COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

Appeal No. 2011AP1876 **Cir. Ct. No. 2006CV360**

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

DAN SCHULLO, PAM SCHULLO, AND VALLEY VU FARMS, LLC,

PLAINTIFFS-APPELLANTS,

V.

DELAVAL, INC., AND ADDISON INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

SPRING VALLEY ENTERPRISES, INC., D/B/A VALLEY ENTERPRISES,

DEFENDANT.

APPEAL from an order of the circuit court for Barron County: JAMES D. BABBITT, Judge. *Affirmed in part, reversed in part, and cause remanded for further proceedings*.

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

¶1 VERGERONT, J. This action arises out of the construction of a new milking parlor on the farm of Dan and Pam Schullo. The Schullos contend that the rails on the stalls for the cows were improperly installed. The Schullos filed this action against the distributor and manufacturer of the milking equipment, DeLaval, Inc.; the dealer and installer, Spring Valley Enterprises; and Spring Valley's insurer, Addison Insurance Company. On summary judgment the circuit court dismissed all claims against DeLaval except one intentional misrepresentation claim based on a specific statement attributed to a DeLaval employee. Spring Valley was dismissed by stipulation because of bankruptcy, and the court subsequently dismissed all claims against Addison on summary judgment.

¶2 On the Schullos' appeal of the dismissal of all claims against DeLaval, we conclude: (1) the circuit court properly dismissed all but one of the misrepresentation claims because the others were based on statements that were "mere puffery"; (2) the court properly dismissed the claim of breach of the purchase agreement because DeLaval is not a party to that agreement; (3) there are issues of fact that preclude summary judgment on the claim of breach of the written warranty, and there is no separate claim for breach of an oral warranty; and (4) the court properly dismissed the negligence claim for the reasons we explain in the opinion.

¶3 On the Schullos' appeal of the dismissal of all claims against Addison except the intentional misrepresentation claim, we conclude the circuit court erred in deciding that Addison's commercial general liability (CGL) insurance policy did not provide coverage for the Schullos' claims of breach of purchase agreement and strict liability misrepresentation. Therefore, the court erred in dismissing these claims on this ground. We also conclude the court erred

in dismissing the negligence claim. Contrary to the circuit court's ruling, we conclude that the complaint does state a claim for relief based on negligence against Addison and that summary judgment based on the application of the economic loss doctrine is not appropriate.

¶4 Accordingly we affirm the dismissal of all the claims against DeLaval that the circuit court dismissed, except that we reverse dismissal of the breach of written warranty claim; and we reverse the dismissal of all claims against Addison except the dismissal of the intentional misrepresentation claim, which we affirm. We remand for further proceedings consistent with this opinion.

BACKGROUND

¶5 In 2001 the Schullos[1] decided to expand their dairy herd. They entered into a contract with Spring Valley for the construction of a new barn and a new milking parlor and for the purchase and installation of various components of a new milking system in the milking parlor. This contract is titled "Purchase Agreement," and we will refer to it as the purchase agreement. The milking equipment making up the milking system under the purchase agreement was manufactured and distributed by DeLaval, and Spring Valley was a DeLaval dealer. Before the Schullos entered into the purchase agreement, they met on a number of occasions with representatives of Spring Valley as well as with Robert Stroh of DeLaval. As we explain in greater detail later in this opinion, the Schullos assert that they entered into the purchase agreement with both Spring Valley and DeLaval, but DeLaval disputes this. However, it is undisputed that the

[1] The Schullos are the sole owners of Valley Vu Farms, LLC, which is also a plaintiff, but we use "the Schullos" to include the LLC unless otherwise indicated.

Schullos acknowledged in writing the acceptance of a written "Limited Warranty of DeLaval, Inc." covering the DeLaval equipment included in the purchase agreement. A Spring Valley representative also signed the written warranty acknowledgment.

¶6 The Schullos began milking cows in the new milking parlor in July 2002. According to the Schullos' submissions, the rails holding the cows in their stalls were improperly installed and, as a result, their cows developed mastitis, some died, some were permanently injured, and the Schullos lost milk revenue. It is undisputed that in November 2002 DeLaval had the rails reinstalled at DeLaval's expense.

¶7 The Schullos filed this action against Spring Valley, DeLaval, and Addison.[2] After Spring Valley was dismissed by stipulation because of bankruptcy, the claims remaining against DeLaval were for intentional and strict liability misrepresentation, breach of contract, breach of warranty, and negligence.[3] The claims remaining against Addison, Spring Valley's insurer, were

[2] The second amended complaint is the operative complaint, and we will refer to it simply as "the complaint." We note that the complaint does not focus on the installation of the rails but instead uses broad language reasonably read to allege deficiencies in the installation of the milking parlor equipment generally and deficiencies in various component parts of the system. However, we confine our attention in this opinion to the improper installation of the rails because the Schullos do not develop an argument with respect to any other deficiency of installation or product.

[3] The heading of the first claim in the complaint is "Misrepresentation/False Advertising." The allegations for this claim include an allegation that the misrepresentations "violated the provisions of WIS. STAT. § 100.18(10), which prohibits false advertising." It is not necessary to discuss this statute to resolve the issues on appeal, and we therefore omit the reference when referring to this claim.

There is a fifth claim in the complaint: "Unfair Trade Practices." The circuit court dismissed this claim on the ground that it was time-barred. Although the Schullos argue in their main brief that this was error, in their reply brief they concede that the claim was not timely. We accept this concession and do not further discuss this claim.

claims of intentional and strict liability misrepresentation, breach of contract, and negligence.

¶8 On DeLaval's motion for summary judgment, the circuit court concluded as follows. (1) On the intentional and strict liability misrepresentation claim, the statements attributed to DeLaval by the Schullos are all opinion or "puffery," except Stroh's statement that he would personally oversee the installation of the DeLaval equipment. As to that statement, the court concluded, there are factual disputes requiring a trial. (2) On the breach of contract claim, the undisputed facts show DeLaval was not a party to the purchase agreement. (3) On the breach of warranty claim, the four-month delay in reinstalling the rails is not, as a matter of law, an unreasonable delay in providing the remedy promised in the written warranty and there is no enforceable oral warranty. (4) On the negligence claim, the complaint does not state a claim for relief against DeLaval because there are not allegations that DeLaval, as opposed to Spring Valley, breached a duty of care to the Schullos. In addition, the court concluded, the economic loss doctrine bars any recovery under a negligence theory.

¶9 On Addison's motion for summary judgment, the circuit court concluded there is no coverage under the policy for the claims against Spring Valley for breach of the purchase agreement and intentional and strict liability misrepresentation. As for the negligence claim, the court concluded that the complaint does not state a claim for relief against Addison, but that, even if it does, the economic loss doctrine bars a claim for negligence.

¶10 Based on these rulings, the circuit court dismissed all claims against DeLaval, except the intentional misrepresentation claim based on Stroh's alleged statement that he would personally oversee the installation of the DeLaval milking

equipment; and the court dismissed all claims against Addison. The court granted a stay of the trial on the single misrepresentation claim against DeLaval pending resolution of this appeal.[4]

DISCUSSION

¶11 On appeal the Schullos contend that they are entitled to a trial on each of their claims against each defendant, except that they do not contend that the circuit court erred in dismissing their intentional misrepresentation claim against Addison.

¶12 We review de novo the grant and denial of summary judgment, employing the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2009-10).[5] In deciding if there are genuine issues of material fact, we draw all reasonable inferences in favor of the non-moving party. ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980).

¶13 In the following sections, we first consider each of the four claims against DeLaval. We affirm the grant of summary judgment in favor of DeLaval

[4] Because the circuit court did not dismiss the intentional misrepresentation for DeLaval, the court's order is not final as to DeLaval. Therefore, as to DeLaval, the Schullos should have filed a petition for interlocutory appeal under WIS. STAT. § 809.50 (2009-10). However, we have the authority to extend the time limit under WIS. STAT. § 809.82(2) and to grant leave to appeal the circuit court's order dismissing the other claims against DeLaval. We choose to do so in the interest of efficiency.

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

on all claims against DeLaval that were dismissed by the circuit court, except the breach of written warranty claim. On that claim we conclude that issues of fact preclude summary judgment. We next consider each of the three claims against Addison on which the Schullos challenge summary judgment—breach of the purchase agreement, strict liability misrepresentation, and negligence. For the reasons we explain, we conclude that none were properly dismissed on summary judgment.

I. Claims Against DeLaval

A. Intentional and Strict Liability Misrepresentation

¶14 The Schullos contend that the circuit court erred in concluding that none of the alleged misrepresentations were actionable except Stroh's statement that he would personally oversee the installation of the DeLaval milking equipment. According to the Schullos, the other statements on which they rely, viewed most reasonably to them, are not opinion or puffery, and therefore a jury should decide this issue.[6]

¶15 We begin by noting that several statements the Schullos refer to in their brief are allegations in their complaint that are attributed to both DeLaval and

[6] DeLaval argues that the Schullos have forfeited the right to make this argument on appeal because in their circuit court brief in opposition to DeLaval's motion for summary judgment on the misrepresentation claim, the Schullos' only argument was based on Stroh's statement that he would personally oversee the installation of the DeLaval milking equipment. (We use the term "forfeiture," despite DeLaval's use of the term "waiver," because "forfeiture" is the correct term in this context. *See* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612.) According to DeLaval, the Schullos did not respond to DeLaval's argument that other statements were puffery. While this appears to be true, the circuit court did rule on this issue, and we have therefore chosen to address it. Even if the right to raise an issue on appeal has been forfeited, this court has the authority to address it. ***State v. Kaczmarski***, 2009 WI App 117, ¶7, 320 Wis. 2d 811, 772 N.W.2d 702.

Spring Valley, without distinguishing between the two or further identifying the speaker. Only one statement has a citation to the record that is based on a factual submission: a statement attributed to Stroh that, after installation of the new system, "the milk quality would be unmatchable." The Schullos are not entitled to a trial based on allegations in a complaint that are not supported by factual submissions. *See* ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, ¶41, 281 Wis. 2d 448, 699 N.W.2d 54 (A court considering a motion for summary judgment cannot rely on mere allegations in the pleadings, but must examine the facts of record.). Therefore we consider only the single statement the Schullos refer to that is supported by a factual submission.

¶16 A statement is legally insufficient to support a claim for misrepresentation if it is "puffery," that is, "[an] exaggeration[] reasonably to be expected of a seller as to the degree of quality of his product, or the truth or falsity of which cannot be precisely determined." ***Tietsworth v. Harley-Davidson, Inc.***, 2004 WI 32, ¶41, 270 Wis. 2d 146, 677 N.W.2d 233 (citation omitted). Examples of statements that have been held to be "puffery" by a court are statements that one's product is "the best," "the finest," "a masterpiece," "of premium quality." ***Id.***, ¶¶42-43.

¶17 We conclude the statement that "the milk quality would be unmatchable" is indistinguishable from the foregoing statements that have been held to be "puffery." Like those statements, "unmatchable" milk quality is hyperbole that can be reasonably expected from a seller and that is too indefinite for a determination of its truth or falsity. Beyond stating that this is an issue for the jury, the Schullos do not explain why this statement is different from others that have been held to be puffery as a matter of law.

¶18 Accordingly, we conclude the circuit court did not err in granting summary judgment in favor of DeLaval on all asserted misrepresentations except Stroh's statement that he would personally oversee the installation of the milking equipment.

B. Breach of Purchase Agreement

¶19 It is undisputed that DeLaval did not sign the purchase agreement, which provided for the purchase of DeLaval milking equipment and other equipment as well as for the construction of a milking parlor and a barn. As we understand the Schullos' argument, they contend there is privity between themselves and DeLaval as to the purchase agreement, and DeLaval is therefore bound by it. According to the Shullos, DeLaval breached the purchase agreement by failing to oversee the installation of the milking equipment.

¶20 "Privity is nothing more than the relationship between the parties to a contract and follows from the fact that a contract exists." ***Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.***, 148 Wis. 2d 910, 916, 437 N.W.2d 213 (1989) (citation omitted). The Schullos rely on ***Paulson v. Olson Implement Co.***, 107 Wis. 2d 510, 319 N.W.2d 955 (1982), in support of their argument that there is privity between DeLaval and the Schullos with respect to the purchase agreement, or, in other words, that DeLaval is a party to that agreement. However, we conclude ***Paulson*** does not support the Schullos' position.

¶21 The court in ***Paulson*** concluded that there was privity between the manufacturer and the buyers of a grain drying bin, but *not* with respect to the contract between the dealer/distributor and the buyers, which the manufacturer did not sign. ***Id.*** at 515 n.2, 516, 518-19. Indeed, that was the argument advanced by the buyers and the court dismissed it as "incorrectly focused." ***Id.*** at 516-17.

Instead, the court concluded, the contract between the dealer/distributor and the buyers furnished the consideration for a second contract, a "warranty contract," between the manufacturer and the buyers. ***Id.*** at 517. This second contract arose, the court explained, because the manufacturer's agent made promises to the buyers that a specially designed grain drying bin had the specific capabilities required by the buyers, and that unilateral contract was accepted and became binding when the buyers signed the sales contract with the dealer/distributor. ***Id.*** at 518. Because there was privity between the manufacturer and the buyers as to this *second* contract, which the court referred to as "the warranty contract," the court concluded that the circuit court had erred in dismissing the warranty claim against the manufacturer based on lack of privity. ***Id.*** at 516, 518-19, 527.

¶22 ***Paulson*** provides no support for the proposition that there is privity between the Schullos and DeLaval regarding the purchase agreement. Indeed, the court in ***Paulson*** implicitly, if not expressly, rejects this very proposition. *See* ***id.*** at 516-17.

¶23 Accordingly, we conclude the circuit court properly granted summary judgment in favor of DeLaval on the claim that it breached the purchase agreement.

C. Breach of Warranty

¶24 The Schullos contend that DeLaval breached both the written warranty and an oral warranty consisting of Stroh's promises that he would personally oversee the installation of the milking equipment and that DeLaval would provide any services the Schullos needed with regard to the milking equipment.

1. *Written Warranty*

¶25 In the written warranty, DeLaval warrants to the Schullos that the "DeLaval … equipment … is free from defects in material and workmanship for a period of one year from the date of installation (the 'Warranty Period')…." The written warranty also specifies the following as the exclusive remedies:

> DeLaval will repair or replace any item of Equipment which is not as warranted above during the Warranty Period …. If DeLaval determines that repair or replacement of the item of Equipment is not an effective remedy, DeLaval shall refund to the Equipment Purchaser the purchase price (excluding the cost of installation labor) of the defective item of Equipment and any other Equipment which cannot be used in the absence of the defective item of Equipment.

¶26 The Schullos argue that DeLaval breached the written warranty because the rails were improperly installed, and DeLaval does not dispute this.[7] Instead, the parties' dispute focuses on the remedy for the breach.

¶27 The Schullos contend that there are factual disputes as to whether, in the circumstances here, the limited remedy of repair or replacement "failed of its essential purpose." *See* WIS. STAT. § 402.719(2) (providing, in addressing "contractual modification or limitation of remedy," that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may

[7] We recognize that the written warranty warrants that the "DeLaval … equipment … is free from defects in material and workmanship…." This language arguably raises the question whether defective installation of the equipment is covered by the written warranty. However, DeLaval does not argue that defective installation of the equipment (if occurring within the warranty period) is not covered by the written warranty. We take the failure to make this argument as an implicit concession, for purposes of this appeal, that the written warranty does cover defective installation of the equipment. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (citation omitted).

be had as provided in chs. 401 to 411"). According to the Schullos, their submissions show that DeLaval took four months to reinstall the railings correctly when it could have done so sooner, and this delay caused substantial damage that could not be repaired. This constitutes a failure of the essential purpose of the limited remedy, they assert, and they are therefore entitled to all the remedies for the breach of written warranty provided in WIS. STAT. chs. 401 to 411.

¶28 DeLaval responds that the circuit court correctly concluded that, based on the undisputed facts, four months was a reasonable time for the corrective reinstallation. According to DeLaval, the limited remedy therefore did not fail of its essential purpose.

¶29 We agree with the Schullos that they are entitled to a trial on whether the limited remedy of repair or replacement failed of its essential purpose. Therefore, the court erred in dismissing the claim for breach of the written warranty.[8]

¶30 WISCONSIN STAT. § 402.719 permits a seller to limit the remedies available to a buyer, subject to certain exceptions. One exception is that where "circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in chs. 401 to 411." § 402.719(2). "The limited remedy of repair or replacement … fails of its essential purpose whenever, despite reasonable opportunity for repair, the goods are not restored to a non-defective condition within a reasonable time." ***Murray v. Holiday Rambler, Inc.***,

[8] Because of this conclusion, it is unnecessary to address the Schullos' alternative argument—that there are factual disputes on whether the limited remedy in the written warranty is unconscionable.

83 Wis. 2d 406, 424, 265 N.W.2d 513 (1978). "What is 'a reasonable time' for taking any action under the Uniform Commercial Code depends on the nature, purpose and circumstances of such action." ***Id.*** at 420 n.7 (citing WIS. STAT. § 401.204(2) (1977), now § 401.205(1)).

¶31 We do not agree with the circuit court that four months was, as a matter of law, reasonable. Viewing the evidence and inferences from the evidence most favorably to the Schullos, a reasonable jury could find that, immediately upon beginning to use the new stalls, the Schullos brought to DeLaval's attention the adverse reaction their cows had to the new stalls, and that DeLaval unreasonably delayed in investigating the Schullos' complaints. If a jury so finds, it could reasonably conclude that the rails were not reinstalled within a reasonable time. Accordingly, the Schullos are entitled to a trial on the issue of whether the exclusive remedies failed of their essential purpose because the rails were not reinstalled within a reasonable time.

¶32 Because the parties have not fully briefed the issue, we do not address the specific remedies available to the Schullos if a jury determines that the delay in reinstallation was unreasonable and therefore the limited remedy of repair or replacement failed its essential purpose.

2. *Oral Warranty*

¶33 The Schullos also contend that Stroh's promise to oversee the installation of DeLaval's equipment and to provide the Schullos with all necessary services created an oral warranty. Specifically, the Schullos argue that Stroh's promise was an oral warranty that DeLaval "would timely correct or repair problems," and that DeLaval breached this warranty.

¶34 The Schullos rely on ***Paulson***, 107 Wis. 2d 510, and argue that the circuit court erred in concluding that ***Paulson*** was distinguishable. Although our analysis differs somewhat from the circuit court, we agree with the circuit court that the Schullos do not have an enforceable claim for breach of an oral warranty.

¶35 In ***Paulson***, as we have already explained, the court concluded that there was a "warranty contract" between the buyers and the manufacturer based on oral promises about the specially designed bin. ***Id.*** at 518-19. After reaching this conclusion, the court considered and rejected the manufacturer's argument that, even if an oral warranty was given, it was disclaimed by writing on the reverse side of the unsigned form detailing the cost of that product. ***Id.*** at 519-20. The court concluded that the written disclaimer related to the advertised standard grain drying bin and not to the specially manufactured bin with greater capabilities that had been specifically promised to the buyers. ***Id.*** at 520. In the alternative, the court concluded that, even if the written disclaimer related to the oral warranty on the specially designed bin, the disclaimer was not effective because it was inconsistent with the oral warranty and resulted in "unbargained for language and the buyer's surprise." ***Id.***

¶36 We do not agree with the Schullos that ***Paulson*** supports their position that there is an oral warranty in addition to the written warranty. Critical to the court's analysis in ***Paulson*** was the fact that the oral warranty there made specific promises that were either excluded by the written disclaimer or inconsistent with it. ***Id.*** On this ground, the court concluded that the oral warranty was enforceable *despite* the written warranty, not in addition to it. ***Id.*** In this case, the asserted oral warranty simply repeats promises regarding installation of the equipment that DeLaval has implicitly conceded are included in the written warranty. *See* ***supra***, ¶26 & n.7. As we have already noted, DeLaval does not

dispute that the written warranty was breached when the rails were not properly installed and does not dispute that this triggered the limited remedy of repair or replacement.

¶37 The Schullos do not explain why in these circumstances the oral promises attributed to Stroh about the installation create a warranty in addition to, and separately enforceable from, the written warranty. Because the Schullos' argument is not adequately developed on this point, we conclude they do not have a claim for breach of an oral warranty based on Stroh's alleged promises.

D. Negligence

¶38 The circuit court dismissed the Schullos' negligence claim against DeLaval on the ground that the complaint does not state a claim for relief because it does not allege a duty breached by DeLaval.[9] The Schullos argue on appeal that the court erred because the complaint does state a claim for relief for negligence, and they point to the allegations in the complaint concerning DeLaval's duties as a manufacturer. Specifically, the complaint alleges that DeLaval had the duty to exercise ordinary care in the design and construction of their milking equipment, to conduct reasonable testing and inspections so as to guard against defective conditions, and to repair "defects they observed while delivering, installing and servicing the milk parlor," all so as to make its equipment safe for its intended use. The Schullos contend, specifically, that DeLaval breached this duty by not overseeing the installation.

[9] Examining a complaint to determine whether it states a claim for relief is the first step under our summary judgment methodology. ***Broom v. DOC***, 2010 WI App 176, ¶9, 330 Wis. 2d 792, 794 N.W.2d 505 (citation omitted).

¶39 We will assume without deciding that the complaint does state a claim for relief in negligence against DeLaval based on its duties as a manufacturer. We nonetheless conclude that this does not entitle the Schullos to a trial on their negligence claim. The alleged duties of DeLaval on which the Schullos rely relate to assuring that there is no product defect, but the Schullos point to no evidence that the rails, as a product, were defective. Rather, the evidence, viewed most favorably to the Schullos, is that the rails were not defective but they caused injury to the cows because Spring Valley improperly installed them. The Schullos provide no developed argument to explain why any characteristic of the rails themselves imposed a duty on DeLaval, as manufacturer, to oversee their installation.

¶40 Accordingly, although our reasons differ from those of the circuit court, we agree the negligence claim was properly dismissed.[10]

II. Claims Against Addison

¶41 The Schullos' claims against Addison are premised on their assertion that the CGL insurance policy between Addison and Spring Valley provides coverage for the Schullos' claims against Spring Valley. The circuit court dismissed the breach of purchase agreement claim and the strict liability misrepresentation claim on the ground that the undisputed facts show there is no coverage for these claims under the policy. The court dismissed the negligence claim based on its conclusion that the complaint did not state a claim for relief

[10] The circuit court also dismissed the negligence claim against DeLaval on the alternative ground that the economic loss doctrine barred the claim, but we need not reach that issue in the context of the claims against DeLaval.

against Addison and, alternatively, that the negligence claim is barred by the economic loss doctrine.

¶42 In the following sections we first conclude that the complaint states a claim for relief in negligence against Addison. We next conclude that there is coverage for damage to the cows caused by the improper installation of the rails and that lack of coverage is an incorrect basis for dismissal of all three claims against Addison: the breach of purchase agreement claim, the negligence claim, and the strict liability misrepresentation claim. Finally, we conclude that Addison is not entitled to summary judgment on the economic loss doctrine and, thus, this is not a proper ground for dismissal of the negligence claim.

A. Adequacy of Complaint on Negligence Claim

¶43 The circuit court held that the complaint does not state a negligence claim against Addison because the complaint does not allege that Addison had a duty of care that was breached. On appeal the Schullos contend that the complaint adequately alleges negligence by Spring Valley in the installation of the milking equipment and adequately alleges Addison's liability under its policy for Spring Valley's negligence pursuant to the direct action statute. *See* WIS. STAT. § 632.24. Addison does not respond to this argument. We take this as a concession that the complaint was sufficient to state a negligence claim against Addison. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (citation omitted) (a respondent's failure to dispute a proposition in the appellant's brief may be taken as a concession on that point).

B. CGL Insurance Policy Coverage

¶44 When we consider whether an insurance policy provides coverage, we first determine whether the policy makes an initial grant of coverage. ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶8, 304 Wis. 2d 750, 738 N.W.2d 578 (citation omitted). If it does, we examine the policy exclusions to determine whether any of them preclude coverage. ***Id.*** In this analysis we focus on the facts underlying the claims. *See* ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶24, 268 Wis. 2d 16, 673 N.W.2d 65 (in considering the initial grant of coverage, we examine the facts of the insured's claim). Given the summary judgment posture of this case, the facts we examine are the evidence and reasonable inferences from the evidence viewed most favorably to the Schullos.

1. *Breach of Purchase Agreement*

¶45 The circuit court concluded that there was an initial grant of coverage for this claim but that certain exclusions remove coverage. On appeal the parties dispute both whether there is an initial grant of coverage and whether any exclusion applies. The facts underlying this claim are that the Schullos entered into an agreement with Spring Valley for the installation of equipment for a milking parlor, which included the rails for the cows' stalls; Spring Valley improperly installed the rails; and the rails caused sickness, injury, and death to their cows and other damages.

a. *Initial Grant of Coverage*

¶46 The relevant language of the "Insuring Agreement" in the policy provides that Addison will pay "those sums that the insured becomes legally obligated to pay as damages because of … 'property damage' to which this insurance applies," but only if the "'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory' … and … occurs during

the policy period." The circuit court held that the improper installation of the rails was an "occurrence" under the policy, and Addison does not dispute this conclusion. Accordingly, we accept that conclusion for purposes of our analysis in this opinion. Addison does dispute "property damage." That is, Addison disputes the circuit court's conclusion that the "occurrence"—improper installation of the rails—caused "property damage" under the policy and the circuit court's conclusion that the claimed property damages occurred during the policy period. We agree with the court on both these points.

¶47 "Property damage" is defined as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

Viewed most favorably to the Schullos, the submissions show that the improper installation caused physical injury to their cows, and this plainly comes within definition "a." The Schullos do not argue on appeal that there is "property damage" other than physical injury to their cows, and we therefore confine our analysis to this point. It is unnecessary for purposes of this appeal to decide whether other losses the Schullos have asserted come within either definition of "property damage."

¶48 The submissions also show that the physical injury to the cows caused by the improperly installed rails occurred during the policy period, that is, from March 29, 2002, to March 29, 2003. Addison asserts that, according to the Schullos' own submissions, the loss in milk production took place from "early"

2003 to 2009, after the policy had already ended. However, the injury to the cows was, according to the Schullos' submissions, sustained during the time the rails were incorrectly installed, from July 2002 to November 2002. This falls entirely within the policy period. The timing of the incurred financial damages resulting from the "property damage" does not affect the initial grant of coverage: it is the "property damage" that must "occur … during the policy period." Whether the Schullos are correct that the loss in milk production is a "sum[] that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage,'" is an issue we need not address on this appeal.

¶49 Having concluded there is an initial grant of coverage for sums Spring Valley is legally obligated to pay because of the property damage to the Schullos' cows caused by the improper installation of the rails, we next consider the exclusions the circuit court held applicable.

b. *Exclusions*

i. *Impaired Property Exclusion*

¶50 Exclusion m., titled "Damage to Impaired Property or Property Not Physically Injured," provides that the insurance does not apply to:

> "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> (1) A defect, deficiency, inadequacy, or dangerous condition in "your product" or "your work"; or
>
> (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

¶51 Addison argues that this exclusion applies because the cows are "impaired property."[11] The policy defines "impaired property" as:

> [T]angible property, other than "your product" or "your work," that cannot be used or is less useful because:
>
> ….
>
> b. You have failed to fulfill the terms of a contract or agreement;
>
> if such property can be restored to use by:
>
> a. The repair, replacement, adjustment or removal of "your product" or "your work"; or
>
> b. Your fulfilling the terms of the contract or agreement.

¶52 According to Addison, the cows are "impaired property" because, viewing the evidence in the Schullos' favor, the cows were less useful when Spring Valley failed to fulfill the terms of the contract by improperly installing the rails, and this deficiency was remedied when the rails were reinstalled. The Schullos respond that the submissions show that the injured cows could not be "restored to use" by reinstalling the rails correctly.

¶53 Viewing the submissions most favorably to the Schullos, we agree with them that the cows are not "impaired property." Certainly the cows that died as a result of the improperly installed rails cannot be "restored to use"; and it is a reasonable inference from the submissions that, while the reinstallation of the rails prevented further damage, that, in itself, did not fully restore the health of the

[11] Addison does not develop an argument that the cows are property "that has not been physically injured" within the meaning of this exclusion. We therefore do not address that alternative.

cows that had become sick or injured during the four months that the rails had been improperly installed.

ii. *Your Product/Your Work Exclusions*

¶54 Exclusion k., titled "Damage to Your Product," provides that the insurance does not apply to "'[p]roperty damage' to 'your product' arising out of it or any part of it." The policy defines "your product" as "[a]ny goods or products, other than real property, manufactured, sold, handled, distributed or disposed by … you."

¶55 Exclusion l., titled "Damages to Your Work," provides that the policy does not apply to "'[p]roperty damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'" The policy defines the "products-completed operation hazard" as "all 'bodily injury' and 'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work'…."

¶56 Addison argues that these exclusions preclude coverage "for the cost of removing, repairing or replacing any of the equipment sold or installed by Spring Valley." Assuming without deciding that the Schullos incurred these costs and are requesting reimbursement for them,[12] and that coverage for these costs is excluded under one or both of these exclusions, Addison's argument does not address coverage for damages resulting from *injury to the cows* caused by the improper installation of the rails. In the absence of any argument on this point from Addison—the party seeking summary judgment based on these exclusions—

[12] Our understanding of the record is that DeLaval bore these expenses, not the Schullos.

we conclude that the "your product/your work" exclusions do not apply to damages resulting from injury to the cows caused by the improper installation of the rails.

c. *Summary*

¶57 We conclude the circuit court erred in deciding that coverage for the breach of purchase agreement claim is precluded under the exclusions advanced by Addison. Because the lack of coverage is the only basis for dismissal presented by Addison, we conclude the court erred in dismissing this claim.

2. *Negligence*

¶58 We do not understand Addison to argue that the negligence claim is not covered by the policy. However, even if we assume that Addison intends that the arguments it makes with respect to lack of coverage for the breach of purchase agreement claim provide a basis for dismissal of the negligence claim as well, we reject that argument. For the reasons already explained, there is coverage for the negligence claim based on the submissions showing an improper installation of the rails that caused injury to the cows.

3. *Strict Liability Misrepresentation*

¶59 According to the Schullos, before they entered into the purchase agreement, Spring Valley representatives stated that they could install the milking parlor without problems and were very knowledgeable about the equipment. Also according to the Schullos, this representation was untrue and they relied upon it in entering into the purchase agreement with Spring Valley. Addison does not

contend that the Schullos' submissions do not provide a factual basis for the claim of strict liability misrepresentation.[13] Addison's position is that this claim must be dismissed because the alleged misrepresentations are not an "occurrence" within the meaning of the policy, and the circuit court agreed.

¶60 We agree with the circuit court that, as a matter of law, the misrepresentation attributed to Spring Valley is not an "occurrence" under the policy. However, we disagree that this is a proper basis for dismissing the strict liability misrepresentation claim.

¶61 The policy defines "[o]ccurrence" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." An "accident," for purposes of interpreting the term "occurrence" in a CGL policy, means "an event or condition occurring by chance or one that arises from unknown causes, and is unforeseen and unintended." ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 86, ¶24, 311 Wis. 2d 492, 753 N.W.2d 448 (***Stuart II***).

¶62 The Schullos argue that the misrepresentation here is an "occurrence" because a claim of strict liability misrepresentation does not require an *intentional* misrepresentation. *See* ***supra***, ¶59 n.13 (listing the elements of strict liability misrepresentation). However, this argument was rejected by the

[13] "The elements of strict liability misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant made the representation based on his or her personal knowledge, or was so situated that he or she necessarily ought to have known the truth or untruth of the statement; (4) the defendant had an economic interest in the transaction; and (5) the plaintiff believed that the representation was true and relied on it." ***Malzewski v. Rapkin***, 2006 WI App 183, ¶19, 296 Wis. 2d 98, 723 N.W.2d 156 (citations omitted).

court in ***Everson v. Lorenz***, 2005 WI 51, ¶¶18-20, 280 Wis. 2d 1, 695 N.W.2d 298. There, the court held that a misrepresentation, whether asserted as a basis for a negligent misrepresentation claim or a strict liability claim, is not an "occurrence." ***Id.***, ¶¶15, 20. The court reasoned that the act of giving information to another is a volitional act even if the speaker made a mistake of fact and/or an error in judgment when making his or her statement. ***Id.***, ¶22. The Schullos' efforts to distinguish ***Everson*** are not persuasive.

¶63 In the alternative, the Schullos contend that, even if the misrepresentation is not an "occurrence," that does not automatically mean that there is not coverage for the damages caused by the misrepresentation, specifically, the damages resulting from injury to the cows. According to the Schullos, under a proper coverage analysis, if there is an "occurrence" that causes the property damage, and if the misrepresentation is also a cause of that property damage, then there is coverage for that property damage even though the legal theory for liability is a misrepresentation claim. The Schullos assert that there is an "occurrence" here for policy coverage purposes, namely, the improper installation of the rails by Spring Valley. According to the Schullos, because Spring Valley is responsible for the "occurrence" that caused injury to the cows and because Spring Valley's misrepresentation also makes it legally liable for the damage to the cows, there is coverage for the damages resulting from the injury to the cows. The Schullos rely primarily on ***United Coop.***, 304 Wis. 2d 750, for their argument.

¶64 Addison responds that, once it is determined that a misrepresentation is not an "occurrence," there is no coverage for the misrepresentation claim and it must be dismissed without further analysis. Addison asserts that the contrary

analysis in ***United Coop.*** was implicitly overruled in the supreme court's subsequent ***Stuart II*** decision.

¶65 For the reasons we explain below, we conclude that ***United Coop.*** supports the Schullos' position and that ***Stuart II*** is not inconsistent with ***United Coop.***

¶66 In ***United Coop.*** we held that there was coverage for a breach of contract claim under an insurance policy even though we determined that the act that allegedly created liability—a refusal to comply with a contract requirement that the seller indemnify the purchaser of property for clean-up costs—was not an "occurrence" that caused property damage under the policy. ***United Coop.***, 304 Wis. 2d 750, ¶¶11-13. For purposes of our coverage analysis, we concluded that soil contamination, rather than the alleged contract breach, could be the "occurrence" for purposes of coverage. ***Id.***, ¶13. We then went on to conclude that the soil contamination was an "occurrence" that caused the alleged property damage and, therefore, the policy initially granted coverage for the claim. ***Id.***

¶67 In explaining why in ***United Coop.*** we were not limited to considering whether the act breaching the contract was the "occurrence," we stated: "in the absence of policy language specifically limiting coverage based on the type of legal claim giving rise to an insured's potential liability, the existence of an 'occurrence' is determined by looking at the asserted cause or 'factual basis' for alleged bodily injury or property damage, not by looking at the legal category of a claim against the insured." ***Id.***, ¶15. We rejected the insurer's reliance, by analogy, on ***Everson***'s conclusion that there was no coverage for the misrepresentation claims in that case. ***Id.***, ¶¶17-19. We explained that in ***Everson*** and other similar misrepresentation coverage cases there was no argument that

there was some event, other than the misrepresentation, that caused property damage.[14] ***Id.***

¶68 ***United Coop.*** supports the Schullos' position that we are not limited to the alleged misrepresentation in deciding if there is an "occurrence" for purposes of coverage. In this case, the parties do not dispute that there is another event that constitutes an "occurrence"—the improper installation of the rails—and we have concluded that the injury to the cows was caused by this "occurrence." Of course, the only damages that are covered under Addison's policy, whatever the legal theory of recovery, are those for which the insured is liable as a result of the property damage caused by this "occurrence." Thus, the damages caused by the "occurrence" must also be damages Spring Valley would be liable for under the Schullo's legal claim, misrepresentation. We do not understand the Schullos to be arguing otherwise.[15]

¶69 We do not agree with Addison that ***Stuart II*** precludes us from applying the analysis we employed in ***United Coop.*** In ***Stuart II*** the court considered a CGL insurer's argument that it was not liable for damages awarded by a jury on misrepresentation and negligent design/construction claims arising out of remodeling work on a home. ***Stuart II***, 311 Wis. 2d 492, ¶4. The jury had concluded that the misrepresentations, which induced the homeowners to enter

[14] Addison argues that our discussion of ***Everson*** and similar cases in ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, 304 Wis. 2d 750, 738 N.W.2d 578, is "dicta." We disagree. This discussion was an integral part of our explanation for rejecting the insurer's position.

[15] We recognize that this means that the misrepresentation claim, if successful, will apparently not result in any greater covered damages than the negligence claim, if that claim is successful. However, Addison does not argue that this is a basis for dismissal of the misrepresentation claim, and we see no reason why it would be.

into the contract, and the negligence were each causes of the plaintiffs' damages. ***Id.***, ¶10.[16] As to the misrepresentation claim, the court addressed the insurance company's argument that the misrepresentations were by definition intentional and, therefore, not an "occurrence" within the meaning of the policy which defined an "occurrence" as an "accident." ***Id.***, ¶¶23-24. In the ensuing discussion, the ***Stuart II*** court addressed only whether a misrepresentation could be an "occurrence." ***Id.***, ¶¶24-45. Consequently, when the court concluded this discussion, it spoke solely in terms of whether the alleged misrepresentation was an "occurrence":

> In sum, each of the [homeowners'] attempts to paint [the contractor's] misrepresentations as accidental occurrences fail. Neither case law nor common sense supports an interpretation of "accidental occurrence" that would include misrepresentations volitionally made with the particular intent to induce. The CGL policy unambiguously limits coverage to accidental occurrences. Therefore, we cannot reasonably view the misrepresentations in this case as occurrences within the meaning of the CGL policy.

Id., ¶45. It followed then, that the "misrepresentations viewed in isolation were not covered" because they were not "occurrences." *See* ***id.***, ¶51. Nothing in ***Stuart II*** suggests that the court either did or intended to address the issue discussed in ***United Coop.***, that is, whether a claim should be dismissed if the

[16] As instructed, the jury had apportioned the damages between the misrepresentation and negligence claims. ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 86, ¶11, 311 Wis. 2d 492, 753 N.W.2d 448 (***Stuart II***). However, the supreme court concluded in ***Stuart I*** that the circuit court erred in requiring the jury to apportion the damages. ***Id.***, ¶17 (citing ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 22, ¶¶4, 48, 308 Wis. 2d 103, 746 N.W.2d 762 (***Stuart I***)).

alleged damages are caused both by the alleged liability-creating act *and* by a distinct event that is an "occurrence."[17]

¶70 Because we conclude that ***Stuart II*** does not implicitly overrule ***United Coop.*** and because our analysis in ***United Coop.*** is applicable here, we follow ***United Coop.***

¶71 Addison has not presented any basis for dismissal of the strict liability misrepresentation claim other than that the misrepresentation is not an "occurrence" within the meaning of the policy.[18] We conclude this is not a proper basis for dismissal, given that the misrepresentation is causally connected to "property damage" caused also by an "occurrence" under the policy. Accordingly, we reverse the dismissal of the strict liability misrepresentation claim.

C. Economic Loss Doctrine

¶72 The economic loss doctrine "operates to restrict contracting parties to contract rather than tort remedies for recovery of economic losses associated with the contract relationship." ***American Girl***, 268 Wis. 2d 16, ¶35 (citation omitted). The doctrine is applicable to both negligence and strict liability misrepresentation claims. *See* ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 245-46, 593 N.W.2d 445 (1999) (citations omitted). Thus, even

[17] The court in ***Stuart II***, 311 Wis. 2d 492, went on to address other issues, including whether the verdict was supported by a negligence claim because of the "rule of concurrent risks." *See* ***id.***, ¶¶47-51. But we discern nothing that implicates our analysis in ***United Coop.***, 304 Wis. 2d 750.

[18] Addison may mean to argue that an alternative ground for dismissal of the strict liability misrepresentation claim is the economic loss doctrine. However, we explain in the next section why Addison is not entitled to summary judgment on that ground.

though there may otherwise be coverage for damages the Schullos seek on their negligence and strict liability misrepresentation claims, the economic loss doctrine may provide a basis for dismissal of those two claims.[19]

¶73 The economic loss doctrine applies only when the contract is for goods and does not apply when the contract is for services. ***1325 North Van Buren, LLC v. T-3 Group, Ltd.***, 2006 WI 94, ¶29, 293 Wis. 2d 410, 716 N.W.2d 822 (citing ***Insurance Co. of N. Am. v. Cease Elec., Inc.***, 2004 WI 139, ¶14, 276 Wis. 2d 361, 688 N.W.2d 462). If the contract, as here, is one for mixed goods and services, we determine whether the contract is predominantly a sale of a product or predominantly a contract for services. ***Linden v. Cascade Stone Co., Inc.***, 2005 WI 113, ¶8, 283 Wis. 2d 606, 699 N.W.2d 189.

¶74 The economic loss doctrine, when it applies, bars recovery of damages not only for physical damage to the purchased product itself but also for physical damage to property that is not considered "other property" under the case law. ***Grams v. Milk Products, Inc.***, 2005 WI 112, ¶¶23-24, 283 Wis. 2d 511, 699 N.W.2d 167 (citations omitted).[20] The "other property" concept that is relevant in

[19] Addison appears to be relying on the economic loss doctrine at certain points in its discussion of "property damage" within the meaning of the insurance policy, but we do not discuss the doctrine in that context. "The economic loss doctrine is a remedies principle[,] … determin[ing] how a loss can be recovered—in tort or contract/warranty law. It does not determine whether an insurance policy covers a claim, which depends instead upon the policy language." ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶35, 268 Wis. 2d 16, 673 N.W.2d 65 (citation omitted).

[20] The term "other property" as used in the context of the economic loss doctrine is a legal term of art, in that it is given a specialized meaning in the case law. ***Wilson v. Tuxen***, 2008 WI App 94, ¶11, 312 Wis. 2d 705, 754 N.W.2d 220 (citation omitted).

this case is the "disappointed expectation" concept.[21] Under this concept, damaged property is not considered "other property" if the need for protection through contract against that loss should have been anticipated by the purchaser. ***Foremost Farms USA Coop. v. Performance Process, Inc.***, 2006 WI App 246, ¶17, 297 Wis. 2d 724, 726 N.W.2d 289. "This test focuses on the expected function of the product and whether, from the purchaser's perspective, it was reasonably foreseeable that the product could cause the damage at issue." ***Id.***

¶75 The Schullos make two arguments against the application of the economic loss doctrine. First, they assert that the purchase agreement with Spring Valley is a contract for services. Second, they contend that the sickness, injury, and death to their cows caused by the improperly installed rails is damage to "other property" under the disappointed expectation test. This is so, they contend, because it was not reasonably foreseeable that damage to the cows would be caused by the rails. According to the Schullos, they are entitled either to summary judgment on this issue or to a trial.

¶76 Turning first to the nature of the purchase agreement, we agree with Addison that, based on the undisputed facts, the purchase agreement is a mixed contract predominantly for a product—the finished milking parlor. We find guidance in two cases, both of which concluded the contracts at issue were mixed

[21] Another concept employed to determine "other property" for purposes of the economic loss doctrine is the "integrated system" concept. ***Grams v. Milk Products, Inc.***, 2005 WI 112, ¶27, 283 Wis. 2d 511, 699 N.W.2d 167. Under this analysis, a component part of a system into which the purchased product is integrated is not considered "other property." ***Id.*** Addison implicitly agrees with the Schullos that the "disappointed expectation" analysis, not the "integrated system" analysis, is appropriate in this case.

contracts, primarily for goods: ***Linden***, 283 Wis. 2d 606, and ***1325 North Van Buren***, 293 Wis. 2d 410.

¶77 In ***Linden*** the court addressed a contract for home construction. ***Linden***, 283 Wis. 2d 606, ¶2. The court considered the totality of the circumstances, including: the language of the contract, the nature of the business of the supplier, the intrinsic worth of the materials, the circumstances of the parties, and the primary objective they hoped to achieve by entering into the contract. ***Id.***, ¶21 (citations omitted). The court noted that the contract did not identify all costs broken down into services and materials, but the cost of materials was nevertheless significant. ***Id.***, ¶23. In addition, the contract was "couched both in terms of service words and product words" and described the finished product. ***Id.***, ¶24. The court also considered it significant that the project's cost was billed using a fixed price, which did not change based upon the number of hours worked. ***Id.***, ¶25. The court determined that "the primary reason the Lindens entered into the contract was to have a house custom built for them." ***Id.***

¶78 ***1325 North Van Buren*** involved a contract for renovation of an existing warehouse into a condominium building. ***1325 North Van Buren***, 293 Wis. 2d 410, ¶7. The contract provided that the contractor would provide the necessary materials as well as construction management services. ***Id.*** In concluding that the predominant purpose of the contract was to provide a completed condominium complex, the court noted the following. First, the contract language provided the contract was for "renovation of a warehouse into a 42-unit condominium and construction of adjacent parking garages," which meant that the contractor was obligated to provide this specific product. ***Id.***, ¶46. Second, the fee for construction management services was only 2.8% of the total contract price. ***Id.***, ¶47. Third, the contract was a fixed-price contract, which

"signifies that the parties bargained based on the specifications of the condominium complex not the amount of work required to complete the project." ***Id.*** Fourth, the bidding process suggested that the owner viewed the contract as one for a finished product, not services, because the decision was made based upon overall project price, not the cost of management services. ***Id.***, ¶48.

¶79 Turning to the facts in this case, we are satisfied that the language of the purchase agreement between Spring Valley and the Schullos establishes that the contract was primarily one for a good, the milking parlor. The contract is entitled "Purchase Agreement" and lists the component parts being purchased for the milking parlor, as well as identifying the price of each. There are only a few references to labor in the contract, and when labor is referenced, it is not separately priced but is included in the price for that product. Thus, like the contracts in ***Linden*** and ***1325 North Van Buren***, the purchase agreement here was a fixed-price contract and did not provide for the contract price to change depending upon the number of hours worked.

¶80 We disagree with the Schullos that the facts here are like those in ***Cease Electric***, 276 Wis. 2d 361, where the court concluded the contract was one for services. In ***Cease Electric***, the owner entered into a contract for the upgrade of the ventilation system in a barn. ***Id.***, ¶3. The court concluded the contract was for services because "[a]ll [the contractor] was required to do was to follow the one-page wiring schematic to ensure that the controller was properly wired to ventilation fans and a power source." ***Id.***, ¶18. The contractor was paid on an hourly basis, not based on a fixed price, and there was no evidence that it furnished component parts for the system other than the conduit and wiring. ***Id.***, ¶¶19, 21. In contrast, in this case Spring Valley supplied all the component parts for the milking parlor and, as already noted, charged a fixed price.

D. "Other Property" Exception—"Disappointed Expectation" Analysis

¶81 Having concluded the purchase agreement is a contract primarily for goods, we turn to an examination of the "other property" exclusion to the economic loss doctrine and, in particular, the disappointed expectation test.

¶82 The parties agree that the Schullos purchased the milking equipment for the purpose of producing milk. Indeed, Addison describes milk production as "the heart of the bargain." The evidence, including reasonable inferences from the evidence, shows that the purpose of the rails was to hold the cows in a position during milking that would be comfortable to the cows and permit the operator to milk efficiently. We agree with Addison that there is no dispute on this record that it was reasonably foreseeable that, if the milking equipment, including the rails, did not perform as expected, milk production would be lower than expected. The Schullos do not make an argument to the contrary, effectively conceding that it was reasonably foreseeable that the failure of the rails to perform as expected would result in a lower than expected level of milk production.

¶83 The parties' dispute centers on whether it was reasonably foreseeable that, if the rails did not perform as expected, they could result in sickness, injury, or death to the cows. The Schullos' unrefuted submissions show that they did not expect this result; and, they assert, there is no evidence that they reasonably should have expected it. *See* ***Foremost Farms***, 297 Wis. 2d 724, ¶17.

¶84 Addison responds that case law establishes that it was reasonably foreseeable, from the Schullos' perspective, that their cows could become sick or injured or die as a result of the equipment installed by Spring Valley. In support of its assertion, Addison focuses on two cases it contends are factually similar to this case: ***Grams***, 283 Wis. 2d 511, and ***Wilson v. Tuxen***, 2008 WI App 94, 312

Wis. 2d 705, 754 N.W.2d 220. We conclude that neither case resolves the issue in this case.

¶85 In ***Grams*** the use of a new milk replacer, which was without medication and therefore cheaper, resulted in malnutrition and an increased mortality rate among the farmer's calves. ***Grams***, 283 Wis. 2d 511, ¶¶7-8. The court concluded that the farmer expected the product would "foster the healthy development and growth of young calves." ***Id.***, ¶50. The court also concluded that the malnutrition, and in some cases death, that occurred was the precise result that the farmer had sought to avoid in purchasing the product. ***Id.***, ¶51. The court rejected the argument that the death of the calves (unlike, perhaps, merely stunted growth) was an unanticipated result. ***Id.***, ¶¶52-53. The court pointed to the fact, evidently undisputed, that showed that, even with medicated milk replacer, there had been a mortality rate of 9%. ***Id.***, ¶53. The court stated: "A reasonable farmer would know that switching to an unmedicated milk replacer could cause some increase in calf mortality. The only question was how much. Obviously, the Grams expected a lower increase in calf mortality than actually occurred, but that does not change the fact that the calves' nutrition—or, unfortunately, malnutrition—was at the heart of the bargain the Grams made." ***Id.***

¶86 In contrast to ***Grams***, Addison points to no evidence in this record that links what Addison describes as the "heart of the bargain"—milk production—with the result of sick, injured, or dead cows. That is, Addison does not cite to evidence, let alone undisputed evidence, that a reasonable farmer in the Schullos' position would know that, if the rails did not perform as expected, sickness, injury, or death could result.

¶87 In ***Wilson***, a farmer purchased dairy cows that were infected with Johne's disease, resulting in decreased milk production and death of some cows. ***Wilson***, 312 Wis. 2d 705, ¶15. We first concluded that the cows themselves were the defective product and therefore not "other property." ***Id.***, ¶14. In the alternative, we stated, even if we considered the cows to be property other than the product itself, their loss in value because of Johne's disease was a disappointed expectation.[22] ***Id.***, ¶15. Addison relies on our discussion of this alternative. We stated that the cows were purchased for the dairy operation, they produced less milk and some of them died because of the disease, and their "failure to produce as expected was contrary to the Wilsons' expectation of the cows' performance." ***Id.***

¶88 We are not persuaded that ***Wilson*** disposes of the issue in this case. Addison evidently assumes that the reasonable expectations of a farmer when purchasing a dairy herd are always the same as the reasonable expectations of a farmer when purchasing milking parlor equipment. However, Addison provides no developed argument to explain why this is so. In ***Foremost Farms*** we explained that "resolution of the factual question—was the damage something a reasonable purchaser should have foreseen—will most often require an inquiry into what is normally known by a purchaser in the plaintiff's position." ***Foremost Farms***, 297 Wis. 2d 724, ¶23. We follow this principle in concluding that neither ***Wilson*** nor ***Grams*** obviates the need for an inquiry into what a reasonable

[22] We engaged in another alternative analysis in ***Wilson***, 312 Wis. 2d 705. We concluded that, even if the cows were not themselves the defective product and even if the correct question for the disappointed expectation test were whether the farmer should have reasonably foreseen the particular risk that the cows might have the disease, there was no factual dispute that a reasonable person would have perceived this risk, given the record in the case. ***Id.***, ¶¶16-19.

purchaser in the Schullos' position would have foreseen when purchasing the milking parlor equipment, in particular, the rails.

¶89 As we have noted above, Addison cites to no evidence, let alone undisputed evidence, that a reasonable farmer in the Schullos' position would know that, if the rails did not perform as expected, sickness, injury, or death could result. Accordingly, we agree with the Schullos that summary judgment dismissing the negligence claim on this ground was error.

¶90 However, we do not agree with the Schullos that they are entitled to a ruling that, as a matter of law, the economic loss doctrine does not bar their negligence and strict liability misrepresentation claims. The Schullos do not present a developed argument pointing to undisputed facts of record that show a reasonable purchaser in their situation could not have foreseen that sickness, injury, or death of their cows could result if the rails did not perform as expected.

¶91 In summary, we conclude that neither party is entitled to summary judgment on the applicability of the economic loss doctrine.

CONCLUSION

¶92 We reverse the grant of summary judgment in favor of DeLaval on the breach of warranty claim, and affirm the grant of summary judgment in favor of DeLaval on all other claims. We reverse the grant of summary judgment in favor of Addison on the claims for breach of purchase agreement, negligence, and strict liability misrepresentation, and affirm the grant of summary judgment dismissing the intentional misrepresentation claim. In addition, as to both DeLaval and Addison, we affirm dismissal of the unfair trade practices claim based on the Schullos' concession. *See* ***supra***, ¶7 n.3

By the Court.—Order affirmed in part, reversed in part, and cause remanded for further proceedings.

Not recommended for publication in the official reports.