COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP79 **Cir. Ct. No. 2006CV10560**

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

GRAIN EXCHANGE CONDOMINIUM ASSOCIATION, INC., A WISCONSIN NON-STOCK CORPORATION, BRIAN C. ZARLETTI, MARI R. CUCANATO-ZARLETTI, RONALD R. BAST, GAIL L. BAST, ERIC DURANT, JENNIFER L. SEEFELD, SCOTT A. SEEFELD, RONALD C. BOCCIARDI, DOROTHY BOCCIARDI, DONALD BIRZER, PETER T. SKOUFIS, PAUL A. STANOSZ, TONY L. FORTUN, JODELL SWENSON, MICHAEL G. WATCHKE, LANGLOIS MCDONALD VENTURE, LLC, A-Z PRINTING CO., INC., TAIRAN SUN, YUXING TIAN, ERIC FALKEIS, HEATHER NELSON, JAMES G. TOPETZES, DIANE AMATO, RUSSELL D. MEIER, HEIDI T. MEIER, TRISTRAM B. KERSEY, JAMES M. PFEIFFER, JOHN R. MOORE, CHANDRALEKHA BOMMAKANTI, SATYA BOMMAKANTI, MAJA BERLIN, JEFFREY P. AUSTIN, DAN P. HLAVACHEK, HEIDI HLAVACHEK, SCOTT RACETTE, JAYSON NOLAND, KATHLEEN NOLAND, CHARLES A. HARVEY, CHERYL A. HARVEY, BRIAN R. DEPIERRE, GRECO PG FIVE, LLC, WILLIAM L. THOMPSON AND CAROLINE S. THOMPSON,

PLAINTIFFS-APPELLANTS,

V.

JOHN J. BURKE, JR. AND 741 MILWAUKEE, LLC,

DEFENDANTS-RESPONDENTS,

DOUGLAS ERNST AND BURKE HOMES, LLC,

DEFENDANTS.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: ELSA C. LAMELAS and TIMOTHY M. WITKOWIAK, Judges. *Affirmed*.

Before Vergeront, Higginbotham and Sherman, JJ.

¶1 SHERMAN, J. Grain Exchange Condominium Association, Inc., and its forty-three named members and two John Doe plaintiffs (collectively, the Association), appeal from a judgment following a jury verdict in favor of 741 Milwaukee, LLC, and orders of summary judgment in favor of 741 Milwaukee and John Burke,[1] the sole member of 741 Milwaukee (collectively, the respondents). We affirm.

BACKGROUND

¶2 In 1999, 741 Milwaukee purchased the nine-story Milwaukee Grain Exchange building, located at 741 North Milwaukee Street, which was built around 1935 as an office building. 741 Milwaukee converted the building into thirty-one residential condominiums, the first sale of which took place in April 2002.

[1] The respondents contend that the Association's appeal of the circuit court's order dismissing Burke as a defendant as to the claims at issue in this appeal is untimely. The Association does not respond to this assertion in their reply brief, and we therefore deem the issue as conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶3 In 2001, 741 Milwaukee incorporated the Grain Exchange Condominium Association. As of April 2005, the Association's board of directors was comprised entirely of unit owners. From that time forward, 741 Milwaukee had no input into or control over the Association or its board.

¶4 In August 2001, Milwaukee's facade ordinance, Milwaukee Ordinance sec. 275-32-13 (Sept. 21, 2010), took effect. Ordinance sec. 275-32-13 requires that professionals examine the facades of buildings five or more stories tall and fifteen or more years old and prepare reports on the façade to be filed with the city. The first report regarding the Grain Exchange's façade was due on December 1, 2005.

¶5 Burke averred that the Association hired Holton Brothers, Inc. to assist in the Grain Exchange building's facade examination report. Holton Brothers in turn subcontracted with Douglas Ernst, president of Construction Engineering Co., to conduct the facade inspection and to prepare the facade report. In a report dated April 12, 2005, Ernst identified areas of the façade which required repair, but described the building's overall facade as "safe with an ordinary repair and maintenance program" and recommended a three-year schedule for making the necessary repairs.

¶6 In October 2006, the Association brought suit against the respondents.[2] The Association alleged twelve causes of action, all of which related to the condition of the facade:

[2] The Association also brought suit against Burke Homes, LLC, and Douglas Earnst. The Association's claims against those parties are not at issue in this appeal and will not be discussed.

1. Intentional misrepresentation;
2. Negligence for failing to provide a statement pursuant to WIS. STAT. § 703.33 (2009-10);[3]
3. Negligence per se under WIS. STAT. § 703.33;
4. False advertising, in violation of WIS. STAT. § 100.18;
5. Negligence per se under Milwaukee Ordinance sec. 275-32-13-d;
6. Negligent breach of sec. 275-32-13-d-8 and 9;
7. Breach of fiduciary duty;
8. Breach of statutory warranty of fitness under WIS. STAT. § 706.10(7);
9. Breach of implied warranty of fitness;
10. Strict liability;
11. Negligent misrepresentation; and
12. "Strict responsibility misrepresentation."

¶7 On the respondents' motion for summary judgment, the circuit court dismissed nearly all of the Association's claims against the respondents. It dismissed the Association's claims for intentional misrepresentation (claim 1), negligent failure to provide a statement pursuant to WIS. STAT. § 703.33 (claim 2), strict liability (claim 10), negligent misrepresentation (claim 11) and "strict responsibility misrepresentation" (claim 12) based on the economic loss doctrine. It dismissed the Association's claims relating to Milwaukee Ordinance sec. 275-32-13-d (claims 5 and 6) on the basis that the Association has no private cause of action under that ordinance and it appears also on the basis that those claims are precluded by the economic loss doctrine. It dismissed the Association's claim for breach of fiduciary duty (claim 7) based on the absence of any fiduciary duty between the Association and the respondents as well as the two claims relating to

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the warranty of fitness (claims 8 and 9) on the basis that any warranties were superseded by the condominium sales contracts. The court also dismissed the Association's claim for breach of § 703.33 (claim 3) because the unit owners who purchased their units on resale lacked standing and the claims of the original owners were time-barred.[4]

¶8 The only claim which survived complete dismissal on summary judgment was claim four, false advertising contrary to WIS. STAT. § 100.18. With respect to that claim, the court dismissed Burke as a defendant, limited the alleged false representations that could form a basis for the claim to the phrase "newly renovated" and ultimately dismissed the fourth claim as to all condominium owners except Diane Amato because those defendants failed to present sufficient evidence to support their claims. Thus, the only claim which remained for trial was Diane Amato's § 100.18 claim.

¶9 Following trial, a jury found in favor of 741 Milwaukee, and judgment was entered in 741 Milwaukee's favor. The Association appeals.

DISCUSSION

¶10 The Association contends that the circuit court erred in the following three respects in its summary judgment rulings: (1) in limiting their WIS. STAT. § 100.18 claims and dismissing all condominium owner's claims under § 100.18, except that belonging to Diane Amato; (2) in concluding that the economic loss

[4] The circuit court also dismissed Burke as a defendant with respect to the Association's third claim.

doctrine precluded the Association's tort claims; and (3) in concluding that the parties' contracts precluded any claims under WIS. STAT. § 706.10(7).

¶11 We review the grant or denial of summary judgment independently of the circuit court. ***Novell v. Migliaccio***, 2008 WI 44, ¶23, 309 Wis. 2d 132, 749 N.W.2d 544. Summary judgment is appropriate where there are no disputed material issues of fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

A. WIS. STAT. § 100.18(1) Claim

¶12 WISCONSIN STAT. § 100.18(1), which is sometimes referred to as the "false advertising" statute, prohibits sellers from making deceptive, false or misleading representations or statements of fact to prospective buyers. *See* ***Malzewski v. Rapkin***, 2006 WI App 183, ¶23, 296 Wis. 2d 98, 723 N.W.2d 156. Section 100.18(1) provides in relevant part:

> No person, firm, corporation or association, or agent or employee thereof ... with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate ... shall make ... an advertisement, announcement, statement or representation of any kind to the public relating to such purchase ... which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

¶13 The purpose of WIS. STAT. § 100.18 is to protect the public by deterring sellers from making false and misleading representations. ***Novell***, 309 Wis. 2d 132, ¶30. To establish a claim under § 100.18, a claimant must prove three elements: (1) the defendant made a representation to the public with the intent to induce obligation; (2) the representation was untrue, deceptive, or

misleading; and (3) the representation materially induced (caused) the plaintiff a pecuniary loss. ***Id.***, ¶49. *See also* WIS. JI-CIVIL 2418.

¶14 The Association alleged in its amended complaint that the respondents violated WIS. STAT. § 100.18(1) by including in sales advertisements false statements that "the building, or elements of the building" were "'newly renovated,' 'new construction,' and an 'engineered masterpiece.'" The circuit court entered summary judgment in favor of the respondents with respect to the terms "engineered masterpiece" and "new construction" because, according to the court, "[e]ngineered masterpiece' is plainly puffery" and the condominiums being sold were "plainly [] not being sold as new property." With respect to the phrase "newly renovated," the circuit court determined that a material issue of fact existed as to whether that statement was false and therefore declined to grant summary judgment in favor of 741 Milwaukee as to that phrase, though it did enter summary judgment in favor of Burke on the basis that there was insufficient evidence to support this claim against him. Following a second motion for summary judgment by the respondents, the circuit court granted summary judgment against all condominium owners except Diane Amato with respect to the phrase "newly renovated" because none of the owners except Amato presented evidence that they saw the "newly renovated statement" set forth in any of the respondent's advertising materials, and thus failed to present any evidence that they were materially induced to purchase a condominium by that statement.

¶15 The Association contends that the circuit court erred in the following two respects with respect to their WIS. STAT. § 100.18(1) claims: (1) in entering judgment in favor of the respondents with respect to the phrase "new

construction"; and (2) allowing only the claim of Amato to proceed to trial with regard to the phrase "newly renovated."[5]

1. "New Construction"

¶16 The Association contends that the circuit court erred in determining that the phrase "new construction" could not form the basis for a claim under WIS. STAT. § 100.18(1) because the phrase was "puffery," a term which has been described as an "'exaggeration[] reasonably to be expected of a seller as to the degree of quality of his [or her] product, the truth of falsity of which cannot be precisely determined.'" ***State v. American TV & Appliance of Madison, Inc.***, 146 Wis. 2d 292, 301-02, 430 N.W.2d 709 (1988) (citation omitted). In ***American TV***, the supreme court stated that statements that constitute puffery have "long [been] considered an acceptable advertising technique" and are not actionable under § 100.18(1) as a misrepresentation of fact. ***Id.*** The Association asserts that the phrase "new construction" was not puffery, but instead a statement of fact in that it "assured buyers that the renovations performed restored the building to be a safe living space, which it was not."

¶17 The circuit court determined that the term "new construction" could not form a basis for a claim under WIS. STAT. § 100.18(1) because the condominiums in the historic Grain Exchange building were "plainly [] not being sold as new property." We do not read the circuit court as determining that the

[5] The circuit court also dismissed the WIS. STAT. § 100.18(1) claims of all owners who purchased their units in the Grain Exchange building on or before October 30, 2003, because those claims were barred by the statute of limitations. The Association does not challenge the dismissal of WIS. STAT. § 100.18(1) claims of owners who purchased their condominiums before October 30, 2003. Nor does the Association challenge the court's determination that the term "engineering masterpiece" could not form a basis for a claim under § 100.18(1).

term "new construction" could not form a basis for a claim under § 100.18(1) because it was puffery. Instead, we read the court's ruling as determining as a matter of law that the term did not materially induce the condominium owners to purchase condominiums in the Grain Exchange building because such reliance would not be reasonable.

¶18 The reasonableness of a plaintiff's reliance is not a separate element of a WIS. STAT. § 100.18 claim. *See* ***Novell***, 309 Wis. 2d 132, ¶53. Rather, it is a factor that may be considered with respect to the third element—whether a representation materially induced (caused) the plaintiff to sustain a pecuniary loss. *See* ***id.*** In ***Novell***, the supreme court explained that "there are cases in which a circuit court may determine as a matter of law that a plaintiff's belief of a defendant's representation is unreasonable, and as a result the plaintiff's reliance (which is based on the unreasonable belief) is also unreasonable." ***Id.***, ¶51. In such a situation, "[t]he circuit court may determine that the representation did not materially induce the plaintiff's decision to act and that plaintiff would have acted in the absence of the representation." ***Id.***

¶19 The undisputed facts show that the Grain Exchange building in which the condominiums were located was advertised as a historic building and that owners were aware that the building was old, not new. We agree with the circuit court that any reliance on the term "new construction" would have been unreasonable and that therefore the representation did not materially induce the plaintiffs to act. Accordingly, we conclude that the circuit court did not err in granting summary judgment in favor of the respondents with respect to this term.

2. "Newly Renovated"

¶20 The Association contends that the circuit court erred in dismissing the WIS. STAT. § 100.18(1) claims of those individuals who purchased their condominiums after October 30, 2003,[6] with respect to the term "newly renovated." The Association asserts that the court dismissed those claims because those condominium owners did not produce the advertisement which represented the building as being "newly renovated" from their individual files. According to the Association, it was erroneous for the court to do so because those individual plaintiffs "[did] not have to prove that [they] relied on the deceptive advertising to state a section 100.18 claim."

¶21 The Association misconstrues the circuit court's ruling. The circuit court did not dismiss on summary judgment all claims except those belonging to Amato because no one besides her had in their possession a copy of the advertisement containing the representation of "newly renovated." The court dismissed their claims because they failed to present any evidence that they saw the advertisement before purchasing their condominiums. The court stated that "the plaintiffs have presented no evidence in the form of affidavits or deposition testimony to indicate that anyone other than Ms. Amato ever saw the advertisement." If a plaintiff did not see the advertisement containing the language "newly renovated," that representation could not have caused the plaintiff a pecuniary loss. Because the undisputed facts show that no plaintiff

[6] See footnote 3.

besides Amato saw the advertisement prior to purchasing their condominium, we affirm the circuit court's dismissal of those claims on summary judgment.[7]

B. Economic Loss Doctrine

¶22 The Association contends the circuit court erred in concluding that the economic loss doctrine barred their tort claims against the respondents because the fraud in the inducement exception to that doctrine applies, preluding dismissal of those claims under the doctrine.

¶23 The economic loss doctrine is a judicially created rule that "'preclud[es] contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship.'" ***Kaloti Enters., Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶27, 283 Wis. 2d 555, 699 N.W.2d 205 (citation omitted). In ***Kaloti***, the supreme court adopted a narrow fraud in the inducement exception to the economic loss doctrine for intentional misrepresentation claims "'where the fraud is extraneous to, rather than interwoven with, the contract.'" ***Id.***, ¶42 (quoting ***Digicorp, Inc. v. Ameritech Corp.***, 2003 WI 54, ¶47, 262 Wis. 2d 32, 662 N.W.2d 652). To invoke this narrow exception, the plaintiff must show: (1) there was an intentional misrepresentation; (2) the misrepresentation occurred prior to the formation of the

[7] The Association argues that they were not required to prove that they relied on the advertisement to state a claim under WIS. STAT. § 100.18(1). To support this assertion, they cite to ***Novell***, wherein the supreme court held that proof of "reasonable reliance" is not a separate element of a claim under § 100.18(1). ***Novell*** held that a plaintiff need not prove that their reliance was *reasonable* to establish a claim under § 100.18(1). It did not, as the Association suggests, hold that an appellant need not prove *any* reliance, whether it be reasonable or unreasonable.

contract; and (3) "'the fraud [was] extraneous to, rather than interwoven with, the contract.'" ***Id.*** (citation omitted).

¶24 The fraud in the inducement exception is potentially applicable only to intentional misrepresentation claims. Thus, it is inapplicable to all the Association's claims dismissed by the circuit court under the economic loss doctrine except potentially that for intentional misrepresentation. As to whether the circuit court was correct in determining that the exception did not apply to that claim, based on the undisputed facts, the Association asserts that "[t]he misrepresentations made by the declarant seller were made in pre-sales advertising—to induce sales" and were therefore extraneous, not interwoven with the parties' contracts. The fact that alleged misrepresentations took place in pre-sales advertising establishes that the alleged misrepresentations occurred prior to the formation of the contracts between the purchasers and Milwaukee 741, the second element which a plaintiff must show to invoke the fraud in the inducement exception. It does not, as the Association asserts, show that the fraud was extraneous to the contract.

¶25 The Association contends that the misrepresentations made "were not interwoven because the tort of misrepresentation was not specifically disclaimed." Relying on ***Grube v. Daun***, 173 Wis. 2d 30, 59-60, 496 N.W.2d 106 (Ct. App. 1992), the Association asserts that "as a matter of public policy, tort disclaimers in contracts will not be honored unless the disclaimer is specific as to the tort it wishes to disclaim." We fail to understand this argument. The Association fails to explain how the failure to disclaim intentional misrepresentation means that the fraud was extraneous to the contract.

¶26 The Association also contends that the circuit court erred in determining that the economic loss doctrine precluded the "independent claims" of the Association, as opposed to those of the Association's individual members, because the Association was not a party to the condominium sales contracts and, its independent claims are not precluded by the economic loss doctrine. The respondents argue that because the Association is authorized by statute to bring suit only "on behalf of all unit owners," it has only those rights which "derive from and are limited by the rights and responsibilities of its constituent unit owners." *See* WIS. STAT. § 703.15(3)(a)(3).[8] The respondents argue that the Association's rights can therefore be no greater than the rights of its members, the result being that in this case, any rights belonging to the Association are in contract, just like those of the Association's members. The Association does not respond to this argument in their reply brief. We therefore deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).[9]

C. Statutory Warranty

¶27 The Association contends the circuit court erred in determining that their statutory warranty claim under WIS. STAT. § 706.10(7) was precluded by the parties' contracts. The Association argues that the boundary walls were subject to WIS. STAT. § 706.10(7) because the limited warranty provided by 741 Milwaukee

[8] WISCONSIN STAT. § 703.15(3) sets forth what powers belong to a condominium association. Included is the power to "[s]ue on behalf of all unit owners." Sec. 703.15(3)(a)3.

[9] The Association also contends that the circuit court erred in determining that the economic loss doctrine applied to the Association's independent claims because that doctrine "is based upon the ability to bargain for warranties," an ability which the condominium unit owners did not have. This argument lacks coherency, and therefore we do not further address it.

"contained an explicit and unambiguous exception, that 'boundary walls,' … were excluded from the warranty statement" and therefore the boundary walls cannot be within the limited warranty's repudiation of the statutory warranties under § 706.10(7). The Association maintains that in order to disclaim claims under § 706.10(7), 741 Milwaukee was obligated to provide an express disclaimer of § 706.10(7), which it did not. To support their position, the Association relies on the following statement in ***Grube***, 173 Wis. 2d at 60: "Wisconsin follows the general rule that integration clauses which negate the existence of any representations not incorporated into the contract may not be used to escape liability for the misrepresentations." The court followed that statement by stating that "as a matter of public policy, tort disclaimers in contracts will not be honored unless the disclaimer is specific as to the tort it wishes to disclaim." ***Id.***

¶28 WISCONSIN STAT. § 706.10(7) provides that the warranty under that statute is subject to any "express or necessarily *implied* provision[s] to the contrary." (Emphasis added). The Association is thus incorrect that any disclaimer of the rights under § 706.10(7) must have been express. Moreover, the Association relies entirely on the quoted statements by the supreme court in ***Grube***, which relate to disclaimers of tort liability. The Association, however, has not cited this court to any legal authority that a statutory breach of warranty action is construed as a tort action in Wisconsin, nor have they developed any argument that it should be.

¶29 It has been observed that "characterizing a breach of warranty action as a contract action or a tort action is not free of difficulty." ***McQuaide v. Bridgeport Brass Co.***, 190 F.Supp. 252, 253 (D.Conn. 1960). Some courts have treated a breach of warranty claim as a tort action while other courts have characterized it as an action in contract. *See* ***id.*** In Wisconsin, however, it appears

that warranty actions are treated as falling within the law of contract rather than the law of tort. *See, e.g.,* ***Amercian Family Mut. Ins. Co. v American Girl, Inc.***, 2004 WI 2, ¶35, 268 Wis. 2d 16, 673 N.W.2d 65. Because the Association has not proffered any other basis for reversal of the circuit court's dismissal of their statutory warranty claim under WIS. STAT. § 706.10(7), we decline to address any further the Association's assertion that liability under § 706.10(7) was not disclaimed by the respondents.

CONCLUSION

¶30 For the reasons discussed above, we affirm.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.