous, for four reasons. First, Wisconsin Community argues its warranty did not require it to get a personal guarantee for every loan. It argues that banking, like any other business, is subject to market pressures, and whether a guarantee is required for a given loan is a business decision. Wisconsin Community argues it simply warranted it had negotiated the best deal it could for each loan. In the case

[9] Wisconsin Community argues interpretation of the contract terms is a question of law reviewed without deference. However, it challenges these findings as clearly erroneous, and does not identify any finding that is reviewed without deference.

[10] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

of August Lotz, the best deal it was able to negotiate was a loan with deferred conditional guarantees.

¶37 This argument misses the mark, for two reasons. First, the circuit court's findings dealt with disclosure and the approval process, not the terms of the loan. Nothing in the court's findings indicated personal guarantees were necessary for every loan. Wisconsin Community was free to make a loan to August Lotz without personal guarantees if it approved the loan using the correct procedures and its loan documents indicated no guarantees existed. The court found Wisconsin Community failed to follow that process here.

¶38 Second, the court did not find fault with the concept of a conditional guarantee. What the court found was that if Wisconsin Community agreed to a conditional guarantee, it was required to make sure the guarantee was signed and in the loan file. What Wisconsin Community actually did made it appear that a conditional guarantee was in place when in fact the truth was substantially more ambiguous.

¶39 Wisconsin Community next argues the August Lotz loan agreements were not "any financial information or written statement … to be furnished to [S&C] pursuant to [the October 11] Agreement…." Wisconsin Community points out that S&C viewed the loan documents before, not after, the October 11 agreement was made. Wisconsin Community argues its warranties applied only to documents provided after the agreement was entered.

¶40 This argument ignores the fact that the October 11 agreement included the sale of the August Lotz loans, which included transfer of all the August Lotz loan documents to S&C. Wisconsin Community's obligation under the October 11 agreement therefore included transferring the August Lotz

documents to S&C. Even though S&C reviewed the documents prior to the October 11 agreement, rather than when it received them, this does not mean Wisconsin Community did not warrant their accuracy.

¶41 Third, Wisconsin Community challenges the factual basis of the court's finding that the loan proceeds were disbursed on terms different from those approved by the loan committee. Wisconsin Community argues:

> [W]ith respect to the [April 2001 loan extension], Barton and Schlichter elected not to sign guarantees. As a result, no part of the line of credit was termed out and the limit on the line of credit was reduced to $1.95 million.

¶42 This statement is not supported by any citation to the record, and is not consistent with the court's findings or the record. The loan agreements in the record indicate that prior to April 2001, August Lotz had a $1.8 million line of credit. On April 29 and May 2, 2001, respectively, the August Lotz principals signed loan agreements for a $350,000 term note and a $1.95 million line of credit, for a total loan of $2.3 million. In fact, then, the line of credit was increased, and in addition August Lotz was granted a new term loan. The circuit court's finding that Wisconsin Community extended this additional credit in May 2001 without the approval of the loan committee is not clearly erroneous.

¶43 Finally, Wisconsin Community argues S&C would have discovered that Schlichter and Barton had not executed guarantees had S&C conducted proper due diligence. However, nothing in the October 11 agreement required S&C to perform any due diligence. As Wisconsin Community acknowledges in its brief, a warranty "is intended to relieve the promisee of any duty to ascertain the fact for himself…." ***Dittman v. Nagel***, 43 Wis. 2d 155, 160, 168 N.W.2d 190 (1969) (citation omitted). Wisconsin Community is bound by its warranties regardless of

whether S&C could potentially have discovered the lack of guarantees on its own.[11]

III. Damages

¶44 Wisconsin Community next challenges the methodology the circuit court used to calculate damages. Whether the circuit court used the correct methodology in calculating damages is a question of law reviewed without deference. ***Magestro v. North Star Envtl. Const.***, 2002 WI App 182, ¶10, 256 Wis. 2d 744, 649 N.W.2d 722.

¶45 Damages in a breach of contract case are typically expectation damages—that is, damages designed "to put the [non-breaching party] in as good a position financially as [it] would have been in but for the breach." ***Thorp Sales Corp. v. Gyuro Grading Co.***, 111 Wis. 2d 431, 438, 331 N.W.2d 342 (1983) (citations omitted). The breaching party is liable for those damages so long as they are "within contemplation of the parties when the contract was made." ***Handicapped Children's Educ. Bd. v. Lukaszewski***, 112 Wis. 2d 197, 206, 332 N.W.2d 774 (1983).

¶46 In this case, the court used the face value of the August Lotz loans as its starting place for calculating S&C's damages. The court then subtracted the value of the collateral on the day the loans were sold. Next, the court added S&C's incidental and consequential damages. These damages included the

[11] Wisconsin Community also argues in passing that it did not warrant that the loans were collectible. Wisconsin Community does not develop this argument, and we do not understand how this has any relevance to whether Wisconsin Community breached the warranties it did make.

additional loan to August Lotz to keep it in business, lost interest, and collection expenses related to the sale of August Lotz. Finally, the court subtracted amounts recovered in the sale of August Lotz.[12]

¶47 Wisconsin Community challenges two aspects of this calculation. First, it argues the court erred in starting with the face value of the loans. Wisconsin Community argues expectation damages for breach of warranty are the difference between the value of what Wisconsin Community warranted and what S&C actually received, plus incidental and consequential damages. *See* ***Mayberry v. Volkswagen of Am., Inc.***, 2005 WI 13, ¶18, 278 Wis. 2d 39, 692 N.W.2d 226 (citing WIS. STAT. § 402.714(2)-(3)). Wisconsin Community argues damages therefore are the difference between the loans with guarantees and the loans without guarantees. It argues there is no evidence of the value of the loans with guarantees because S&C never proved it would have been able to recover the full amount of the loans if guarantees had been in place.

¶48 Wisconsin Community ignores the rule that in a breach of warranty case, "the contract price is relevant but not conclusive evidence of the value of the goods as warranted at the time and place of acceptance." *See* ***id.***, ¶39. S&C purchased the August Lotz loans in an arm's length transaction believing Schlichter and Barton had executed conditional guarantees. The price S&C paid therefore reflects both parties' contemporaneous opinion—backed up by capital—on the value of the loans with guarantees on the date of sale, and is highly relevant evidence on that point. While S&C could also have valued the loans with guarantees using the method Wisconsin Community suggests, it chose not to, and

[12] The calculation included a number of other adjustments not relevant here.

Wisconsin Community apparently did not put in any evidence supporting its theory that the value of the loans was substantially less. The only evidence in the record therefore indicates the loans' value with guarantees on the day of sale was their face value. The court did not err in using that value as the starting place in its damages calculation.

¶49 Wisconsin Community next argues the damages calculation is erroneous because not all of S&C's damages were "within contemplation of the parties when the contract was made." *See* ***Lukaszewski***, 112 Wis. 2d at 206. Wisconsin Community argues it could not have anticipated S&C's decision to release Schlichter and Barton from liability, and S&C's decision resulted in unnecessary additional damages.

¶50 In this case, Wisconsin Community breached its warranty that the documents in the August Lotz loan files were accurate. At the time the contract was entered, both parties understood that S&C chose which loans to purchase based on its review of documents in the loan files. They should have expected that S&C would seek to hold Wisconsin Community responsible for losses on loans S&C would not have purchased had it known the correct information. Damages for part or all of the August Lotz loan balance were therefore "within contemplation" of both parties at the time the contract was made. *See* ***id.***

¶51 In addition, both parties should have anticipated that if a borrower defaulted, S&C would be required to make decisions on the best way to recover as much of the loan as possible. At bottom, Wisconsin Community is alleging S&C made unreasonable decisions in its attempt to recover the loan proceeds. This is an issue of mitigation of damages, not whether an item of damages is within the contemplation of the parties. *See* ***Peterson v. Cornerstone Prop. Dev., LLC***, 2006

WI App 132, ¶53, 294 Wis. 2d 800, 720 N.W.2d 716 (duty to mitigate requires use of "reasonable means under the circumstances to avoid or minimize the damages"). Failure to mitigate is an affirmative defense, with the burden of proof on the party raising the defense. ***Lobermeier v. General Tel. Co.***, 119 Wis. 2d 129, 148, 349 N.W.2d 466 (1984). It does not appear that Wisconsin Community alleged S&C breached its duty to mitigate at the circuit court, and Wisconsin Community does not argue mitigation in this appeal.

IV. S&C's cross-appeal

¶52 In its cross-appeal, S&C argues the court erred in finding it had not proven all the elements of intentional misrepresentation against Heartland and in not awarding punitive damages. However, for the reasons given above, S&C's tort claims, including its claim for intentional misrepresentation, are barred by the economic loss doctrine. We therefore need not reach S&C's challenge to the court's finding on this issue. *See* ***Gross***, 227 Wis. at 300. In addition, because the economic loss doctrine bars S&C's tort claims, S&C's claim for punitive damages also fails. *See* ***Schwigel v. Kohlmann***, 2005 WI App 44, ¶10, 280 Wis. 2d 193, 694 N.W.2d 467 (punitive damages not available for breach of contract).

By the Court.—Judgments affirmed in part; reversed in part, and cause remanded with directions. No costs.

Not recommended for publication in the official reports.