COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2173 **Cir. Ct. No. 2004CV395**

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

RENAISSANCE LEARNING, INC.,

PLAINTIFF-APPELLANT,

V.

OMRON CORPORATION AND OMRON ELECTRONICS, LLC,

DEFENDANTS-RESPONDENTS,

PLEXUS SERVICES CORP.,

DEFENDANT.

APPEAL from an order of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Renaissance Learning, Inc., appeals from an order granting summary judgment to Omron Corporation. Renaissance sought to recover the over $2.5 million damages it incurred when a component part Omron supplied to an intermediary manufacturer with which Renaissance had contracted failed in use. We agree with the circuit court that Renaissance's breach of contract and breach of implied warranty claims fail for lack of privity of contract, its tort claims are barred by the economic loss doctrine and its WIS. STAT. § 100.18 (2005-06)[1] claim fails for lack of intent to mislead. We affirm.

¶2 Renaissance sells optical mark readers (OMRs) to school systems. OMRs electronically read the "bubbles" students mark on scantron sheets. Omron makes photosensors that are components of OMRs. Renaissance decided to redesign its OMRs and in February 2001 bought a design from a California company which incorporated an Omron photosensor called the EE-SY169A ("the '169A"). After considering various photosensors, including non-Omron makes, Renaissance ultimately chose the Omron EE-SY169 ("the '169"). In July 2001, Renaissance contracted with Plexus Services Corp. to have Plexus manufacture the new OMRs. Production began in October 2001; by August 2002 Renaissance was receiving complaints that the OMRs were failing. An investigation isolated the cause to the '169 photosensor.

¶3 Renaissance's claims against Omron stem from the period during which Renaissance evaluated which photosensor to incorporate into its redesigned OMR. The design Renaissance purchased used an Omron '169A. The '169A could read only pencil marks, however, and Renaissance deemed it essential that

[1] All references to the Wisconsin Statutes are to the 2005-06 version.

the photosensor in its application be capable of reading dye ink. The ’169 could do both. On April 11, 2001 a representative of NEP Electronics, an Omron distributor, visited Renaissance accompanied by Omron’s Tim Hession. NEP gave Renaissance Omron’s 1998 Photomicrosensor Product Data Book, which provided general information about Omron’s entire line of photosensors.[2]

¶4 Because the redesigned OMR incorporated a continuously lit photosensor, Renaissance was interested in the photosensor’s endurance. A chart in the Data Book showed the results of laboratory reliability testing Omron had conducted. The average life expectancy of the tested photosensors was stated to be 344,000 hours, about thirty-nine years. Accompanying text explained that the data were obtained under constant conditions and cautioned that, in actual usage, ambient condition changes must be considered. Since the data were not stated to be limited to any particular models, Renaissance understood the data to be broadly applicable to all photosensors for sale in the Data Book, including the ’169.

¶5 On June 7, 2001, Omron’s Hession and Arlynne Fernandez Smith, also of Omron, traveled to Renaissance’s office because Renaissance wanted a teleconference with Omron’s Ayabe, Japan office. Renaissance informed Hession before they arrived, however, that it had decided on the ’169 and that the teleconference no longer was necessary. At the meeting, Renaissance presented the circuit design, a prototype unit and the proposed use, and shared results of testing it did comparing the abilities of the ’169 and ’169A to read various inks, pencil marks and erasures. Renaissance reported that the ’169A showed

[2] The terms “photosensor” and “photomicrosensor” appear to be used interchangeably in the parties’ materials. We intend no difference in meaning, and use “photosensor” for brevity.

considerable inconsistency, while the ’169 was accurate 100% of the time. Smith told Renaissance that the ’169 was Omron’s “best” part for its OMRs.[3]

¶6 In July Renaissance contracted with Plexus, which purchased the ’169 photosensor directly from Omron. Within a year, customers—especially in humid areas of the country—began reporting OMR failure. An investigation showed that the continuously lit ’169 photosensors rapidly degraded when their aluminum components oxidized in the presence of water vapor and heat. Renaissance incurred more than $2.5 million in damages stemming from investigating and replacing the failed OMRs.

¶7 On April 13, 2004, Renaissance filed an action against Omron asserting contract claims, tort claims and a statutory claim under WIS. STAT. § 100.18.[4] Omron moved to dismiss all the claims, asserting that there was no privity of contract, the tort claims were barred by the economic loss doctrine, and the § 100.18 claim was barred by the statute of limitations. The court granted Omron’s motion to dismiss Renaissance’s tort claims but denied the motion to dismiss the others. Omron then moved for summary judgment on the remaining claims, addressing the § 100.18 claim on its merits, rather than making a statute of

[3] A day earlier, Smith had e-mailed Hirofumi Murai in Ayabe, asking: “For preparation for the meeting tomorrow, what would be the reliability difference between [the ’169 and ’169A]?” Murai responded by e-mail at 2:41 p.m. on June 7:

> In regard to the reliability comparison between Infrared LED [the ’169A] and red LED [the ’169], in general, red LED has lower reliability than infrared because another element of Al (aluminum) is doped into the GaAs. This ingredient has an adverse affect on the reliability when ambient humidity is high.

Murai’s response was not communicated to Renaissance.

[4] Renaissance also sued Plexus, who later was dismissed.

limitations argument. In September 2006, the court granted Omron's motion on the express and implied contract claims, concluding there was no privity of contract, but denied it on the § 100.18 claim.

¶8 On May 30, 2007, the time for filing dispositive motions long past, Omron sought leave to file another summary judgment motion on the only remaining claim, the alleged violation of WIS. STAT. § 100.18. This motion addressed the merits and the statute of limitations, which was supported by a newly filed affidavit of Omron's Hession. Renaissance opposed the motion on grounds the affidavit was inconsistent with Hession's prior deposition testimony, thereby calling his credibility into question. The court granted leave, limited argument to the statute of limitations and ultimately granted Omron's motion. Renaissance appeals. Additional facts will be supplied where warranted.

DISCUSSION

1. Contract Claims

¶9 Renaissance contracted with Plexus to manufacture its OMR. Plexus contracted with Omron to supply the '169. The question is whether Renaissance has an action in contract against Omron by virtue of sample test data in Omron's Data Book, Smith orally representing that the '169 was Omron's "best" part for the OMR, and Omron's failure to dissuade Renaissance from using the '169 once Omron became aware of the OMR's design and intended purpose. At summary judgment, the circuit court said no. We agree.

¶10 When reviewing a grant of summary judgment, we apply de novo the standards set forth in WIS. STAT. § 802.08(2), just as the circuit court did. *See* ***Linden v. Cascade Stone Co.***, 2005 WI 113, ¶5, 283 Wis. 2d 606, 699 N.W.2d

189. Summary judgment must be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Sec. 802.08(2). We view the summary judgment materials in the light most favorable to the nonmoving party. ***Rainbow Country Rentals and Retail, Inc. v. Ameritech Publ'g, Inc.***, 2005 WI 153, ¶13, 286 Wis. 2d 170, 706 N.W.2d 95.

¶11 The circuit court concluded that Omron and Renaissance were not in privity of contract. No written contract existed between Renaissance and Omron. Renaissance contends, however, that the representations in the Data Book combined with interactions between its and Omron's employees created privity. Renaissance looks to ***Paulson v. Olson Implement Co.***, 107 Wis. 2d 510, 319 N.W.2d 855 (1982), as support for its argument.

¶12 In ***Paulson***, the two stockholders of a large-scale farm corporation (collectively, Paulson) entered into a written agreement with Olson Implement Company to buy a grain-drying facility that included a component manufactured by Super Steel Products Corporation. ***Id.*** at 512-14. Super Steel's agent provided literature to Paulson and specifically told it on two occasions that Super Steel's product would dry Paulson's 5,000-bushel daily corn harvest within twenty-four hours. ***Id.*** at 518. Olson affirmed the agent's representations when Paulson signed the sales agreement. ***Id.*** at 513-14. The drying bin never performed as represented, however, instead taking forty to fifty hours. ***Id.*** at 514.

¶13 The supreme court had "no difficulty, in law or equity, in finding privity" between Super Steel and Paulson because Super Steel's actions and express representations, made for the obvious purpose of inducing a sale, formed a

"unilateral contract" with Paulson. ***Id.*** at 518-519. A unilateral contract arises where only one party has made a promise and only that party is subject to a legal obligation. ***Id.*** at 517, n. 6. The sales contract between Olson and Paulson furnished the underlying consideration for the unilateral contract. ***Id.*** at 518-19. Twice Super Steel had directly promised Paulson that the specially tailored drying bin would meet its specific needs. ***Id.***

¶14 Superficially similar, ***Paulson*** nonetheless is easily distinguishable. That case was based on express oral guarantees. Here, the affidavits of Omron employees who dealt with Renaissance all aver that they did *not* provide any oral or written representations or guarantees of the '169's performance.[5] The affidavits similarly disavowed that they ever represented or guaranteed either orally or in writing that the information in the Data Book would be how the '169 would perform either generally or in Renaissance's application. As Renaissance did not refute those averments in its counteraffidavits, those matters are deemed uncontroverted. *See* ***Wisconsin Elec. Power Co. v. California Union Ins. Co.***, 142 Wis. 2d 673, 684, 419 N.W.2d 255 (Ct. App. 1987). A review of the Data Book—a compendium of graphs, charts, diagrams and tables—confirms that it is not promotional literature. It simply reports the results of testing, and in fairly dry

[5] The closest to an affirmative representation of suitability came from Smith, the Omron employee who told Renaissance that the '169 was Omron's "best" part for it. Renaissance offers nothing to show that, at the time, the '169 was not Omron's best part for it. Renaissance deemed it essential that the redesigned OMR be capable of reading dye ink. The '169 could and the '169A could not. A Renaissance affidavit exhibit indicates that, under Renaissance's own testing, the '169 "was accurate 100% of the time and the ['169A] had a considerable amount of inconsistencies." The '169B with which Renaissance later replaced the '169 did not become commercially available until the latter half of 2002. If Smith made such a broad comment, it does not approach the direct, specific guarantee of suitability present in ***Paulson v. Olson Implement Co.***, 107 Wis. 2d 510, 319 N.W.2d 855 (1982),

fashion. The Data Book does not make the express performance guarantees like those which led to a unilateral contract in ***Paulson***.

¶15 We do not decide whether ***Paulson*** extends to written representations. Assuming solely for argument's sake that it does, Renaissance's position still comes up short. Indeed, Renaissance shies from characterizing the Data Book as expressly warranting the '169's performance. Rather, Renaissance asserts that it "understood" the reliability data to apply to the '169; that the data "indicated" to it that humidity was not a factor; and that, because the Data Book did not distinguish between the '169 and the '169A, it "concluded" the '169 was suitable for its application. Conclusions about the '169's aptness thus came from Renaissance's own deductions drawn from the reliability data. This is a far cry from the direct, specific promises of suitability found in ***Paulson***.

¶16 No written contract existed between Renaissance and Omron. Renaissance's attempt to use ***Paulson*** as a springboard for finding an express contract fails because, first, no oral guarantees were made and, second, the reliability data in no way constitute direct, specific representations or guarantees of the '169's performance. Renaissance's summary judgment papers confirm that Renaissance drew not on Omron's direct representations but on its own inferences and interpretations of the reliability data. Viewing the summary judgment materials in the light most favorable to Renaissance, no reasonable fact finder could conclude that information from Hession and Smith, by itself or combined with the Data Book, created a contract between Renaissance and Omron. Without privity of contract between Renaissance and Omron, there is no liability for a breach of warranty, express or implied. *See* ***Prinsen v. Russos***, 194 Wis. 142, 145, 215 N.W. 905 (1927).

2. Economic Loss Doctrine

¶17 The circuit court dismissed Renaissance's three tort claims—fraudulent misrepresentation, negligent misrepresentation and strict responsibility—on grounds that they were barred by the economic loss doctrine (ELD). Renaissance contends that the court's ruling is an unwarranted extension of the ELD unrelated to its underlying principles.

¶18 A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint, a matter we review de novo. ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999). Applying the ELD to a set of facts also presents a question of law subject to independent appellate review. ***Insurance Co. of N. Am. v. Cease Elec., Inc.***, 2004 WI 139, ¶15, 276 Wis. 2d 361, 688 N.W.2d 462.

¶19 The ELD is a judicially created doctrine under which a commercial purchaser of a product cannot recover from a manufacturer, under tort theories, damages that are solely economic. ***Daanen & Janssen, Inc. v. Cedarapids, Inc.***, 216 Wis. 2d 395, 400, 573 N.W.2d 842 (1998). Economic damages are those direct or consequential losses resulting from inadequate value because the product is inferior and does not work for the general purposes for which it was manufactured and sold. ***Id.*** at 401. Three policies support the application of the ELD to commercial transactions: preserving the fundamental distinction between tort law and contract law; protecting the parties' freedom to allocate economic risk by contract; and encouraging the purchaser, which is the party best situated to assess the risk of economic loss, to assume, allocate or insure against that risk. ***Wausau Tile***, 226 Wis. 2d at 247. The ELD applies even where no privity of

contract exists between the manufacturer and the remote purchaser. ***Daanen & Janssen***, 216 Wis. 2d at 418.

¶20 We conclude that this case fits precisely within the parameters of the ELD. Renaissance pled only economic damages. It alleged that it incurred more than $2.5 million in losses relating to the investigation and replacement of over 20,000 failed OMRs. Repair and replacement costs are typical measures of economic loss. ***Wausau Tile***, 226 Wis. 2d at 248.

¶21 We disagree that the circuit court overextended the doctrine's boundaries. "A manufacturer in a commercial relationship has no duty under either negligence or strict liability theories to prevent a product from injuring itself. The duty to provide a product which functions to certain specifications is contractual." ***Rich Prods. Corp. v. Kemutec, Inc.***, 241 F.3d 915, 918 (7th Cir. 2001). In protecting the freedom to contract, commercial parties may set the terms of their own agreement, including warranties, disclaimers and limitation of remedies and a manufacturer may negotiate with its distributors and purchasers to disclaim or limit its liability for economic losses. ***Daanen & Janssen***, 216 Wis. 2d at 407-08. Renaissance desired a photosensor with specific capabilities and attributes. It was free to negotiate for warranty protection with Plexus, or even with Omron. By choice or omission, Renaissance did not do so. Wisconsin law does not permit imposing a tort duty to cover the economic loss of a party who did not bargain for adequate contract remedies. *See* ***Wausau Tile***, 226 Wis. 2d at 265. The motion to dismiss was properly granted.

3. WISCONSIN STAT. §100.18 claim

¶22 Renaissance's complaint also raised a false advertising claim under WIS. STAT. § 100.18. Omron argues on appeal that it is barred by the three-year statute of limitations. *See* WIS. STAT. § 100.18(11)(b)3.

¶23 We need not address the argument as presented. WISCONSIN STAT. § 100.18 claims require proof of intent to sell or induce. ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 86, ¶35, ___ Wis. 2d ___, ___ N.W.2d ___, No. 2005AP1287. We have concluded that Renaissance's understanding of the '169's capabilities came from its own misperceptions, not from any misrepresentations by Omron. If there was no negligent misrepresentation, there surely cannot have been intentional misrepresentation. This claim fails.

CONCLUSION

¶24 The parties had no formal contract and none was created by virtue of any oral or written representations or face-to-face dealings; Renaissance's contract claims therefore fail. The ELD precludes Renaissance from pursuing tort remedies for its solely economic loss. Tort law aims to protect people from unanticipated calamity. *See* ***Wausau Tile***, 226 Wis. 2d at 248. Renaissance's misfortune may seem a calamity, but it was not unforeseen. Finally, its WIS. STAT. § 100.18 claim fails for lack of proof of intent. We affirm the circuit court in all regards.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.