

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 28, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2010AP890

Cir. Ct. No. 2008CV5822

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DANIEL L. THELEN AND SUZANNE H. THELEN,

PLAINTIFFS-APPELLANTS,

v.

**DELORES CREMER AND THOMAS AND DELORES CREMER
REVOCABLE TRUST,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
JOHN C. ALBERT, Judge. *Affirmed.*

Before Vergeront, P.J., Lundsten and Blanchard, JJ.

¶1 LUNDSTEN, J. Daniel and Suzanne Thelen entered into an agreement with the Thomas and Delores Cremer Revocable Trust for the purchase of commercial property. As part of that agreement, the Thelens received a

condition report signed by Delores Cremer stating that, to the extent past remodeling had occurred, the proper permits had been obtained. Years later, the Thelens brought suit against Cremer and the Trust under misrepresentation theories, alleging that the condition report was false. The circuit court granted summary judgment in favor of Cremer and the Trust, concluding that the economic loss doctrine barred the claims. The Thelens appeal, arguing that summary judgment was improper and, additionally, that the circuit court erred when granting a motion to strike their second amended complaint. We reject the Thelens' arguments and affirm.

Background

¶2 In May 2002, Daniel and Suzanne Thelen entered into an agreement to purchase commercial real estate from the Thomas and Delores Cremer Revocable Trust.¹ As pertinent here, that agreement 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 other than those identified in Seller’s Real Estate Condition Report ... provided to Buyers within 3 days of acceptance.” The Thelens received a condition report signed by both Thomas and Delores Cremer in spaces provided for “owner’s certification” signatures, certifying that “the information in this report is true and correct to the best of the owner’s knowledge.” Among other representations, the condition report had “no” marked next to the item stating: “I am aware either that remodeling affecting the

¹ The limited documents in the record, if viewed alone, would leave some doubt about the identity of the seller in this case. The record, however, contains an admission from the Thelens that “they purchased the property from the Thomas and Delores Cremer Revocable Trust.” Consistent with this admission, the parties assume that the sales contract was between the Trust and the Thelens, and we follow their lead for purposes of this opinion.

property's structure or mechanical systems was done or that additions to this property were made during my period of ownership without the required permits.”

¶3 In December 2008, after Thomas Cremer died, the Thelens brought suit against the Trust and also against Delores Cremer individually. In May 2009, the Thelens filed a first amended complaint. Because this amended complaint was filed within six months of the original complaint, it became the operative complaint by operation of WIS. STAT. § 802.09(1).² Pertinent here, the Thelens alleged that the condition report falsely represented that all remodeling was done with the required permits, and they brought claims for intentional, negligent, and strict liability misrepresentation.

¶4 Cremer and the Trust moved for summary judgment, arguing that the economic loss doctrine barred the three misrepresentation claims. On September 29, 2009, the Thelens filed a brief opposing summary judgment and, on the same date, filed a second amended complaint. Cremer and the Trust moved to strike the second amended complaint, arguing that the Thelens had not sought leave to amend and that no other basis for amendment was present. The circuit court addressed both motions in one decision. First, the court granted the motion to strike. Second, concluding that the economic loss doctrine barred the Thelens' claims, the court granted summary judgment in favor of Cremer and the Trust. The Thelens appeal that decision.

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Discussion

¶5 The Thelens raise three issues on appeal, and we address each in turn. In subsections A and B, we refer to Delores Cremer and the Thomas and Delores Cremer Revocable Trust collectively as Cremer. In subsection C, we address arguments directed at Delores Cremer individually and, for clarity's sake, in that section we refer to Cremer by her first name.

A. Whether The Circuit Court Improperly Struck The Thelens' Second Amended Complaint

¶6 The Thelens argue that the circuit court misused its discretion when it granted Cremer's motion to strike their second amended complaint. That amendment would have added language specifying a statutory claim against Cremer. The Thelens complain that the circuit court erred because it should have, but did not, analyze whether the amendment would prejudice Cremer. We are not persuaded.

¶7 Amendments to pleadings are governed by WIS. STAT. § 802.09(1), which provides, in pertinent part:

A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires.

¶8 Here, the six-month "matter of course" amendment option was no longer available when the Thelens filed the second amended complaint, and Cremer did not give consent to the amendment. Thus, the Thelens needed leave of the court. As explained below, the Thelens' argument fails because they neither

requested leave to amend nor presented argument on this topic until a subsequent reconsideration motion.

¶9 In September 2009, over nine months after filing suit and over four months after filing a first amended complaint, and without an oral or written request to amend, the Thelens filed a second amended complaint. Apparently as a preemptive strategy, Cremer moved to strike the second amended complaint, arguing:

[T]he second amended complaint was filed more than six (6) months after the original summons and complaint were filed and the plaintiffs have already filed one amended complaint in the above-captioned action. Accordingly, the plaintiffs may file an amended complaint only by leave of the Court or by written consent of the defendants. *The defendants have not agreed in writing to permit the plaintiffs to file an amended complaint stating a new cause of action, which the plaintiffs have done, and the Court has not granted the plaintiffs leave to file the second amended complaint.*

(Emphasis added.) Neither before the circuit court nor on appeal do the Thelens argue that the statements in this motion are inaccurate. Thus, we deem the Thelens to have conceded these points.

¶10 We stress that the circuit court was not asked to decide whether it should grant leave to amend. Cremer did not argue that the circuit court should not grant leave to amend. More significantly, the Thelens did not request leave to amend, did not respond to Cremer's motion to strike, and did not otherwise present argument as to why the court should exercise its discretion to grant leave to amend. It is true that the circuit court granted Cremer's motion to strike the second amended complaint. However, that was in response to Cremer's motion and does not suggest that the court was addressing whether to grant leave to amend.

¶11 The Thelens later moved for reconsideration of the court’s decision, but they do not complain about the circuit court’s denial of that reconsideration motion. If the Thelens believe that such a challenge is implicit in their argument, they are mistaken. A different discretionary standard applies to reconsideration motions, and such an argument would require development that is lacking here.

¶12 In sum, the only argument the Thelens make on appeal is meritless. They ask us to review whether the circuit court properly applied a leave-to-amend analysis, but they do not explain why the court was required to undertake such an analysis in the absence of a request for leave to amend or argument on that topic.

B. Intentional Misrepresentation Claim

¶13 The Thelens contend that their first amended complaint states a statutory claim under WIS. STAT. §§ 895.446(1) and 943.20(1)(d) and, therefore, should not have been dismissed on summary judgment. However, as we explain below, although the Thelens complain about the circuit court’s summary judgment decision, they failed to present developed argument on this topic prior to that decision. We decline to analyze the circuit court’s decision based on reasoning that was not timely presented.

¶14 WISCONSIN STAT. § 895.446(1)³ provides a civil cause of action for violations of certain criminal code provisions, including WIS. STAT. § 943.20.

³ WISCONSIN STAT. § 895.446(1) states:

(1) Any person who suffers damage or loss by reason of intentional conduct that occurs on or after November 1, 1995, and that is prohibited under s. ... 943.20 ... has a cause of action against the person who caused the damage or loss.

(continued)

Pertinent here, § 943.20(1)(d) prohibits “[o]btain[ing] title to property of another person by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made.” The Thelens argue that the circuit court erred when it “refused to construe the Thelens’ first cause of action in their first amended complaint to state a valid claim of fraudulent misrepresentation under Sections 895.446(1) and 943.20(1)(d).”

¶15 The Thelens’ first claim for relief, labeled “intentional misrepresentation,” stated:

14. The plaintiffs restate the [general] allegations set forth in paragraphs 1-13 above, as if set forth here in full.

15. The defendants knew the [previously stated] representations to be untrue or, alternatively, made such misrepresentations recklessly without caring whether or not the representations were true or false. The defendants made the representations with the intent to deceive the plaintiffs and for the purpose of inducing the plaintiffs to act on it to the plaintiffs’ damage.

Cremer interpreted this quoted text in the complaint as stating a common law intentional misrepresentation claim. Cremer moved for summary judgment, arguing that the claim should be dismissed because it is barred by the economic loss doctrine.⁴

Remedies available for a violation of § 895.446(1) include actual damages and “[e]xemplary damages of not more than 3 times the amount awarded [in actual damages].” WIS. STAT. § 895.446(3).

⁴ The elements of intentional misrepresentation are:

- (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant made the

(continued)

¶16 The Thelens, in opposing summary judgment, did not argue that Cremer was incorrect about the effect of the economic loss doctrine *on the common law claim*. Rather, the Thelens took a different approach that required the following two propositions to be true: (1) “the economic loss doctrine does not bar claims for intentional misrepresentation where the alleged injury may involve a violation of Wisconsin Statute,” and (2) the Thelens’ “intentional misrepresentation” claim for relief states a statutory claim under WIS. STAT. §§ 895.446(1) and 943.20(1)(d).

¶17 In support, the Thelens developed an argument directed at their first proposition—that, as a general principle, statutory claims are not barred by the economic loss doctrine. But the Thelens provided the circuit court with no argument supporting their second proposition—that their complaint states a claim under WIS. STAT. §§ 895.446(1) and 943.20(1)(d). Rather, on this topic, the Thelens made only the following bare assertion: “intentional misrepresentation ... claims state a cause of action for the defendants’ violation of WIS. STAT. §§ 895.446(1) and 943.20(1)(d).” This assertion does not constitute a developed legal argument. And nowhere in their summary judgment argument did the Thelens add to it. For example, they did not cite a case for the proposition that, as a general matter, all pleadings that are sufficient to state a cause of action for common law intentional misrepresentation are also sufficient to state this statutory

representation either knowing that it was untrue, or recklessly not caring whether it was true or false; (4) the defendant made the representation with the intent to deceive the plaintiff in order to induce the plaintiff to act on it to plaintiff’s pecuniary damage; and (5) the plaintiff believed that the representation was true and relied on it.

Malzewski v. Rapkin, 2006 WI App 183, ¶17, 296 Wis. 2d 98, 723 N.W.2d 156.

claim. Neither did the Thelens analyze their complaint in light of §§ 895.446(1) and 943.20(1)(d). In fact, the Thelens did not even discuss what is required to state a claim under §§ 895.446(1) and 943.20(1)(d).⁵ Also notable is that, while the Thelens ask us to construe their complaint “liberally” to state a statutory claim, they made no such request in their summary judgment argument before the circuit court. Put simply, the Thelens made their bare assertion and then left it to wither.

¶18 On appeal, the Thelens ignore their lack of a developed argument at the summary judgment stage. They present no reason why, given that they failed to present a developed argument to the circuit court, we should reverse the court’s summary judgment decision. As we noted in the leave-to-amend context above, the Thelens moved for reconsideration of the court’s decision. But, once again here, they do not complain about the circuit court’s denial of that reconsideration motion. Thus, we are not presented with arguments that address that decision and its different discretionary standard. Again lacking a developed argument, we decline to address the motion for reconsideration decision.

⁵ The elements of WIS. STAT. § 943.20(1)(d) are:

- (1) the defendant made a false representation to the owner of the property;
- (2) the defendant knew that the representation was false;
- (3) the defendant made the representation with the intent to deceive and defraud the property’s owner;
- (4) the defendant got title to the property as a result of the false representation;
- (5) the owner of the property was deceived by the representation; and
- (6) the owner of the property was thus defrauded.

Malzewski, 296 Wis. 2d 98, ¶21.

*C. Negligent And Strict Liability Misrepresentation Claims
Against Delores Cremer Individually*

¶19 The Thelens complain that the circuit court improperly relied on the economic loss doctrine to dismiss two common law tort claims: negligent misrepresentation and strict liability misrepresentation against Delores in her individual capacity. These claims relate to the “condition report” signed by Delores representing that, to the best of her knowledge, she was not aware of remodeling done to the property without the required permits.

¶20 The Thelens submit that the economic loss doctrine bars these claims as to the contractual party—the Trust—but not as to third parties, such as Delores individually. Their argument is premised on *Shister v. Patel*, 2009 WI App 163, 322 Wis. 2d 222, 776 N.W.2d 632. In effect, the Thelens ask us to expand on the holding in *Shister* to cover situations such as this one. We decline to do so for the following reasons.

¶21 The Thelens’ *Shister* argument hinges on the proposition that Delores Cremer, like the real estate broker in *Shister*, performed a “service” as part of the real estate transaction between the Thelens and the Trust. To put this argument into context, we briefly describe the situation addressed in *Shister*.

¶22 In *Shister*, a buyer, pursuant to an agreement, purchased residential real estate. *Id.*, ¶2. The sellers had hired a real estate broker and used that broker’s services to sell the real estate. *See id.* Prior to entering into the purchase agreement, the sellers provided the buyer with a “condition report” stating, among other things, that the sellers “lacked knowledge regarding any remodeling done without the required permits.” *Id.* It was later revealed that not only had the sellers known that the required permits were lacking, but also that the sellers

informed their real estate broker of this fact and that the real estate broker “told [the sellers] not to disclose the remodeling ... without permits on the condition report.” *Id.*, ¶3. Among other claims, the buyer sued the real estate broker under tort theories of intentional and strict liability misrepresentation. *Id.*, ¶6. Addressing “the liability of third party professionals who are involved in the real estate transaction, and whose duties and responsibilities to the plaintiff do not arise out of contract,” we held that the economic loss doctrine did not bar the claims against the real estate broker. *Id.*, ¶¶12, 18.

¶23 The Thelens argue that we should follow *Shister*’s result here because Delores provided a “service” as that term is used in *Shister*. In particular, the Thelens’ reasoning is that: (1) key to *Shister* is that the real estate broker performed a service; (2) Delores performed a “service” as that term is used in *Shister*; and, therefore, (3) the result here should be the same as in *Shister*—the claims should not be barred by the economic loss doctrine. We need not address all parts of this argument because the Thelens have failed to provide support for the second part—that Delores performed a “service” as that term is used in *Shister*.

¶24 The Thelens assert the following:

Regardless of whether Delores Cremer was obligated to execute and deliver a condition report to the Thelens, once she undertook to provide such a report she assumed an independent duty to make a reasonable and diligent inquiry and provide information to the Thelens that was accurate, inclusive and not misleading. *Such duty was in the nature of a service, similar to the service provided by the broker in Shister.* This duty existed independently of any duty as trustee to perform under the purchase agreement.

(Emphasis added.) This paragraph, and the highlighted text in particular, simply constitutes an assertion that Delores’s activity here is akin to the service performed by the broker in *Shister*. Nowhere do the Thelens explain why we should adopt this view.

¶25 *Shister* addressed “the provision of brokerage services” from a paid professional “in the course of [a] transaction entrusted to [the broker].” *Id.*, ¶¶13, 15. Here, the Thelens concede that Delores was not a paid professional in the real estate context, and they do not suggest that she was otherwise hired to do anything. More to the point, they do not explain how Delores’s filling out and signing of a condition report based on her knowledge of the property was a “service” in any meaningful sense, under *Shister* or otherwise. To the contrary, so far as we can tell, Delores’s role was more like a party to the contract than a third-party paid professional.

¶26 The Thelens do not otherwise develop an argument that the circuit court erred when it dismissed their negligent and strict liability misrepresentation claims against Delores. For example, the Thelens assert that it also mattered in *Shister* that there was no contractual privity between the real estate broker and the buyer, but the Thelens do not develop a stand-alone argument based on lack of privity here. The Thelens also cite three policy concerns in an effort to buoy their *Shister* argument. But the Thelens do not clearly explain that these policy arguments have freestanding significance. However, for the sake of completeness, we briefly explain why these policy arguments are not persuasive.

¶27 The Thelens, relying on *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis. 2d 395, 573 N.W.2d 842 (1998), point to three policies underlying

the economic loss doctrine, and argue that they are inapplicable here. *See id.* at 403 (stating the three policies). We address each in turn.

¶28 First, the Thelens point to the policy of maintaining “the fundamental distinction between tort law and contract law.” *Id.* The Thelens categorically assert that this policy is not applicable where, as here, there is no contractual privity between the parties. We need not discuss this argument in detail because it is undeveloped. For example, the Thelens’ categorical proposition appears to conflict with the very case on which they rely. *See id.* (stating that the economic loss doctrine “is generally based on three policies [including the fundamental-distinction policy], none of which is affected by the presence or absence of privity between the parties”). The Thelens do not address this.

¶29 Second, the Thelens point to the policy of protecting “commercial parties’ freedom to allocate economic risk by contract.” *Id.* The Thelens assert, without support, that this policy is relevant only to “distributive chain” scenarios, not property sale cases such as the present case. However, the Thelens do not demonstrate how this assertion squares with seemingly contrary case law. *See, e.g., Van Lare v. Vogt, Inc.*, 2004 WI 110, ¶¶21, 27, 274 Wis. 2d 631, 683 N.W.2d 46 (applying the economic loss doctrine in a commercial property sale scenario and relying on this policy as relevant).

¶30 Third, the Thelens point to the policy of encouraging “the party best situated to assess the risk [of] economic loss, the commercial purchaser, to assume, allocate, or insure against that risk.” *Daanen*, 216 Wis. 2d at 403. The Thelens assert that it matters under this policy that Delores allegedly knew about permit defects and that the Thelens could not have known about those defects.

The Thelens misapprehend this policy. The point is not that a seller knows more about the product than a buyer. The point is that purchasers, particularly commercial purchasers, are well situated to assess the risks that matter to them and to bargain accordingly. The Thelens suggest no reason why they are not comparable to the commercial purchasers discussed in *Daanen* and similar cases.

¶31 Accordingly, the Thelens have not persuaded us that the circuit court improperly relied on the economic loss doctrine to dismiss the two common law tort claims against Delores individually.

Conclusion

¶32 For the reasons discussed, we affirm the circuit court's order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

