COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0801 **Cir. Ct. No. 01CV001380**

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

GERALD GRAMS AND JOLIENE GRAMS,

PLAINTIFFS-APPELLANTS,

V.

MILK PRODUCTS, INCORPORATED,

DEFENDANT-RESPONDENT,

CARGILL, INCORPORATED,

DEFENDANT.

APPEAL from a judgment of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed*.

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Gerald Grams and Joliene Grams appeal a summary judgment in favor of Milk Products, Inc. The circuit court, after

considering the undisputed material facts, concluded that Milk Products was entitled to judgment as a matter of law because the economic loss doctrine barred the Grams' tort claims and that no privity of contract existed between the Grams and Milk Products. We agree. We also conclude that the Grams waived argument on the intentional misrepresentation claim because the basis for the claim on appeal, the label placed on the product by Milk Products, was not raised before the circuit court. We therefore affirm the judgment.

FACTS

¶2 The material facts are not in dispute, unless otherwise indicated. Milk Products manufactures milk replacer for various animal feed companies. During and prior to the times involved in this case, Milk Products was manufacturing milk replacer for Cargill, Inc. Cargill retailed the milk replacer under its own brand name and label. Milk Products manufactured "Half-Time" brand milk replacer per the Cargill proprietary formula, with medication included to suppress calf disease.

¶3 Some time in 2000, Cargill ordered the Half-Time milk replacer product from Milk Products without medication and arrangements were made to supply the non-medicated milk replacer product to Cargill. In November 2000, the Grams asked Armin Daubert, a Cargill salesman, about obtaining a less expensive milk replacer. The Grams and Cargill agreed that the medication would be removed from Half-Time in order to reduce the price. According to the Grams, Daubert represented to them that the Half-Time non-medicated version was being successfully used in other calf-raising operations.

¶4 In December 2000, Cargill contracted with the Grams to supply them with the non-medicated Half-Time milk replacer product, which Cargill

delivered later that month. The Grams did not contract with Milk Products for the non-medicated milk replacer.

¶5 The Grams began using non-medicated Half-Time milk replacer in January 2001 and continued using the product until approximately June 15, 2001. Soon after the Grams began using the non-medicated Half-Time milk replacer, their calves began to experience a lack of weight gain and deterioration in health, as well as an increased mortality rate. The Grams began complaining to Cargill of potential problems with the non-medicated milk replacer. Representatives of Milk Products came to the Grams' farm on May 24, 2001 and again in June 2001 to investigate the Grams' complaints. The Grams eventually terminated use of the non-medicated Half-Time product; afterwards, all the Grams' calves experienced weight gain similar to those experienced prior to the use of the non-medicated product, did not have health problems as experienced by the calves that had been fed the non-medicated product and had mortality rates similar to those experienced prior to using the non-medicated product. According to the Grams, they were the only persons to whom the Half-Time non-medicated milk replacer had been sold.

¶6 The Grams sued Milk Products and Cargill for breach of implied warranty, strict liability tort, negligence, intentional misrepresentation and strict liability misrepresentation. Milk Products and Cargill each filed for summary judgment. The circuit court granted Milk Products' summary judgment motion in its entirety, dismissing all counts against it. The circuit court concluded that the economic loss doctrine barred the common law negligence and strict liability claims as well as the strict responsibility claim. The circuit court also concluded that the economic loss doctrine barred the intentional misrepresentation claim on the same grounds as the other tort claims and, alternatively, that the undisputed facts did not show that the Grams were fraudulently induced to enter into a

contract with Milk Products. Additionally, the breach of implied warranty claim was dismissed for lack of privity of contract between Milk Products and the Grams.[1] The Grams appeal the summary judgment favoring Milk Products.

DISCUSSION

¶7 When reviewing a summary judgment, we perform the same function as the circuit court and thus our review is de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). On summary judgment, a court must view the facts and the inferences to be drawn from those facts in the light most favorable to the party opposing the motion. ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980).

¶8 On summary judgment the court does not decide the

> issue of fact; it decides whether there is a genuine issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his [or her] entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.

Energy Complexes, Inc. v. Eau Claire County, 152 Wis. 2d 453, 461-62, 449 N.W.2d 35 (1989) (citation omitted). "If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its

[1] The circuit court also dismissed all the negligence and misrepresentation claims against Cargill based upon the economic loss doctrine. However, the court did not dismiss the breach of implied warranty claim against Cargill.

significance, it would be improper to grant summary judgment." ***Grams***, 97 Wis. 2d at 339.

PRIVITY OF CONTRACT

¶9 We first address the Grams' argument that they are entitled to recovery on their breach of implied warranty claim against Milk Products. The Grams acknowledge they had no direct contract with Milk Products but maintain they are entitled to recover as third-party beneficiaries of the contract between Milk Products and Cargill. We disagree.

¶10 To be a third-party beneficiary of a contract, the contract must intentionally be entered into for the direct benefit of the third party. ***Mercado v. Mitchell***, 83 Wis. 2d 17, 28, 264 N.W.2d 532 (1978). A third party cannot recover upon the contract unless the contract indicates an intention to secure some benefit to the third party. ***Peters v. Peters Auto Sales, Inc.***, 37 Wis. 2d 346, 351, 155 N.W.2d 85 (1967). The benefit must be more than incidental. ***Krawczyk v. Bank of Sun Prairie***, 174 Wis. 2d 1, 8, 496 N.W.2d 218 (Ct. App. 1993).

¶11 The undisputed evidence shows that Milk Products had an oral contract with Cargill to produce the Half-Time non-medicated milk replacer. While the Grams present no evidence of the contract, Milk Products conceded that a contract between it and Cargill existed. The summary judgment record, however, does not provide any facts about the terms of the contract. The Grams acknowledge the absence of privity of contract between them and Milk Products. However, the Grams argue that Cargill and Milk Products entered into the contract to produce the non-medicated milk replacer primarily for the Grams' benefit. The Grams refer to a memorandum of Dan Hager, of Cargill, in support of their argument, which states "In December of 2000 the [Grams] first started purchasing

a custom blend of milk replacer from Cargill that was produced by Milk Products, Inc." The Grams assert this memorandum shows that their order for non-medicated milk replacer was a special order that Milk Products had reason to know was being sold to a specific customer. From this, the Grams conclude, they were third-party beneficiaries of the contract between Cargill and Milk Products.

¶12 Milk Products argues the contract between it and Cargill was not intended to primarily and directly benefit the Grams but only the two parties to the contract. Milk Products asserts no privity of contract existed between it and the Grams, relying in great part on the reasoning provided in ***Cooper Power Systems, Inc. v. Union Carbide Chemicals and Plastics Co., Inc.***, 123 F.3d 675 (7th Cir. 1997). In ***Cooper Power*** the court stated:

> A person cannot assert contractual rights as a third-party beneficiary to a contract unless that person was an intended beneficiary of the contract…. "[T]here must be evidence, on the part of the promisee, that he intended to directly benefit a third party, and not simply that some incidental benefit was conferred on an unrelated party by the promisee's actions under the contract. There must be evidence that the promisee assumed a duty to the third party."

Id. at 680 (citations omitted).

¶13 The circuit court in this case concluded "there was no issue of fact that the [Grams] do not have a contractual relationship with Defendant Milk Products, Co." The circuit court found support for its conclusions in ***Cooper Power***. The facts in ***Cooper Power*** are closely analogous to the facts of this case. Union Carbide contracted with and supplied some resins to a company named PFI. ***Id.*** at 679. PFI used these resins to develop paint, which was subsequently sold to Cooper Power. ***Id.*** Union Carbide was aware that PFI sold this paint to customers who then used the paint to coat electrical transformers. ***Id.*** Cooper Power used

this paint to coat some of its electrical transformers, which subsequently failed because the paint could not withstand high temperatures. ***Id.*** Cooper Power filed claims against Union Carbide and PFI. ***Id.*** at 679-80.

¶14 Cooper Power's claims against Union Carbide were based in contract and warranty. The court found there was no privity of contract between Cooper Power and Union Carbide, concluding that Cooper Power was not a third-party or intended beneficiary of the contract between Union Carbide and PFI. ***Id.*** at 680. Cooper Power's claims against Union Carbide were dismissed. ***Id.*** The court reasoned that the manufacturer's benefit obtained by the sale of its product by a distributor was not sufficient to make the ultimate buyer an intended beneficiary of the sales contract. ***Id.*** The court concluded that Cooper Power was, at best, an incidental beneficiary and denied the claims. ***Id.***

¶15 In this case, Cargill and Milk Products contracted for the production of milk replacer. Cargill sold the milk replacer to the Grams. As in ***Cooper Power***, there is no privity of contract between the manufacturer, Milk Products, and the ultimate customer, here the Grams. The Grams, similar to Cooper Power, are merely incidental beneficiaries. The Grams have not provided any evidence to support their claim they were intended third-party beneficiaries to the contract between Cargill and Milk Products.

¶16 Privity of contract is essential to a cause of action for breach of implied warranty. *See* ***Dippel v. Sciano***, 37 Wis. 2d 443, 450, 460, 155 N.W.2d 55 (1967). Because there was no privity of contract between the Grams and Milk Products, we conclude the circuit court properly dismissed the Grams' claim for breach of implied warranty.

ECONOMIC LOSS DOCTRINE

¶17 The Grams next argue that the circuit court erred in dismissing their tort claims of strict liability, common law negligence, strict responsibility misrepresentation, and intentional misrepresentation by applying the economic loss doctrine. According to the Grams, the economic loss doctrine is inapplicable to their tort claims. We conclude the economic loss doctrine applies to bar the tort claims and that the circuit court properly dismissed these claims based on the economic loss doctrine.

¶18 The economic loss doctrine is a judicially created doctrine under which a purchaser of a product cannot recover from a manufacturer on a tort theory for damages that are solely economic. ***Bay Breeze Condo. Ass'n, Inc. v. Norco Windows, Inc.***, 2002 WI App 205, ¶9, 257 Wis. 2d 511, 651 N.W.2d 738. It is based upon an understanding that contract law and the law of warranty are better suited than tort law for dealing with purely economic loss in the commercial arena. ***Id.***; *see also* ***Daanen & Janssen, Inc. v. Cedarapids, Inc.***, 216 Wis. 2d 395, 403-04, 573 N.W.2d 842 (1998). Consequently, when contractual expectations are frustrated because of a defect in the subject matter of the contract and the only damages are economic losses, the exclusive remedy lies in contract. ***Bay Breeze***, 257 Wis. 2d 511, ¶9.

¶19 The policies inspiring the economic loss doctrine are (1) protection of the parties' freedom to allocate economic risk by contract; (2) encouragement of the party in the best position to assess the risk of economic loss (the purchaser) to assume, allocate or insure against that risk; and (3) maintenance of the fundamental distinction between tort law and contract law. ***Id.***, ¶10. In protecting

the distinction between tort and contract law, the economic loss doctrine recognizes

> [i]n contract law, the parties' duties arise from the terms of their particular agreement; the goal is to hold parties to that agreement so that each receives the benefit of his or her bargain. The aim of tort law, in contrast, is to protect people from misfortunes which are unexpected and overwhelming. The law imposes tort duties upon manufacturers to protect society's interest in safety from the physical harm or personal injury which may result from defective products. Thus, where a product fails in its intended use and injures only itself, thereby causing only economic damages to the purchaser, "the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong."

Id., ¶11 (citation omitted).

¶20 In protecting the freedom to contract, commercial parties may set the terms of their own agreement, including warranties, disclaimers and limitations of remedies, and a manufacturer may negotiate with its distributors and buyers to purchase the product at a less expensive price; in some situations this may be the only way to encourage manufacturers to produce certain products. ***Id.***, ¶12. As a matter of policy, when commercial parties have allocated their respective risks through contract, the economic loss doctrine directs that it is more appropriate to enforce that bargain than to allow "end runs" around that bargain through tort law. ***Id.***

¶21 Application of the economic loss doctrine is justified to maintain the distinct functions of tort and contract law. ***Daanen & Janssen***, 216 Wis. 2d at 403. Although policies underlying contract law and tort law may overlap, they do vary. ***Id.*** at 404.

¶22 The economic loss doctrine does not apply if the damage is to property other than the defective product itself. In that situation, a complainant may pursue an action in tort. ***Bay Breeze***, 257 Wis. 2d 511, ¶13. "In short, economic loss is damage to a product itself or monetary loss caused by the defective product, which does not cause personal injury or damage to other property." ***Id.*** (citation omitted).

¶23 The Grams argue that the economic loss doctrine is inapplicable to all their tort claims because the non-medicated milk replacer caused damage to "other property." We are not persuaded that the "other property damage" exception to the economic loss doctrine applies to the facts at hand.

¶24 The "other property" exception to the economic loss doctrine does not apply if the claim simply involves disappointed performance expectations. ***Selzer v. Brunsell Bros. Ltd.***, 2002 WI App 232, ¶36, 257 Wis. 2d 809, 652 N.W.2d 806. For example, in ***Selzer***, Selzer purchased and took delivery of a number of windows for installation in his home. ***Id.***, ¶5. Eventually Selzer noticed wood rot in several of the window's frames, which ultimately spread to the siding below a number of the windows. ***Id.***, ¶6. In his action for breach of both express and implied warranty and intentional, negligent and strict liability misrepresentation against the manufacturer, Selzer argued that his claims fell under the "other property" exception to the economic loss doctrine because the rot on a number of the windows spread beyond the windows to his siding. ***Id.***, ¶35. We rejected this argument. ***Id.***

¶25 We concluded that Selzer had expected his windows to resist rot; they failed to do so, which in turn caused damage to the siding adjacent to the windows. ***Id.***, ¶37. We determined that a tort claim based on these losses

stemmed directly from the failure of the windows to perform as expected. ***Id.*** Because Selzer had not established harm beyond disappointed expectations, he was precluded from pursuing a recovery in tort. ***Id.***

¶26 In a case similar to the one at hand, ***D'Huyvetter v. A.O. Smith Harvestore Products***, 164 Wis. 2d 306, 475 N.W.2d 587 (Ct. App. 1991), a farmer's silo failed to be as "air-tight" as expected, which allegedly damaged the feed inside the silo, which in turn allegedly caused illness, death and poor production and reproduction among the farmer's livestock. ***Id.*** at 326. Even though the farmer had claimed considerable damage beyond the costs to repair the silo, we held that this damage did not qualify as "other property" damage because all alleged damages arose directly from the failure of the silo to perform as expected. ***Id.*** at 328. The damages were therefore properly recoverable in contract, not tort. ***Id.***

¶27 We conclude that the present facts are analogous to ***Selzer*** and almost identical to those in ***D'Huyvetter*** and compel a similar result. The Grams expected the Half-Time non-medicated milk replacer to provide adequate nutrition to the calves. The milk replacer failed to do so, which in turn caused damage to the calves. A tort claim based on these losses stems directly from the failure of the non-medicated milk replacer to perform as expected. Because the Grams have not proven any harm beyond disappointed performance expectations, they are precluded from pursuing a recovery in tort.

¶28 In the alternative, the Grams argue that the economic loss doctrine does not bar their intentional misrepresentation claim because they were fraudulently induced to purchase and use the non-medicated Half-Time product. The Grams claim they were fraudulently induced to purchase and use the non-

medicated milk replacer by the label placed on the product by Milk Products that, they claim, provided false information about the amount of protein contained in the product. They argue that had the label contained accurate information pertaining to the protein content, they would have been informed that they were purchasing an inferior product and would have ceased purchasing it.

¶29 Because this issue is being raised for the first time on appeal, we conclude the Grams have waived this argument. Although we engage in a de novo review of summary judgment determinations, we may apply waiver to arguments raised for the first time on appeal. ***Gruber v. Village of North Fond du Lac***, 2003 WI App 217, ¶27, 267 Wis. 2d 368, 671 N.W.2d 692. "Whether the court will in its discretion consider [an issue raised for the first time on appeal] depends upon the facts and circumstances of each case." ***Hopper v. Madison***, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977).

¶30 The record and the briefs persuade us we should apply waiver here. The Grams did not plead misrepresentation based on inaccurate label information nor did they argue misrepresentation before the circuit court based on the label. Waiver is appropriate because, had the Grams raised their argument regarding the label in response to the summary judgment motion, Milk Products may have been able to present factual materials in rebuttal. More importantly, had the Grams raised the label issue with any prominence to the circuit court, the court could have specifically addressed it. This did not occur. "We are loath to reverse a trial court on an issue that the trial court never had the opportunity to address." ***Gruber*** at ¶27. Moreover, the Grams do not point to any part of the summary judgment

record establishing they relied on the information on the label leading them to purchase the milk replacer product.[2]

¶31 The absence of contractual privity between the Grams and Milk Products does not alter the conclusion that the economic loss doctrine bars their tort claims. The policy for application of the economic loss doctrine to tort actions applies with equal force regardless of whether privity of contract exists. ***Daanen & Janssen***, 216 Wis. 2d at 403.

¶32 As previously discussed, application of the economic loss doctrine serves to protect commercial parties' freedom to contract. ***Daanen & Janssen***, 216 Wis. 2d at 407. The important policy of enforcing the agreed-upon bargain rather than allowing an end-run around the bargain through tort law applies with equal force where privity of contract is at issue. For example, if a remote commercial purchaser is given a direct cause of action in tort against the manufacturer, the entire risk of economic loss is borne by that manufacturer. ***Id.*** If no such action is permitted, the manufacturer and its distributors and purchasers are free to allocate risk by disclaiming or limiting their respective liabilities by contract. ***Id.*** If remote commercial purchasers could seek full recovery against the manufacturer regardless of any limitation in the manufacturer's contract with its distributor, manufacturers, in essence, would be deprived of their freedom to negotiate, allocate and limit liability. ***Id.*** at 408.

¶33 When the Grams purchased the non-medicated milk replacement from Cargill, they entered into a contract with Cargill and had the opportunity to

[2] Reliance is an element of intentional misrepresentation. *See* WI JI-Civil 2401 (2002).

allocate risks between them and Cargill. It is undisputed that the contract contains no express warranty. Cargill in turn negotiated a separate contract with Milk Products, allocating the risks between them. Milk Products had no opportunity to allocate risks between it and the Grams through negotiating a contract directly with them. We see no reason to encroach upon the parties' allocations of the risk of economic loss and to extricate the parties from their bargains. *See* ***id.*** at 410.

¶34 The Grams' allegations are of purely economic loss and fail to implicate any tort law concerns involving unreasonably dangerous products or public safety. They invoke contract law concerns involving failed economic expectations. We therefore must conclude, as did the ***Daanen & Janssen*** court, that even in the absence of privity, the economic loss doctrine bars a remote commercial purchaser from recovering economic losses from a manufacturer under tort theories of strict liability and negligence. *See* ***id.*** at 400. The Grams cannot recover in tort for what are essentially contract damages. The economic loss doctrine bars the Grams' tort claims.

CONCLUSION

¶35 The circuit court properly granted summary judgment against the Grams on their breach of implied warranty claim against Milk Products because, based on the submissions, it is undisputed they have no contract with Milk Products and are not third-party beneficiaries of the contract between Milk Products and Cargill. Furthermore, summary judgment was proper on the tort claims against Milk Products under the economic loss doctrine, based on the undisputed facts the defective product in question did not cause damage to other property but merely reflected disappointed expectations. Finally, the Grams'

intentional misrepresentation claim was waived. We therefore affirm the summary judgment in favor of Milk Products.

By the Court.—Judgment affirmed.

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