COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1566 **Cir. Ct. No. 2008CV1595**

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

UNITED CONCRETE & CONSTRUCTION, INC.,

PLAINTIFF-APPELLANT,

V.

RED-D-MIX CONCRETE, INC., NATIONWIDE MUTUAL INSURANCE COMPANY AND ALLIED INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Reversed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. In this breach-of-contract case, United Concrete & Construction, Inc., appeals from an order granting summary judgment in favor of

Red-D-Mix Concrete, Inc. We conclude that material facts remain in dispute, such that the trial court erred in granting summary judgment. We reverse.

¶2 United installs residential concrete "flatwork" such as patios and driveways. Red-D-Mix manufactures and distributes ready-mixed concrete. Red-D-Mix supplied United's concrete in the 2002 and 2003 seasons. United then switched to a different supplier due to unresolved complaints of excessive bleed water in the concrete, resulting in pitting, scaling, spalling and crumbling.

¶3 In early 2007, United wanted to use Red-D-Mix again but not without assurances that the bleed water problem had been remedied. Red-D-Mix salesman John Clark met in person with United's president, Timothy Hippert. During the nearly hour-long meeting, Clark allegedly told Hippert that Red-D-Mix had addressed the problem and, in fact, had built a new plant and was using the same materials from the same suppliers as was M&M, United's interim supplier.

¶4 United resumed purchasing concrete from Red-D-Mix for the 2007 season. United experienced the same excessive bleed water issues as before. Customers began complaining. United advised them that the problems resulted from defective concrete and that it intended to take legal action against Red-D-Mix. United asked them to sign Assignments of Rights to Sue, which would contractually allocate to them monies recovered for the total replacement of the defective concrete. Twenty-two of the homeowners returned signed Assignments.

¶5 United filed suit against Red-D-Mix, alleging breach of contract, breach of express and implied warranties, negligence, indemnification,

contribution and unfair trade practices under WIS. STAT. §100.18 (2009-10).[1] Red-D-Mix moved for summary judgment. Red-D-Mix asserted that United's claims brought in its own name were speculative and premature; that United's own negligence claims, and those assigned to it, were barred by the Economic Loss Doctrine; that the Assignments were a nullity because the homeowners had nothing to assign and that, under ***Linden v. Cascade Stone Co., Inc.***, 2005 WI 113, 283 Wis. 2d 606, 699 N.W.2d 189, there was no privity of contract between the homeowners and Red-D-Mix; that United's §100.18[2] claim failed because representations, if made, about the quality of the concrete were unactionable "puffery"; and that its remaining claims should be dismissed because it did not establish that it suffered damages. United argued that genuine issues of material fact remained. The court ruled in Red-D-Mix's favor. United appeals.

¶6 We review decisions on summary judgment de novo, applying the same methodology as the trial court. ***Riverwood Park, Inc. v. Central Ready-Mixed Concrete, Inc.***, 195 Wis. 2d 821, 826, 536 N.W.2d 722, 724 (Ct. App. 1995). That methodology, set forth in WIS. STAT. § 802.08(2), has been recited often and we need not repeat it here. ***Riverwood Park, Inc.***, 195 Wis. 2d at 826. We will reverse a summary judgment if a review of the record reveals disputed material facts or if there are undisputed material facts from which reasonable

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

[2] A claim for misrepresentation under WIS. STAT. § 100.18 has three elements: (1) the defendant made a representation to "the public" with the intent to induce an obligation; (2) the representation was untrue, deceptive, or misleading; and (3) the representation caused the plaintiff a pecuniary loss. ***K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.***, 2007 WI 70, ¶19, 301 Wis. 2d 109, 732 N.W.2d 792.

alternative inferences may be drawn. ***Hofflander v. St. Catherine's Hosp., Inc.***, 2003 WI 77, ¶26, 262 Wis. 2d 539, 664 N.W.2d 545.

¶7 United asserts that the trial court erred in granting summary judgment by: (1) concluding that United's breach-of-contract damages were speculative; (2) concluding that ***Linden*** bars United's claims through the Assignments; (3) ruling that representations that a specific problem had been remedied were unactionable puffery; (4) ruling that United was not a member of the public for purposes of WIS. STAT. § 100.18; and (5) granting summary judgment with prejudice. It does not challenge on appeal the trial court's ruling that the Economic Loss Doctrine disposes of its tort claims.

Whether damages were fatally speculative

¶8 The trial court found that United did not establish its damages with certainty because "the customers have not come forward and stated with any specificity what their damages are." We disagree.

¶9 To establish the amount of damages with enough certainty to present a genuine issue of material fact to defeat summary judgment, the nonmoving party need show only that a reasonable jury could award damages in an amount that is supported by the evidence. *See* ***AccuWeb, Inc. v. Foley & Lardner***, 2008 WI 24, ¶19 n.8, 308 Wis. 2d 258, 746 N.W.2d 447. United has shown that, as a result of Red-D-Mix's alleged breach of contract, it breached the contracts with twenty-two of its customers whose flatwork needs replacement. Hippert's affidavit puts the cost of replacement at at least $150,000. Another homeowner has filed suit in small claims court. These damages flowed directly from Red-D-Mix's breach and should have been reasonably foreseeable at the time the contract was made. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 320, 306 N.W.2d 292

(Ct. App. 1981). The Assignments dispense only with the homeowners' claims against Red-D-Mix; their breach-of-contract claims against United remain viable.

¶10 The party opposing summary judgment need not prove its case or put in all its evidence. ***Foryan v. Fireman's Fund Ins. Co.***, 27 Wis. 2d 133, 138, 133 N.W.2d 724 (1965). Whether United's proof ultimately will be enough to convince a fact finder that its claims have merit is not before the trial court on a motion for summary judgment. The court's task is to determine whether a dispute exists as to any material fact, not to resolve it. The burden is on the moving party to prove that there are no genuine issues of material fact. ***Strasser v. Transtech Mobile Fleet Serv., Inc.***, 2000 WI 87, ¶31, 236 Wis. 2d 435, 613 N.W.2d 142. Red-D-Mix did not do so. Viewing United's submissions in the light most favorable to it, we are satisfied that it could present sufficient evidence to enable a reasonable jury to award damages in an amount supported by the evidence.

*Whether **Linden** bars United's claims through the Assignments*

¶11 The trial court concluded that the homeowners could not sue Red-D-Mix on their own, and so had no rights to assign, because a property owner cannot sue a subcontractor directly. *See **Linden***, 283 Wis. 2d 606, ¶¶17, 32. While the homeowners may have had no rights against Red-D-Mix to assign, the Assignments neither strip from United its right to sue Red-D-Mix nor protect United from homeowners' potential breach-of-contract claims.

Whether Red-D-Mix's representations were "puffery"

¶12 United next contends that Red-D-Mix, through Clark, expressly misrepresented that it had addressed the prior issue of excessive bleed water in the concrete to induce it to purchase Red-D-Mix concrete. Noting that Clark, a

different salesman than the one Hippert dealt with in 2003, may not even have known about earlier issues, the trial court concluded that the alleged statements, including that Red-D-Mix had fixed the problem, were "typical salesman-type" puffery and thus not actionable under WIS. STAT. § 100.18.

¶13 "[P]uffery" is "[an] exaggeration[] reasonably to be expected of a seller as to the degree of quality of [its] product, 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 courts have held to be puffery are that one's product is "the best," "the finest," "a masterpiece" or "of premium quality." ***Id.***, ¶¶42-44. Because such statements are considered to be expressions of the seller's opinion, the buyer has no right to rely on them. ***Loula v. Snap-On Tools Corp.***, 175 Wis. 2d 50, 54, 498 N.W.2d 866 (Ct. App. 1993). Whether a statement is puffery is a question of fact. *See* ***Lambert v. Hein***, 218 Wis. 2d 712, 724 n.4, 582 N.W.2d 84 (Ct. App. 1998).

¶14 Hippert, United's owner, averred in his affidavit that, before resuming business with Red-D-Mix, he met with Clark for forty-five minutes to an hour to get specific assurances about his concerns. United argued that Hippert spent that long precisely because Clark was a different salesman, and that Clark confirmed that Red-D-Mix had fixed the problem. Red-D-Mix "highly contested" that Clark made that statement but argued that even if he had, it was no more than commentary on the quality and durability of his product. We conclude that what role, if any, Clark's being a "new" salesperson should play in his credibility, what he said, and whether it constituted "puffing" combine to present a genuine issue of material fact not proper for resolution by summary judgment.

Whether United was a member of "the public"

¶15 Without explanation, the trial court stated that it was "satisfied that United is not a member of the public and cannot make a claim under [WIS. STAT. §] 100.18." Section 100.18(1) does not define who is a member of "the public." A statement made to an individual could be one made to "the public." ***K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.***, 2007 WI 70, ¶23, 301 Wis. 2d 109, 732 N.W.2d 792. The "important factor" in determining if one is a member of the public is if a "particular relationship" exists between the parties. ***Id***.

¶16 We agree with United that whether it is a member of "the public" under WIS. STAT. § 100.18(1) presents a question of fact. *See* ***K&S Tool & Die Corp.***, 301 Wis. 2d 109, ¶¶2, 30. A jury reasonably could find that a particular relationship existed between United and Red-D-Mix because of their past dealings; it just as reasonably could find that United was a member of "the public" when Red-D-Mix, through Clark, solicited United's business anew. This genuine issue of material fact was improperly decided on summary judgment.

By the Court.—Order reversed.

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