V

COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2017

Diane M. Fremgen
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. 2015AP2552 **Cir. Ct. No. 2014CV833**

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

MH IMAGING, LLC,

PLAINTIFF-RESPONDENT,

V.

K&K HOLDINGS, LLC,

DEFENDANT,

FRANK KALDIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: TIMOTHY D. BOYLE, Judge. *Affirmed*.

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

¶1 PER CURIAM. Frank Kaldis appeals from a judgment entered in favor of MH Imaging, LLC, following a dispute over a lease for commercial

space. He contends that (1) he was immune from liability due to his membership in a limited liability company (LLC); (2) the economic loss doctrine barred MH's claims against him; (3) there could be no liability for misrepresentation under WIS. STAT. § 100.18 (2015-16),[1] as that statute did not apply to the facts of the case; (4) there was insufficient evidence to support the jury's verdict; and (5) he is entitled to a new trial in the interests of justice. We disagree and affirm.

¶2 MH is a company that offers diagnostic imaging services such as MRIs and X-rays. K&K Holdings, LLC, is a company that owns a commercial space in Mt. Pleasant, Wisconsin. Kaldis is a managing member of K&K.

¶3 MH became interested in the commercial space owned by K&K in the spring of 2013. At that time, the space was occupied by a business competitor of MH, Advanced Medical Imaging (AMI). Nevertheless, MH was assured by several individuals, including Kaldis, that AMI would leave when its lease expired and the space would be available to rent. In reliance, MH signed a lease with K&K for the space on May 1, 2013. It was promised possession of the space beginning on July 15, 2013.

¶4 Unbeknownst to MH, around the same time that Kaldis told MH it could sign a lease for the commercial space, he also promised AMI that it could renew its lease. On or about April 19, 2013, Kaldis directed K&K's property manager, Joyce Spoerlein, to draft a lease renewal for AMI. When she raised concerns about promising the same space to two different companies, he told her to mind her own business. AMI stayed on as tenant after July 15, 2013.

[1] All references to the Wisconsin Statutes are to the 2015-16 version.

¶5 Caught in the middle of Kaldis' double-dealing, MH agreed to modify its date of possession twice. During that time, Kaldis assured MH that he would have AMI vacate the commercial space. In fact, K&K commenced an eviction action against AMI over unpaid rent. Once AMI became current with its rent, however, Kaldis no longer wished to evict it, and AMI renewed its lease. Spoerlein believed that Kaldis' actions in the matter were contrary to K&K's interests.

¶6 MH subsequently filed an action against K&K for breach of contract and breach of the implied duty of good faith and fair dealing. It later amended its complaint to add claims against Kaldis. MH accused Kaldis of intentional misrepresentation, misrepresentation under WIS. STAT. § 100.18, and interfering with a contractual relationship.

¶7 Kaldis filed a motion to dismiss, asserting that he was immune from liability due to his membership in K&K's LLC and that the economic loss doctrine barred MH's claims. Kaldis also maintained that there could be no liability for misrepresentation under WIS. STAT. § 100.18, as that statute did not apply to the facts of the case. The circuit court denied the motion as premature due to the still undeveloped facts of the case.

¶8 The matter was eventually set for a jury trial. Shortly before trial, Kaldis' attorney moved to withdraw from the case. Kaldis did not object to withdrawal, even after he knew that trial would proceed. The circuit court granted the motion.

¶9 After Kaldis permitted his attorney to withdraw, he indicated that he welcomed the pro se trial. He expressed this sentiment in emails sent to MH's attorney, which stated the following:

> So I will appear at trial, defend myself to the best of my ability, and explain my side of the situation to the jury. If the result is not satisfactory, I will file a notice of appeal…. I'll see you [at trial] Tuesday.
>
> ….
>
> I really did not want to waste 2-3 days of my life in a courtroom, but such is life and will give it my best shot to go at it alone and fight a high powered attorney like you…

¶10 The case was tried to a jury over the course of two days. Appearing pro se, Kaldis made limited objections and called only one witness—himself. He did not file proposed jury instructions or a verdict form, and he did not object to the ones used by the circuit court.

¶11 Ultimately, the jury returned a verdict against Kaldis for $375,000 for intentional misrepresentation, misrepresentation under WIS. STAT. § 100.18, and interfering with a contractual relationship. Kaldis quickly retained counsel and moved for judgment notwithstanding the verdict and for a new trial. The circuit court denied the motions and affirmed the jury's verdict. This appeal follows.

¶12 On appeal, Kaldis first contends that he was immune from liability due to his membership in K&K's LLC. Under Wisconsin law, LLC members are not personally liable for torts committed in their capacity as members. *See* WIS. STAT. § 183.0304. However, they may become liable for torts committed outside of that capacity. ***Id.***

¶13 Here, the jury heard evidence that Kaldis engaged in intentional misconduct that was contrary to K&K's interests and his duties as a member.[2] It found that Kaldis had "personally or through an agent" made an untrue representation of fact with the intent to deceive and induce MH to act upon it. It further found that Kaldis had intentionally interfered with MH's contract with K&K without justification. These findings, which were based on Kaldis' actions as an individual, were sufficient to take him outside of the immunity protection afforded to LLC members and make him personally liable.[3]

¶14 Kaldis next asserts that the economic loss doctrine barred MH's claims against him. "The economic loss doctrine 'is a judicially created doctrine that seeks to preserve the distinction between contract and tort.'" ***Ferris v. Location 3 Corp.***, 2011 WI App 134, ¶12, 337 Wis. 2d 155, 804 N.W.2d 822 (citation omitted). It provides that a party to a contract may not pursue remedies in tort to recover solely economic losses arising out of the performance or nonperformance of the contract. ***Id.***

¶15 We are not persuaded that the economic loss doctrine barred MH from bringing its claims against Kaldis. To begin, the doctrine does not apply to misrepresentation claims under WIS. STAT. § 100.18. ***Shister v. Patel***, 2009 WI

[2] WISCONSIN STAT. § 183.0402 governs the duties of LLC members and provides that no member "shall act or fail to act in a manner that constitutes … [w]illful misconduct." Section 183.0402(1)(d).

[3] Admittedly, the verdict form could have been more precise in ascertaining whether Kaldis had acted in his individual capacity as opposed to his capacity as a member of K&K. However, Kaldis waived his right to challenge the form by failing to object to it. WIS. STAT. § 805.13(3). The fact that Kaldis was acting pro se does not excuse his waiver. *See* ***Waushara Cty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992) (pro se litigants must comply with rules of procedure and substantive law).

App, 163, ¶7 n.5, 322 Wis. 2d 222, 776 N.W.2d 632. For this reason alone, it does not compel reversal.[4] More fundamentally, there was no contract between MH and Kaldis. The economic loss doctrine exists to compel parties bound by a contractual relationship to pursue damages via contract, not to prevent an injured party from bringing potentially viable tort claims when no contract exists. ***Walker v. Ranger Ins. Co.***, 2006 WI App 47, ¶10, 289 Wis. 2d 843, 711 N.W.2d 683.

¶16 Kaldis next maintains that there could be no liability for misrepresentation under WIS. STAT. § 100.18, as that statute did not apply to the facts of the case. Kaldis submits that any misrepresentations made were not to "the public," as contemplated by the statute, because they were not contained in any sort of traditional media advertising. He also suggests that the sophisticated nature of the parties was sufficient to remove their communications from the scope of the statute. Again, we disagree.

¶17 It is evident from the language of WIS. STAT. § 100.18, as well as relevant case law, that the statute applies to a broad range of misrepresentations. ***MBS-Certified Pub. Accountants, LLC v. Wis. Bell, Inc.***, 2013 WI App 14, ¶20, 346 Wis. 2d 173, 828 N.W.2d 575. Contrary to Kaldis' assertion, § 100.18 is not limited to transactions involving traditional media advertising.[5] ***Bonn v.***

[4] As noted by the circuit court, any one of MH's claims would have resulted in damages.

[5] WISCONSIN STAT. § 100.18(1) provides in relevant part:

> No person … with intent to induce the public in any manner to enter into any contract or obligation relating to the … lease of any real estate … shall … place before the pubic … in a newspaper, magazine … or in any other way similar *or dissimilar* to the foregoing … a statement of fact which is untrue, deceptive or misleading.

(Emphasis added).

Haubrich, 123 Wis. 2d 168, 173, 366 N.W.2d 503 (Ct. App. 1985). Moreover, a misrepresentation made to a single person may constitute one made to "the public." ***Fricano v. Bank of Am. NA***, 2016 WI App 11, ¶28, 366 Wis. 2d 748, 875 N.W.2d 143.

¶18 At trial, MH's Executive Vice President, Christina Wipperfurth, testified that MH first began looking at the commercial space owned by K&K in the spring of 2013. She also testified that several individuals, including Kaldis, told her that AMI would be leaving when its lease expired and the space would be available to rent. This pre-lease communication, which Kaldis knew was false, qualified as a misrepresentation to the public for purposes of WIS. STAT. § 100.18.

¶19 As for Kaldis' suggestion that that the sophisticated nature of the parties was sufficient to remove their communications from the scope of WIS. STAT. § 100.18, the record does not support this. Both Wipperfurth and MH's managing member, Dr. Mark Hatfield, denied having any professional experience in commercial real estate or property management.

¶20 Kaldis next complains that there was insufficient evidence to support the jury's verdict—either for the claims it found or for the portion of damages relating to harm to business reputation. The jury awarded $25,000 for harm to MH's business reputation.

¶21 Our review of a jury's verdict is narrow, and we will sustain it if there is any credible evidence to support it. ***Betterman v. Fleming Cos.***, 2004 WI App 44, ¶15, 271 Wis. 2d 193, 677 N.W.2d 673. Our standard of review is even more stringent where, as here, the circuit court upheld the verdict on postverdict motions. ***Id.***, ¶16. In such situations, we will not overturn the verdict unless

"'there is such a complete failure of proof that the verdict must be based on speculation.'" ***Id.*** (citation omitted).

¶22 Upon review of the record, we are satisfied that there was sufficient evidence to support the claims found by the jury. As noted, the jury heard evidence that Kaldis told MH that AMI would be leaving when its lease expired and the commercial space would be available to rent. It also heard evidence that, around the same time, Kaldis promised AMI that it could renew its lease and directed K&K's property manager to draft a lease renewal just prior to the date of MH's lease. That promise of renewal ultimately prevented MH from being able to take possession of the space.

¶23 Likewise, we are satisfied that there was sufficient evidence to support the jury's award for harm to MH's business reputation. Wipperfurth testified that she warned K&K's property manager that reputation damage would occur if MH could not occupy the commercial space when promised. She explained that to prepare for its new location, MH had determined employee staffing and ordered equipment and furnishings. The jury was shown her email that stated MH was making supply purchases with a delivery date of July 15, 2013, intending to be operational the next day. From this, the jury could reasonably infer that MH's reputation was harmed by having to go back to employees, vendors, etc., and informing them that it would not be opening as planned.

¶24 Finally, Kaldis argues that he is entitled to a new trial in the interests of justice. He alleges that, due to various unobjected-to errors at trial, which he blames on his lack of counsel, the real controversy was not fully tried.

¶25 WISCONSIN STAT. § 752.35 allows this court to reverse a judgment or order if we are convinced that the real controversy was not fully tried. This discretionary reversal power is reserved for "exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶26 This is not an exceptional case. Rather, this is a case where Kaldis knowingly elected to represent himself and is now unhappy with the result. As the circuit court observed in its decision to deny Kaldis' motion for a new trial:

> The court finds that most if not all of the problems suggested by the defendant were self inflicted. Mr. Kaldis had made choices on how he defended himself. He was not misinformed of his options. He has failed to assume personal responsibility, that is he knew what he was doing. He knew the consequences of his actions. And now after the choices were maybe not so good wants another kick at the cat….
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> ….
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> [U]pon review of the record and the arguments there is no evidence … of any reasonable probability that the outcome would have been different. The Court is satisfied that the jury substantially weighed all of the evidence presented to it and made a fair and reasonable conclusion in reaching their verdict.

We agree with the circuit court and decline to use our power of discretionary reversal to grant a new trial.

¶27 For these reasons, we affirm.[6]

By the Court.—Judgment affirmed.

[6] To the extent we have not addressed any other argument raised by Kaldis on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

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