COURT OF APPEALS
DECISION
DATED AND FILED

January 24, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP295 **Cir. Ct. No. 2009CV210**

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

GURPREET K. SINGH AND JOGA SINGH,

PLAINTIFFS-APPELLANTS,

V.

LESTER D. HESTAD, GLORIA D. HESTAD AND MIDWEST FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

DAVID MILES, D/B/A VALLEY HOME INSPECTIONS,

DEFENDANT.

APPEAL from a judgment of the circuit court for Washburn County: GERALD L. WRIGHT, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Gurpreet and Joga Singh appeal a summary judgment dismissing their various claims arising from the purchase of their home. The Singhs asserted claims for statutory and common law misrepresentation, breach of express and implied warranty, and negligent construction. The circuit court granted summary judgment to the sellers, dismissing all of the Singhs' claims. We affirm.

BACKGROUND

¶2 Lester and Gloria Hestad constructed their own home with assistance from others, including friends and family. They moved into the home in November 2000, and listed it for sale in 2005. The Singhs toured the home several times with their realtor Jeri Bitney.

¶3 Joga testified in his deposition that he never met Gloria and that Lester did not tell him anything during their one meeting that caused Joga to want to purchase the home. The Singhs knew the Hestads had built the house, but were unconcerned that the Hestads had done a lot of the construction work. Bitney, however, recommended that the Singhs have the home inspected and receive a home warranty from the Hestads.

¶4 The Singhs submitted an offer to purchase the home on June 15, 2005. On June 17, they accepted the Hestads' counter offer, which included a one-year home warranty and an inspection contingency. The Singhs also received and signed the real estate condition report on the seventeenth. They hired David Miles to inspect the home.

¶5 Miles discovered no significant problems with the home. Joga testified he did not view the real estate condition report prior to June 17, and did

not rely upon it in purchasing the home. Rather, he was relying on Miles' inspection report. Gurpreet similarly testified that they relied on the inspection report in purchasing the home, and that no oral or written representations by the Hestads influenced her decision to purchase the home. The sale closed on August 31, 2005.

¶6 The Singhs later experienced problems with the home and obtained an inspection from James Price. Among other things, Price discovered problems with the home's structural design and electrical and plumbing systems. Price told the Singhs it was unsafe to remain in the home and the repair costs would exceed the home's value. The Singhs vacated the home in June 2009.

¶7 The Singhs brought the present action in August 2009, naming the Hestads and Miles. Miles was dismissed by stipulation because the two-year statute of limitations for claims against home inspectors had expired. *See* WIS. STAT. § 440.977(1).[1] The circuit court subsequently granted summary judgment dismissing all claims against the Hestads, based on all of the multiple grounds argued by the Hestads.[2] The Singhs now appeal.

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

[2] "The appellant's brief *shall* include a short appendix containing, at a minimum, the findings or opinion of the circuit court [and] limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues ...." WIS. STAT. RULE 809.19(2) (emphasis added). The Singhs' appendix, however, contains only a judgment and an order for judgment, which merely indicate the court was granting summary judgment for "the reasons stated on the record at the hearing." Moreover, the Singhs' brief fails to explain how the court decided each of the issues. *See* WIS. STAT. RULE 809.19(1)(b), (d). We caution counsel that noncompliance with the rules of appellate procedure may result in sanctions, including monetary penalties. *See* WIS. STAT. RULE 809.83(2).

DISCUSSION

¶8 We first address, and reject, the Singhs' claims for breach of warranty and statutory and common law misrepresentation. We agree with the Hestads' argument that these claims all fail because there was no reliance.

¶9 The Singhs' breach of express warranty and misrepresentation claims all include reliance as an element.[3] *See* ***Malzewski v. Rapkin***, 2006 WI App 183, ¶¶13-14, 17, 19-21, 296 Wis. 2d 98, 723 N.W.2d 156. The Singhs,

[3] The Singhs also assert a claim for breach of the implied warranty of habitability. However, they fail to identify the elements of this claim, which may or may not exist in Wisconsin. *See* ***Dittman v. Nagel***, 43 Wis. 2d 155, 160 n.1, 168 N.W.2d 190 (1969) ("It is generally the law that there are no implied warranties of quality in the sale of real estate.") (citing SAMUEL WILLISTON & WALTER H.E JAEGER, 7 WILLISTON ON CONTRACTS 804, § 926A (3d ed. 1963)); WIS. STAT. § 706.10(6); *but see* ***Riverfront Lofts Condo. Owners Ass'n v. Milwaukee/Riverfront Props.***, 236 F. Supp. 2d 918, 926-934 (E.D. Wis. 2002) (concluding WIS. STAT. § 706.10(7) establishes an implied warranty of habitability). We also note that ***Dittman***'s footnoted comment does not account for the real estate condition report now mandated in Wisconsin. *See* WIS. STAT. §§ 709.01, 709.02, 709.03, 709.06 (generally, requiring sellers of real property to disclose any known defects); WILLISTON, *supra*, 804-05 ("Unless the seller of real estate ... is under a duty to disclose facts as to the property known to him but not to the buyer, generally he need not do so ....") (citation omitted). In any event, as the Singhs fail to identify the elements of an implied warranty claim, we will assume it, like express warranty, includes reliance as an element.

Regardless, we would also reject the Singhs' claim because, even assuming such a claim exists in Wisconsin, the contract between the parties was for the sale of an existing home, not improvement or construction of a home. According to the Singhs' argument, construction is the only situation where an implied warranty has been recognized. *See* ***Petersen v. Hubschman Constr. Co.***, 389 N.E.2d 1154 (Ill. 1979). This is also consistent with the language of WIS. STAT. § 706.10(7), which applies only where the "grantor undertakes to improve the premises."

Further, we observe that the Singhs seek to distinguish ***Dittman*** by *twice* misstating the case's holding. In their initial brief, citing ***Dittman***, 43 Wis. 2d at 165, they assert the court assumed that implied warranties existed, but concluded they had not been breached in any event. ***Dittman*** says no such thing. In their reply brief, the Singhs tell us that ***Dittman*** was instead "decided based on insurance overage [sic] issues." Not only does this assertion lack a supporting citation, but our review of ***Dittman*** reveals not a single reference to insurance. We need not consider arguments not supported by proper legal argument. ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

however, admitted in their deposition testimony that they never relied on any oral or written representations from the Hestads. More importantly, the Singhs expressly disavowed any reliance on the real estate condition report and indicated they relied entirely upon the results of their home inspection. Thus, any omissions of known defects on the real estate condition report cannot provide a basis for these claims.

¶10 Nonetheless, the Singhs argue: "The issue is not whether the Singhs relied on [the] Hestad[s'] statement that they knew of no defects. The issue is whether the Hestads had an affirmative duty to disclose that they built the home without plans, without expertise, and without knowledge of the building code requirements." This argument conflates the elements of reliance and representation of fact. Even assuming the Hestads violated a duty to disclose further information on the real estate condition report, the Singhs' claim still fails because they did not rely on any of the Hestads' representations, whether they be affirmative or by omission from the report.

¶11 Next, we address the Singhs' negligent construction claim. We agree with the circuit court that the claim is barred by the economic loss doctrine.[4]

¶12 Our supreme court has explained the economic loss doctrine as follows:

> The ELD is a judicially created doctrine that seeks to preserve the distinction between contract and tort. The ELD also seeks to protect parties' freedom to allocate

[4] The circuit court determined that the economic loss doctrine barred all of the Singhs' tort claims. Because we resolve the Singhs' other claims based on a lack of reliance, we need not resolve whether they were also barred by the economic loss doctrine. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997).

> economic risk by contract .... Furthermore, the ELD is meant to encourage the purchaser, who is the party best situated to assess the risk of his or her economic loss, to assume, allocate, or insure against that risk. For the purposes of the ELD, we have defined an economic loss as being damages resulting from inadequate value because the product is inferior and does not work for the general purposes for which it was ... sold. This court also has held that a recovery for an economic loss refers to a recovery that results either from a product failing in its intended use or from a product failing to live up to a contracting party's expectations.

Below v. Norton, 2008 WI 77, ¶24, 310 Wis. 2d 713, 751 N.W.2d 351 (citations and punctuation omitted). The doctrine applies in the context of residential real estate transactions, *see* ***id.***, ¶28, and negligent construction claims, *see* ***Linden v. Cascade Stone Co.***, 2005 WI 113, ¶¶3, 32, 283 Wis. 2d 606, 699 N.W.2d 189.[5]

¶13 The Singhs do not deny that the damages they seek are for an economic loss. However, they argue the economic loss doctrine should not apply because the contract here related only to purchasing the home, not constructing it. They assert this means there was no opportunity to allocate the risks of negligent design and construction by contract. We disagree. At the time of the Singhs' purchase, any design or construction defects were already present in the finished home. The Singhs therefore could allocate the risk that such defects existed. In fact, they did precisely that—they negotiated a one-year home warranty and an inspection contingency.

[5] The Hestads assert the economic loss doctrine was also "applied in ***Stuart v. Weisflog's Showroom Gallery, Inc.***[,] 311 Wis. 2d 492, 543 (2008)[,] to preclude negligence claims relating to the design and construction of a home." That is inaccurate. As the Singhs emphasize, that case was not decided based on the economic loss doctrine, and the Hestads' partial citation is, in fact, to a two-justice concurrence. *See* ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 86, ¶¶83, 105, 311 Wis. 2d 492, 753 N.W.2d 448 (Roggensack, J., concurring) ("join[ing] none of the majority opinion except its ultimate conclusion that the [insurance] policy provides no coverage").

¶14 The Singhs next argue the economic loss doctrine cannot apply because the "other property" exception applies, despite the "integrated system" and "disappointed expectations" tests. The economic loss doctrine does not apply where a plaintiff claims the allegedly defective product caused "damage to property other than the product, or economic loss claims that are alleged in combination with noneconomic losses." ***Daanen & Janssen, Inc., v. Cedarapids, Inc.***, 216 Wis. 2d 395, 402, 573 N.W.2d 842 (1998) (citing ***Northridge Co. v. W.R. Grace & Co.***, 162 Wis. 2d 918, 937, 471 N.W.2d 179 (1991)). However, "[d]amage by a defective component of an integrated system to either the system as a whole or other system components is not damage to 'other property' [that would preclude] the application of the economic loss doctrine." ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 249, 593 N.W.2d 445 (1999).

¶15 Specifically, "the economic loss doctrine applies to building construction defects when ... the defective product is a component part of an integrated structure or finished product." ***Linden***, 283 Wis. 2d 606, ¶28 (quoting ***Bay Breeze Condo. Ass'n v. Norco Windows, Inc.***, 2002 WI App 205, ¶26, 257 Wis. 2d 511, 651 N.W.2d 738). Therefore, the doctrine precludes the Singhs' claims for any damages to their home or its components that was caused by defective components of the home. *See* ***Linden***, 283 Wis. 2d 606, ¶¶3, 28-29 (water damage to a home or condo unit caused by leaking windows, stucco, or roof falls within the integrated system rule).

¶16 The Singhs, however, maintain the other property exception still applies because their amended complaint alleged that the Hestads' negligent construction caused damages, "including damage to personal property." They also cite their discovery responses, claiming damage to furniture, rugs, blinds, kitchen items, clothing, bedding, and other household items. We agree that personal

property items within the home constitute "other property" because they are not component parts of the integrated system—the home—that the Singhs purchased.

¶17 This brings us to the final question, whether claims for damage to the Singhs' other property are nonetheless barred pursuant to the disappointed expectations test. "The 'disappointed expectations' test is directed at determining whether the purchaser should have anticipated the need to seek protection against loss through contract." ***Foremost Farms USA Coop. v. Performance Process, Inc.***, 2006 WI App 246, ¶17, 297 Wis. 2d 724, 726 N.W.2d 289. The "test is met when 'prevention of the subject risk was one of the contractual expectations motivating the purchase of the defective product.'" ***Id.***, ¶18 (quoting ***Grams v. Milk Prods., Inc.***, 2005 WI 112, ¶43, 283 Wis. 2d 511, 699 N.W.2d 167). The test is an objective one, and "asks whether the damage was 'reasonably foreseeable' should the purchased product prove to be defective, such that the purchaser, at least in theory, could have obtained protection in contract." ***Id.***, ¶19.

¶18 The Singhs argue the disappointed expectations test is not met here because they "did not purchase the home to prevent smoke and soot damage to their property[,]" or "for the purpose of preventing damage to personal property caused by the defective fireplace." This, however, is the sole reference to a fireplace or smoke or soot damage in their entire brief. Thus, it is unclear what the Singhs are referring to, much less whether the personal items they listed earlier in their brief were allegedly damaged by smoke or soot from some fireplace.[6] This argument is therefore insufficiently developed and we need not resolve it. *See*

[6] Indeed, it is unclear whether the Singhs claim the Hestads negligently constructed or installed the fireplace, or whether the fireplace was a premanufactured unit that was defectively designed or constructed by the manufacturer, but properly installed by the Hestads.

State v. Flynn, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). The circuit court's dismissal of the Singhs' claims was based on all of the multiple grounds argued by the Hestads, and the Singhs acknowledge that the disappointed expectations test was argued below. By failing to develop an adequate argument refuting that ground, the Singhs are deemed to have conceded its validity. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).[7]

By the Court.—Judgment affirmed.

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

[7] In any event, it appears the Singhs' argument fails on the merits. The Singhs address the purpose of only the home, while neglecting the purpose of the allegedly defective component of that integrated system. A fireplace, along with its integrated chimney or venting system, is designed to vent smoke and soot to the home's exterior as part of its regular operation. Therefore, it is reasonably foreseeable that a defective fireplace might cause damage by releasing those contaminants into the home's interior. *See* ***Foremost Farms USA Coop. v. Performance Process, Inc.***, 2006 WI App 246, ¶19, 297 Wis. 2d 724, 726 N.W.2d 289. In other words, the alleged damage to other property resulted from disappointed expectations of the fireplace's performance. *See* ***Grams v. Milk Prods., Inc.***, 2005 WI 112, ¶¶34, 36, 283 Wis. 2d 511, 699 N.W.2d 167.