COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0085 **Cir. Ct. No. 03SC002174**

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

VINCENT T. PRESTON,

PLAINTIFF-APPELLANT,

V.

CONDON CONSTRUCTION AND REALTY, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Vincent Preston appeals a judgment dismissing his small claims action to recover damages resulting from a broken lateral sewer

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

pipe leading into a house that Condon Construction & Realty had built and sold to Preston five years earlier. We affirm for the reasons discussed below.

Background

¶2 Condon built the house in 1997 and sold it to Preston and his wife in 1998, pursuant to a "Residential Offer to Purchase" contract. Condon provided the Prestons with a written warranty which provided, in part: "The workmanship and material supplied to this project carries a one year warranty against defects" and "The builder will be available to make corrections or adjustments to the component parts of the home for a period of one year."

¶3 In 2003, a leak developed at a coupling joint in the lateral pipe connecting the house to the municipal sewer system. It cost Preston $3,239.78 to excavate and repair the lateral pipe, which went under the driveway. Preston filed this small claims action, seeking to recover damages under theories of general contractor's negligence, negligent misrepresentation, and breach of implied warranty. Preston presented testimony from a plumber that the hole either developed from water flow through a solder joint that was bad to begin with, or, as the plumber believed was more likely, a pebble worked its way through the pipe and got caught at the joint, where vibrations slowly caused it to wear its way through the pipe. The plumber further testified that the joint fitting was against code and that the standard practice was to install a single pipe connecting a house to the main sewer system without any coupling at all. The plumber admitted on cross-examination that he worked primarily in an industrial setting, that he had reviewed the residential code from 1998 rather than 1997, and that he himself had installed a coupling in a lateral pipe on at least one occasion.

¶4 After taking evidence, the trial court decided that the negligence and negligent misrepresentation claims were barred by the economic loss doctrine (and, alternatively, failed for lack of sufficient evidence); that the damage to the pipe occurred after the expiration of the express warranty; and that, even if Wisconsin law recognized an implied warranty of fitness for purpose with the sale of a house, here the limitation period of the express warranty controlled any implied warranty.

Discussion

¶5 Whether the economic loss doctrine applies to a particular transaction is a question of law. ***Prent Corp. v. Martek Holdings, Inc.***, 2000 WI App 194, ¶10, 238 Wis. 2d 777, 618 N.W.2d 201. The existence of an implied warranty is also a legal question that we review *de novo*. ***Micro-Managers, Inc. v. Gregory***, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988). However, when a case is tried to the court, we will uphold the trial court's factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2).

Economic Loss Doctrine

¶6 The first issue is whether the economic loss doctrine bars Preston from raising his negligence and negligent misrepresentation claims. This court recently summarized the economic loss doctrine as follows:

> "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." Economic damages are those arising because the product does not perform as expected, including damage to the product itself or monetary losses caused by the product. Economic damages do not include losses due to personal injury or damage to other property.

> The economic loss doctrine preserves the distinction between contract and tort law. The premise of the economic loss doctrine is that contract law, and particularly the law of warranty, is better suited than tort law for dealing with purely economic loss. Allowing buyers and sellers to allocate the risk of economic losses by contract promotes an efficient, predictable marketplace. On the other hand, claims concerning personal injury or damage to property other than the product itself are best governed by tort law, an area of law intended to protect people from misfortunes that are unexpected and overwhelming. In operation, "the economic loss doctrine requires transacting parties in Wisconsin to pursue only their contractual remedies when asserting an economic loss claim …."

Linden v. Cascade Stone Co., 2004 WI App 184, ¶¶7-8, No. 04-0004 (citations omitted).

¶7 Preston first appears to argue that the economic loss doctrine should not apply here because this was a consumer transaction in which the parties did not have equal bargaining power. The merit of this argument is far from apparent. First, there are examples in the case law applying the economic loss doctrine to consumer transactions. *See*, *e.g.*, ***Selzer v. Brunsell Bros., Ltd.***, 2002 WI App 232, ¶¶31-33, 257 Wis. 2d 809, 652 N.W.2d 806 (homeowner's strict responsibility and negligent misrepresentation claims against Marvin Windows barred by the economic loss doctrine). Second, differentiating "consumer" transactions from other transactions is no simple matter. Is a transaction a "consumer" transaction when the terms of the seller are take it or leave it? Did Preston have the ability to negotiate his warranty when he contracted with Condon to build his home? Third, the only policy reason Preston presents for exempting consumer transactions from the economic loss doctrine is the notion of unequal bargaining power owing to the fact that Preston had to rely on the skill and knowledge of Condon. That fact, however, does not create unequal bargaining power. Large, powerful corporations frequently hire much smaller companies to

perform specialized tasks where the corporation itself lacks expertise—for example, the installation of sewer lines. In such transactions it would be specious to contend that the large corporation lacks bargaining power. We could say more about the complexities of this question. Preston, however, does not begin to address such complexities. He has not presented a developed argument on this complicated topic, and we decline to address the matter further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶8 Preston next argues that the economic loss doctrine should not apply to damages resulting from the excavation of his property, as separate and distinct from the cost of the repair and replacement of the pipe itself. He refers (without citation) to cases which recognize an "other property" exception in which a homeowner may, for example, recover in tort for water damage resulting from a defective roofing job, even while limited to contract or warranty remedies for damage to the roof itself. But the "damage" to Preston's land does not fit this exception. Preston does not argue that excavation was undertaken to repair the land. Rather, excavation—and restoration of the land—was simply part of the process of repairing the lateral pipe. Therefore, the cost of excavating and restoring the land is not separate and distinct from the repair of the pipe.

¶9 Because Preston has not persuaded us that the economic loss doctrine does not apply, we conclude that the trial court properly applied the doctrine to limit Preston's attempt to recover under his breach of warranty theories.

Implied Warranty

¶10 Preston contends that Wisconsin law should recognize an implied warranty of fitness in a house sold by a builder-vendor. Preston presents this as an

issue of first impression, and argues that an implied warranty of fitness in the sale of a home would be a logical extension of Wisconsin's recognition of an implied warranty of fitness in residential leases, *see* ***Pines v. Perssion***, 14 Wis. 2d 590, 596, 111 N.W.2d 409 (1961), and also consistent with the trend in other states. We are not persuaded.

¶11 First, Preston has not presented a developed argument explaining why we should interpret the word "premises" in WIS. STAT. § 706.10(7) as including an unimproved lot. He has not, therefore, demonstrated that we should look to ***Riverfront Lofts Condominium Owners Ass'n v. Milwaukee/Riverfront Properties Ltd. Partnership***, 236 F. Supp. 2d 918 (E.D. Wis. 2002), for guidance. Simply pointing to a dictionary definition of "premises" and stating that the definition "may or may not include an unimproved lot" plainly falls short.

¶12 Second, Preston conceded the following before the trial court: "[A]s a result of the passage of time, he has no remedy against either the plumber, or against Condon under either the Residential Offer to Purchase contract or the one-year Warranty provided by Condon at the time of sale." We agree with the trial court's observation in this regard. The trial court explained that if the express warranty covered the cost of replacing the pipe within one year, the express warranty's time limit would be inconsistent with an implied warranty of indefinite duration. Preston presents no authority supporting the notion that an implied warranty may be used to extend the time limit of the express warranty. *Cf.* WIS. STAT. § 706.10(7) (providing an implied warranty that improvements to real estate "shall be performed in a workmanlike manner, and shall be reasonably adequate to equip the premises for [the contracted] use and occupancy" only "[i]n the absence of an express or necessarily implied provision to the contrary").

¶13 Finally, the factual findings of the trial court are inconsistent with granting relief under an implied warranty. The trial court found that the pipe did not begin to leak until five years after the sale, as evidenced by the loss of water pressure and flooding at that time. The court was not persuaded by Preston's evidence that a defective pipe or defective installation was the cause. Rather, the court appeared to accept the alternate theory that the gradual rubbing of a stone lodged against the joint had likely caused the hole to form. The court further deemed the testimony of Preston's expert insufficient to establish that the installation of the coupling joint on the pipe had been negligent. Absent a finding by the trial court that the leak developed as a result of a defect in the pipe or its installation, there is no factual basis to conclude that there was a breach of any warranty, express or implied.

¶14 In light of our decision on these points, we need not address additional arguments advanced by Preston.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.