COURT OF APPEALS
DECISION
DATED AND FILED

April 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1639 **Cir. Ct. No. 01-CV-2731**

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

DRAGAN IVANKOVIC AND JASMINA IVANKOVIC,

PLAINTIFFS-APPELLANTS,

V.

WISCONSIN O'CONNOR CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Dragan and Jasmina Ivankovic have appealed pro se from a judgment dismissing their complaint against Wisconsin O'Connor Corporation. The trial court dismissed the Ivankovics' breach of contract claim on the ground that it was barred by the statute of limitations. It dismissed their claims of strict liability and negligent misrepresentation based on the economic loss

doctrine, determining that the Ivankovics' tort claims could not lie because they alleged only economic loss. We agree with the trial court's analysis, and affirm the judgment.

¶2 The Ivankovics commenced this action on November 13, 2001. In their complaint, they alleged that Wisconsin O'Connor built a four-unit apartment building in 1995. An offer to purchase and counteroffer for the sale of the building to the Ivankovics was signed by all of the parties on October 31, 1995. Closing occurred on November 15, 1995. The Ivankovics alleged that after the closing, they discovered that when it rained, water would penetrate the building's exterior, creating moisture problems on the interior of the building, in the apartments, and in the basement of the structure. They alleged that the water and moisture problem resulted from the improper installation of siding on the building during its construction.

¶3 In their first cause of action, the Ivankovics alleged breach of contract. They alleged that in conjunction with the sale, Wisconsin O'Connor represented to them that the property was in good condition, had been constructed in a sound manner and was free of any substantial defects. They alleged that Wisconsin O'Connor breached an express representation made in the offer to purchase, which stated: "Seller represents to Buyer that as of the date of acceptance Seller has no notice or knowledge of conditions affecting the property or transaction." They alleged that the water problem would significantly shorten the expected normal life of the property. They further alleged that it constituted a significant health or safety hazard, promoting insect infestation of the property, and would significantly reduce the value of the property.

¶4 The Ivankovics' second cause of action was for strict responsibility, based on their allegation that Wisconsin O'Connor's representations regarding the condition of the building were untrue. Their third cause of action was for negligent misrepresentation, based on allegations that Wisconsin O'Connor failed to exercise ordinary care when it warranted that it had no notice or knowledge of any condition affecting the property.

¶5 We conclude that the trial court properly dismissed the Ivankovics' claim for breach of contract based upon the six-year statute of limitations set forth in WIS. STAT. § 893.43 (2001-02).[1] Section 893.43 provides that an action upon a contract is barred unless it is commenced within six years after the cause of action accrues.

¶6 A cause of action for breach of contract accrues at the moment the contract is breached, regardless of whether the injured party knew or should have known that the breach occurred. ***CLL Assocs. v. Arrowhead Pac.***, 174 Wis. 2d 604, 607, 497 N.W.2d 115 (1993). This contrasts with tort claims, where the statute of limitations begins to run on the date that the injured party discovers, or with reasonable diligence should have discovered, the tortious injury. ***Id.*** at 609. Unlike tort actions, the discovery rule does not apply to actions for breach of contract. ***Id.*** at 610-11.

¶7 Pursuant to ***CLL***, it is clear that the six-year statute of limitations for the breach of contract claim commenced running when the contract was breached, not when the Ivankovics discovered the water problems or the breach. Moreover,

[1] All references to the Wisconsin Statutes are to the 2001-02 version.

in their complaint, the Ivankovics alleged that Wisconsin O'Connor represented that the building was in good condition, and breached the portion of the contract in which it represented that it had no notice or knowledge of conditions affecting the property "as of the date of acceptance." The Ivankovics acknowledged in their complaint that this representation was made in the offer to purchase, which was accepted by them on October 31, 1995. Because the alleged breach of contract was founded upon this representation, the breach occurred when the representation was made and the contract was accepted on October 31, 1995.

¶8 We therefore reject the argument made by the Ivankovics in the trial court, indicating that the breach occurred at the time of closing on November 15, 1995. We also reject the argument made by the Ivankovics on appeal. Although their argument is confusing, they appear to allege that the cause of action accrued before the offer to purchase was accepted, during the time the building was faultily constructed. This argument makes no sense because before the offer to purchase was accepted, there was no contract between the Ivankovics and Wisconsin O'Connor, and no breach of contract could have occurred.

¶9 Because this action was not commenced until November 13, 2001, more than six years after the offer to purchase was accepted on October 31, 1995, the trial court properly dismissed the Ivankovics' breach of contract claim. The trial court also properly dismissed the Ivankovics' claims for negligent misrepresentation and strict liability.

¶10 The economic loss doctrine applies to bar tort recovery for purely economic loss in consumer transactions, ***State Farm Mutual Automobile Insurance Co. v. Ford Motor Co.***, 225 Wis. 2d 305, 348, 592 N.W.2d 201 (1999), and in commercial transactions, ***Prent Corp. v. Martek Holdings, Inc.***, 2000 WI

App 194, ¶16, 238 Wis. 2d 777, 618 N.W.2d 201. Economic loss has been defined as damages for inadequate value, costs of repair and replacement of a defective product, and the consequent loss of profits. ***State Farm***, 225 Wis. 2d at 314. An economic loss may be direct or consequential, and includes a loss in the value of the product itself and losses which are caused because the product is defective or does not operate as represented. ***Prent***, 238 Wis. 2d 777, ¶17. However, economic losses do not include property damage to property other than the defective product or a system in which it is incorporated, nor do economic losses include damage arising from personal injury caused by the product. ***Id.*** In determining whether the economic loss doctrine should be applied, a court must examine the nature of the damages complained of, the risk that caused them to arise, and how that risk impacts on the policies underlying the economic loss doctrine. ***Id.***, ¶19.

¶11 Because the Ivankovics' purchase of property from Wisconsin O'Connor is a consumer purchase, we conclude that it is controlled by ***State Farm***'s holding that the economic loss doctrine applies to bar tort recovery for purely economic loss in consumer transactions. Moreover, even if there was any doubt as to whether ***State Farm*** governed this case, the allegations of the Ivankovics' complaint demonstrate why the economic loss doctrine applies here. In seeking damages, the gist of the Ivankovics' allegations is that the property has structural defects due to a water problem, and that the problems will reduce the value of the property. This is plainly an allegation of economic loss.[2] Moreover,

[2] In their brief, the Ivankovics also allege that they "will incur personal injury" if the property is not repaired. Such a claim is pure speculation. The Ivankovics have not alleged that personal injury to them or anyone else has occurred because of the water problems in the building. No basis therefore exists to conclude that they have suffered non-economic damages to which the economic loss doctrine is inapplicable.

the risk that the property was not in the condition represented by Wisconsin O'Connor when the offer to purchase was accepted was a risk that contract law was designed to address, and a matter that could have been addressed in the parties' contract. The trial court therefore properly concluded that the Ivankovics' tort claims for negligent misrepresentation and strict liability were barred by the economic loss doctrine.

¶12 As a final matter, we note that Wisconsin O'Connor has moved this court for an order determining that this appeal is frivolous under WIS. STAT. RULE 809.25(3). It contends that the Ivankovics knew, or should have known, that their appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

¶13 Whether an appeal is frivolous is an issue we decide as a matter of law. ***Lessor v. Wangelin***, 221 Wis. 2d 659, 666, 586 N.W.2d 1 (Ct. App. 1998). We must consider what a reasonable person in the position of the appellant would have known or should have known about the facts and law applicable to the appeal. ***Id.*** at 667. Because the Ivankovics could reasonably have concluded that the applicability of the economic loss doctrine to their tort claims was sufficiently unclear under the law as to warrant consideration on appeal, we decline to find their appeal to be frivolous.

By the Court.—Judgment affirmed.

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