COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2012

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2011AP935 **Cir. Ct. No. 2009CV488**

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

AMCORE BANK,

PLAINTIFF-RESPONDENT,

V.

HEUS MANUFACTURING LLC, EHR ENTERPRISES, INC., CRAIG SHELTON AND EDWARD E. JONES,

DEFENDANTS,

SUSAN ENNEPER AND MARK ENNEPER,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed*.

Before Brown, C.J., Reilly, J., and Neal Nettesheim, Reserve Judge.

¶1 PER CURIAM. In this case of "sellers' remorse," Susan and Mark Enneper appeal a judgment granting summary judgment in favor of Amcore Bank, N.A., and dismissing their misrepresentation counterclaims against Amcore. The Ennepers argue that material facts remain in dispute as to the duty they say Amcore, the buyer's lender, owed them as sellers of a business and as to Amcore's allegedly false representations that they claim induced them to sell, a decision they soon came to regret. We reject those arguments and affirm the judgment.

Overview

¶2 The Ennepers owned a machining business, Heus Manufacturing, Inc., along with Robert Heus (Robert), the great-grandson of Heus' founder.[1] In April 2007 the Ennepers and Robert sold Heus to EHR Enterprises and its owner, Edward Jones. Amcore loaned EHR $4.7 million to fund the purchase. The Ennepers also provided seller financing to EHR, using the same collateral as Amcore. Of the $4.7 million Amcore loaned, $1.8 million was paid to the Ennepers at closing. In the end, an anticipated guarantee of a portion of Amcore's loan by the United States Department of Agriculture did not materialize.

¶3 By 2009, EHR was in default. Amcore filed an action for a money judgment against EHR, and against Jones and Craig Shelton, Jones' business partner, who personally guaranteed the loans. Amcore also sought to foreclose its

[1] Along the way, Mark Enneper transferred his stock to Susan, his Puerto Rican-born wife, so that Heus could become "8(a) certified." The 8(a) program, administered by the Small Business Administration, allows the United States Department of Agriculture to enter into contracts with the SBA for supplies and services that the SBA, in turn, subcontracts out to businesses owned and controlled by socially or economically disadvantaged individuals. http://www.dm.usda.gov/smallbus/8a.htm (last visited Jan. 30, 2012). With that transfer, Robert Heus and Susan collectively owned all the outstanding shares of capital stock in Heus.

mortgage on the real estate and to replevin the personal property collateral, which required naming the Ennepers and Robert to get clean title to the collateral. The Ennepers filed counterclaims against Amcore alleging negligent, strict responsibility and intentional misrepresentation. The Ennepers and Amcore stipulated to the dismissal of the claims regarding their priority interests in the collateral. In the meantime, Jones declared personal bankruptcy. The $4.7 million money judgment Amcore won against Shelton remains unsatisfied.

¶4 All that is left of the lawsuit is the Ennepers' counterclaims. The core of the claims is that Amcore, through commercial banker Matthew Arn, misrepresented Jones' creditworthiness and business capabilities and that the USDA had guaranteed the loan. The Ennepers further claimed that, in reliance on those misrepresentations, they sold Heus to EHR to their financial detriment.

Facts Underlying the Ennepers' Claims

¶5 The affidavits and depositions set forth the following facts. The business broker the Ennepers hired identified Jones as an 8(a)-certified potential buyer. Based on their own due diligence and advice from their legal counsel and accountants, the Ennepers learned that Jones had outstanding debts, a history of management failures and difficulty running profitable ventures, despite infusions of cash. The plan, however, was that Mark and Robert would continue to handle the day-to-day management, while Jones—a "slick salesperson" who could "sell sand in the desert or ice in the arctic"—would put deals together. With this in mind, Mark and Robert negotiated five-year employment contracts with EHR.

¶6 In August 2006, Susan, Robert and EHR entered into a Stock Purchase Agreement whereby EHR would purchase Susan's and Robert's shares of stock for approximately $7.14 million. EHR also agreed that at closing it would

pay Susan $1.8 million and Robert $180,000 and execute promissory notes for the balance owed to each. The Agreement was contingent upon EHR obtaining adequate financing from a primary lender. Jones advised that EHR had chosen Amcore. Arn was the banker who was to service the loan.

¶7 After hearing nothing from Jones for several months, Arn drove by EHR's factory in mid-December. It appeared to be closed. Arn assumed Jones had secured other financing and already was running Heus.

¶8 Soon after, however, work on the loan recommenced. In January 2007, Amcore issued EHR a commitment letter outlining the proposed loan and indicating that a stated portion of the loan would have to be USDA guaranteed, in case EHR defaulted. The Ennepers also wanted a USDA guarantee because the approval process would reassure them that the buyer was a good risk.

¶9 In mid-March, Arn did a walk-through of Heus with a USDA loan specialist. Also present were Mark, Robert, Jones and EHR's CFO. Based on information from Jones, Arn told the loan specialist that Jones had been president of a certain $30 million company and that Jones' other failures resulted from "very restrictive" loan payouts preventing his purchase of necessary equipment. The next day, the loan specialist recommended USDA approval of the guarantee. The parties eventually discovered that Jones actually had been only a salesman at the named company, was fired from that position and had gotten significant loans in his other ventures.

¶10 The Ennepers' accountants expressed concern that the Ennepers were funding so much of the purchase price and that EHR was financing the total transaction and contributing no capital of its own. Those cautions notwithstanding, Mark still thought EHR would be "a good fit" as a purchaser of

Heus due to his and Robert's business acumen, Jones' sales ability, the established government contracts and the USDA's own due diligence.

¶11 By the time of the USDA walk-through, over seven months had passed since the parties' initial Stock Purchase Agreement. A week after the walk-through and the loan specialist's recommendation, Mark e-mailed Arn asking the status of the USDA approval. Citing the time invested, Mark wrote that he thought it was "time to put some $ and dates down, and get this done, or move on. If you are ok closing the amcore end before the usda does their thing, then let's just get it done."

¶12 On March 29, the USDA issued a conditional commitment to guarantee $1.72 million of Amcore's loan to EHR, indicating that it appeared that the transaction could be properly completed. Arn testified that conditional commitment gave the bank a "green light" to proceed with the loan. Arn e-mailed Mark that the USDA loan specialist had suggested restructuring the sale because the amount of subordinated debt EHR owed to the Ennepers and Robert was too high. Restructuring the sale to convert subordinated debt, which is not considered equity under USDA guidelines, to preferred stock "allowed us to meet the [tangible net worth] calculation and get the deal approved…. Amcore and the USDA are still working towards a closing for tomorrow."

¶13 Accordingly, Robert, Susan, EHR and Jones entered into an Amended Stock Purchase Agreement under which, in lieu of promissory notes, a portion of the purchase price would be paid through issuance of EHR preferred stock. The parties also agreed that EHR's and Jones' obligations would be secured by a second lien encumbering all of Heus' real property and an agreement establishing a second-position security interest in all of Heus' personal property.

¶14 With the USDA's conditional commitment in its hand, Amcore closed the sale on April 4, 2007 without the loan guarantee. Jones ultimately failed to provide the paperwork necessary to finalize the USDA loan guarantee. After a year of requesting the documents, the USDA terminated the commitment. Back at Heus, serious differences of opinion about how to run the business had developed between Jones and the former owners. Both Mark and Robert left. Within two years, the business had failed, EHR was in default and the Ennepers and Amcore alike incurred considerable financial losses. This litigation followed.

Court proceedings

¶15 Amcore moved for summary judgment. The court, Judge Gary R. Sharpe presiding, addressed four misrepresentations the Ennepers claimed Arn made: (1) the March 29, 2007 e-mail advising them that restructuring the sale "allowed us to … get the deal [USDA-]approved"; (2) failing to disclose the amount of indebtedness EHR/Jones was carrying and that EHR was closed when Arn drove by in December 2006; and (3) statements to the USDA loan specialist at the walk-through that Jones had headed a $30 million company (4) and that his prior business failures were due to overly restrictive lending.

¶16 The court concluded that the statement about USDA approval was not a misrepresentation because conditional approval is all a banker ever gets, and if the Ennepers were unaware of that, Arn—the buyer's banker—had no duty to inform them otherwise. The court likewise concluded that Amcore had no duty, and likely not even the right, to disclose to the Ennepers its customer's indebtedness, nor the obligation or authority to advise them that EHR appeared to be closed on a single day. The court deemed the other two statements to be "very minor misrepresentations," invited further briefing and set a new hearing.

¶17 At the continued hearing, Judge Sharpe disclosed an unsolicited telephone conversation in which the case was brought up. He recused himself at the Ennepers' request and the case was assigned to Judge Richard Nuss.

¶18 At the final hearing, the court concluded that, after reviewing the record and briefs, the two statements about Jones' business background that Judge Sharpe originally called "very minor misrepresentations" were not misrepresentations at all, but simply statements based on what Arn knew when he made them. Further, the Ennepers had "every opportunity" to follow up on the remarks through their own due diligence. The court also concluded that Amcore owed the Ennepers no duty and any reliance the Ennepers placed on representations Amcore made through Arn was at their own peril. The court granted summary judgment in favor of Amcore and dismissed the counterclaims with prejudice. The Ennepers appeal.

The appeal

¶19 We first address whether summary judgment was properly granted. We employ the same methodology as the circuit court and our review is de novo. ***Green Springs Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). That methodology is well known, and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995); *see also* WIS. STAT. § 802.08(2) (2009-10).[2] To

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

defeat summary judgment, the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial." Sec. 802.08(3); ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 291, 507 N.W.2d 136 (Ct. App. 1993). A factual issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (citation omitted).

¶20 As they did below, the Ennepers allege that Amcore, through Arn, negligently misrepresented several material facts that were untrue and that their reliance on Arn's misrepresentations induced them to sell their business and ultimately suffer a several-million-dollar loss, or at a minimum raise an issue of material fact for a jury. Because they do not flesh out their arguments in regard to strict responsibility and intentional misrepresentation, we need not address those claims. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (this court need not address undeveloped arguments).

¶21 Negligent misrepresentation has four elements: (1) a duty of care or voluntary assumption of a duty on the part of the defendant; (2) a breach of that duty, *i.e.*, failure to exercise ordinary care in making the representation or in ascertaining the facts; (3) a causal link between the conduct and the injury; and (4) actual loss or damage as a result of the injury. ***Hatleberg v. Norwest Bank Wisconsin***, 2005 WI 109, ¶40, 283 Wis. 2d 234, 700 N.W.2d 15; *see also* WIS JI-CIVIL 2403. Failure to disclose a fact may be misrepresentation if the nondisclosing party has a duty to disclose that fact. *See* ***Lecic v. Lane Co.***, 104 Wis. 2d 592, 604, 312 N.W.2d 773 (1981).

¶22 The Ennepers argue that, while Amcore normally would not owe them a duty, once Arn chose to make the statements, he voluntarily assumed the

duty to disclose everything necessary to prevent the statements from being misleading. *See* ***Grove Holding Corp. v. First Wisconsin Nat'l Bank of Sheboygan***, 12 F. Supp. 2d 885, 890 (E.D. Wis. 1998). Put another way, an aspect of the alleged misrepresentation stems from what Arn did not say. It remains an open question in Wisconsin, however, whether a failure to disclose can support a claim for negligent misrepresentation. ***Kaloti Enters., Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶13 n.3, 283 Wis. 2d 555, 699 N.W.2d 205. In any event, whether a legal duty exists is an issue of law. ***Ollerman v. O'Rourke Co.***, 94 Wis. 2d 17, 27, 288 N.W.2d 95 (1980).

¶23 A bank generally "does not owe a duty of care to a noncustomer with whom the bank has no direct relationship." ***Eisenberg v. Wachovia Bank, N.A.***, 301 F.3d 220, 225 (4th Cir. 2002) (collecting cases). Amcore's duty was to Jones/EHR, not to the Ennepers, who were not Amcore's customers. We decline the Ennepers' invitation to rule that, before making the statements at the walk-through, Arn was obligated to investigate the financial information Jones supplied and, if at odds with Jones' depiction, to divulge it to them. We likewise decline to hold that Arn had a duty to ensure that noncustomers of the bank understood that the USDA approval was not a certainty when Arn himself viewed conditional approval as a "green light" to close.

¶24 Furthermore, the representations Arn made were not material to the Ennepers' decision to sell. A material fact is one that would influence the outcome of the controversy. ***Marine Bank v. Taz's Trucking, Inc.***, 2005 WI 65, ¶12, 281 Wis. 2d 275, 697 N.W.2d 90. Arn's e-mail advising that restructuring the sale allowed Amcore to "get the deal approved" was not material because Mark already knew about Jones' blemished business history yet still had told Arn that he was amenable to "just get[ting] it done" if Arn was "ok closing the amcore

end before the usda does their thing." Besides, Mark and Robert intended to run the business themselves.

¶25 The Ennepers nonetheless argue that their reliance on the misrepresentations induced them to sell Heus and thus incur a great loss. Where, as here, the facts are undisputed, reasonable reliance is a question of law. *See* ***Ritchie v. Clappier***, 109 Wis. 2d 399, 406, 326 N.W.2d 131 (Ct. App. 1982).

¶26 The reasonableness of one's reliance on a misrepresentation is judged after reviewing the facts of the case, including "the intelligence and experience of the misled individual and the relationship between the parties." ***Bank of Sun Prairie v. Esser***, 155 Wis. 2d 724, 734, 456 N.W.2d 585 (1990). One must exercise reasonable diligence for one's own protection. ***Production Credit Ass'n v. Croft***, 143 Wis. 2d 746, 760, 423 N.W.2d 544 (Ct. App. 1988).

¶27 The Ennepers and Robert had owned and operated Heus for nearly twenty-five years, growing it from a one-man shop into a profitable business with almost a hundred employees. They had the wherewithal to conduct due diligence before the sale, access to professionals to assist them and an appreciation for the need to do so. Red flags popped up in time to investigate further or to abort the sale entirely; the Ennepers chose to either ignore or downplay them. We thus cannot say that their reliance was reasonable. A representation upon which no reasonable reliance may be placed will not support a misrepresentation action. *See* ***Ritchie***, 109 Wis. 2d at 404.

¶28 The reliance inquiry in a negligent misrepresentation claim is equivalent to the causation element in other negligence claims. *See* ***Ramsden v. Farm Credit Servs.***, 223 Wis. 2d 704, 721, 590 N.W.2d 1 (Ct. App. 1998). Even if their reliance on Arn's representations induced the Ennepers to go ahead with

the sale, the misrepresentations, if such they were, were not the cause of their damage. Rather, EHR's default and failure were the cause of their injury. The Ennepers faulted Jones' overspending. Jones blamed financial difficulties after losing a significant 8(a) government contract. Neither of those stemmed from the claimed misrepresentations but from Jones' mismanagement, a potential to which the Ennerpers had been alerted.

¶29 The Ennepers also direct us to the RESTATEMENT (SECOND) OF TORTS, § 552 (1977), which subjects to liability "[o]ne who, in the course of his [or her] business, profession or employment, or in any other transaction in which he [or she] has a pecuniary interest, supplies false information for the guidance of others in their business transactions." The Ennepers argue that Arn had a pecuniary interest in consummating the deal because of the commission he stood to earn if the loan went through. The information Arn compiled for the loan presentation and then passed on to the USDA loan specialist was not meant to guide the Ennepers in their business transactions. It was for Amcore's own benefit—first to determine whether to make the loan, then to gain USDA approval. The Restatement does not apply.

¶30 We are satisfied that the Ennepers could not prevail on their misrepresentation claims and that there exist no genuine issues of material fact. The circuit court properly granted summary judgment in Amcore's favor and dismissed the Ennepers' counterclaims.

By the Court.—Judgment affirmed.

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