IN THE COURT OF APPEALS OF IOWA

No. 8-559 / 07-1602
Filed October 29, 2008

VAN SICKLE CONSTRUCTION COMPANY and MATTHEW J. VAN SICKLE,
Plaintiffs-Appellees,

vs.

WACHOVIA COMMERCIAL MORTGAGE, INC., f/k/a THE MONEY STORE COMMERCIAL MORTGAGE, INC.,
Defendant-Appellant,

and

IVAN VAN LOON and
JEANNE M. VAN LOON,
Defendants.

Appeal from the Iowa District Court for Clarke County, David L. Christensen, Judge.

Defendant appeals from a district court ruling denying its motion for judgment notwithstanding the verdict following a jury verdict and judgment in favor of plaintiff in a fraudulent misrepresentation and negligent misrepresentation action. **REVERSED.**

John T. Clendenin and Brad C. Epperly of Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, for appellant.

Theodore F. Sporer of Sporer & Flanagan, P.C., Des Moines, for appellees.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

MILLER, J.

Wachovia Commercial Mortgage, Inc. (Wachovia) appeals from a district court ruling denying its motion for judgment notwithstanding the verdict following a jury verdict and judgment in favor of Van Sickle Construction Company (Van Sickle) in a fraudulent misrepresentation and negligent misrepresentation action. We reverse the judgment of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

In November 1998, Ivan and Jeanne Van Loon executed and delivered a promissory note to Wachovia in the principal sum of approximately $1,534,000. The note was secured by a mortgage on commercial real estate owned by the Van Loons on which they operated a farm implement business. The Van Loons defaulted on the note, and Wachovia initiated foreclosure proceedings against them in 2003. A decree was entered foreclosing Wachovia's mortgage in 2004. A subsequent sheriff's sale of the real estate left a sizeable deficiency judgment.

Wachovia attempted to collect the deficiency by causing a writ of execution to be issued to the Clarke County Sheriff who was directed to levy on certain property owned by the Van Loons that remained on the real estate, including a "1980 Peterbilt tractor" and a "1989 International Semi Tractor." A notice of sheriff's levy and sale was issued to the Van Loons in February 2005. After receiving the notice, Ivan transferred the title to the International tractor to a new corporation he had recently formed. Shortly before the scheduled sheriff's sale, the parties agreed to cancel the sheriff's sale and instead sell the "affected collateral . . . by private sale."

Auctioneer Kelly Daugherty conducted a public auction for Wachovia on April 11, 2005. Van Sickle, which is owned and operated by Matthew Van Sickle, purchased the Peterbilt and International tractors at the auction to replace two older trucks that it used in its excavating business. Daugherty advised purchasers at the auction that he would obtain the titles to the vehicles that had been sold "and would not disburse any funds from our account until those titles were in their hands." Van Sickle took immediate possession of the tractors it purchased that day, and Matthew Van Sickle believed he would receive the titles "once the checks cleared." In anticipation of receiving the titles "in the near future," Van Sickle began making improvements on the tractors using parts from the two old trucks it was replacing, rendering those trucks "worthless."

Daugherty and Wachovia encountered difficulties after the auction in procuring the titles to the tractors purchased by Van Sickle due in part to Ivan's pre-sale title transfer. Van Sickle was not able to use either of the tractors it had purchased or its old trucks while waiting for the titles. It eventually received the title to the Peterbilt tractor in July 2005 and to the International tractor in August 2005.

Van Sickle filed suit against the Van Loons and Wachovia in August 2005, alleging fraudulent misrepresentation and negligent misrepresentation claims against all of the defendants. It sought recovery for "business injury, economic injury, lost opportunity, and loss of the use of the vehicles." Wachovia filed a motion to dismiss and a motion for summary judgment, both of which were denied by the district court.

The case proceeded to trial in July 2007. At the close of Van Sickle's evidence, Wachovia moved for a directed verdict as to both claims against it. Wachovia argued that Van Sickle had failed to present sufficient evidence to prove the fraudulent misrepresentation claim and that both the fraudulent misrepresentation and negligent misrepresentation claims were barred by the economic loss doctrine. The district court denied Wachovia's motion.

The jury returned a verdict in favor of Van Sickle on the fraudulent misrepresentation and negligent misrepresentation claims against Wachovia[1] and awarded Van Sickle $27,000 in actual damages and $250,000 in punitive damages.[2] Wachovia filed a motion for judgment notwithstanding the verdict, asserting essentially the same arguments raised in its motion for directed verdict. The district court denied the motion and entered judgment on the jury's verdict.[3]

Wachovia appeals. It claims the district court erred in denying its motions for directed verdict and judgment notwithstanding the verdict because (1) there was not substantial evidence supporting the fraudulent misrepresentation and

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[1] Van Sickle dismissed the Van Loons as defendants in the case before the jury returned its verdict.

[2] We note that neither the jury instructions nor the verdict form limited an award of punitive damages to the fraudulent misrepresentation claim.

[3] In awarding $250,000 in punitive damages, the jury determined Wachovia's conduct was not directed specifically at Van Sickle. Yet the court entered judgment in favor of Van Sickle for the entire amount of punitive damages. *See* Iowa Code § 668A.1(2)(b) (2005) (providing for a share of the punitive damages awarded to be paid into a civil reparations fund if the jury finds a defendant's conduct was not directed specifically at the claimant). However, due to our resolution of the claims raised in this appeal, we need not and do not address this apparent error. *Cf. Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 772 (Iowa 1999) (addressing court's failure to follow mandates of section 668A.1(2)(b) sua sponte).

punitive damages claims and (2) the economic loss doctrine bars the negligent misrepresentation claim.[4]

II. SCOPE AND STANDARDS OF REVIEW.

Our rule governing motions for judgments notwithstanding the verdict provides:

> If the movant was entitled to a directed verdict at the close of all the evidence, and moved therefor, and the jury did not return such verdict, the court may then either grant a new trial or enter judgment as though it had directed a verdict for the movant.

Iowa R. Civ. P. 1.1003(2). The purpose of this rule is to allow the district court an opportunity to correct any error in failing to direct a verdict. *Easton v. Howard*, 751 N.W.2d 1, 4 (Iowa 2008). A motion for judgment notwithstanding the verdict must stand on the grounds raised in the motion for directed verdict. *Id.* at 4-5.

We review the denial of a directed verdict for correction of errors at law. *Id.* at 5. The issue we must determine is whether there was sufficient evidence to generate a jury question. *Id.* In deciding this issue, we view the evidence in the light most favorable to the nonmoving party and take into consideration all reasonable inferences that could be fairly made by the jury. *Id.* If substantial evidence in the record supports each element of a claim, the motion for directed verdict must be overruled. *Id.*

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[4] Wachovia additionally claims the court erred in submitting the negligent misrepresentation claim to the jury because it did not owe a duty of care to Van Sickle as it was not in the business or profession of supplying information to others. *See Sain v. Cedar Rapids Comm. Sch. Dist.*, 626 N.W.2d 115, 124 (Iowa 2001). We need not and do not address this issue as it was neither raised in nor decided by the district court. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

III. MERITS.

A. Fraudulent Misrepresentation.

Wachovia first claims the district court erred in submitting Van Sickle's fraudulent misrepresentation claim to the jury because "Van Sickle failed to establish anything more than Wachovia's failure to perform a promised future act it reasonably intended to perform at the time the promise was made." We agree.

In order to establish its fraudulent misrepresentation claim, Van Sickle was required to prove the following by a preponderance of clear, convincing, and satisfactory evidence: "(1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent; (6) justifiable reliance; and (7) resulting injury." *Smidt v. Porter*, 695 N.W.2d 9, 22 (Iowa 2005). Intent to deceive, which is closely related to the element of scienter, is knowledge of the falsity of a material misrepresentation. *Magnusson Agency v. Pub. Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 28 (Iowa 1997). It can be proved by showing the defendant had actual knowledge of the falsity, possessed reckless disregard for the truth, or falsely stated or implied that the representations were based on personal knowledge or investigation. *Id.*

The representations involved in this case relate to Wachovia's promise to transfer the titles to the tractors Van Sickle purchased at the auction "once the checks cleared," which Matthew Van Sickle believed to mean "soon . . . a week, two weeks, something like that." Despite these representations, Van Sickle did not receive the titles until several months after the auction. However, the mere breach of a promise is never enough in itself to establish the fraudulent intent necessary to support a fraudulent misrepresentation claim. *Id*. A statement of

intent to perform a future act is instead actionable only if, when made, the speaker had an existing intention not to perform. *Robinson v. Perpetual Servs. Corp.*, 412 N.W.2d 562, 565 (Iowa 1987).

In establishing the present intent not to perform, the fact that an agreement was not performed does not alone prove the promisor did not intend to keep the promise when it was made. *Id.* "In other words, a false statement innocently but mistakenly made will not establish intent to defraud unless the statement was recklessly asserted." *Magnusson Agency*, 560 N.W.2d at 28.

> Unless the present state of mind is misstated, there is of course no misrepresentation. When a promise is made in good faith, with the expectation of carrying it out, the fact that it subsequently is broken gives rise to no cause of action, either for deceit, or equitable relief. Otherwise any breach of contract would call for such a remedy. The mere breach of a promise is never enough in itself to establish the fraudulent intent. It may, however, be inferred from the circumstances, such as the defendant's insolvency or other reason to know that he cannot pay, or *his repudiation of the promise soon after it is made, with no intervening change in the situation*, or his failure even to attempt any performance, or his continued assurances after it is clear that he will not do so.

Robinson, 412 N.W.2d at 565-66 (quoting W. Prosser, *The Law of Torts* § 109, at 730-31 (4th ed. 1971)).

None of these circumstances were present in this case. There is no substantial evidence that, at the time of the auction, Wachovia knew it would have difficulty transferring the titles. In fact, Matthew Van Sickle admitted as much at trial, testifying he did not "have any information that would lead [him] to believe that Wachovia didn't expect . . . that the titles would be available." The evidence presented at trial clearly established that Wachovia did not know Van

Loon transferred the title to the International tractor until after the auction in April 2005. It thereafter diligently attempted to obtain the titles, ultimately succeeding in doing so in July and August 2005.

We therefore reject Van Sickle's argument that Wachovia's representations regarding its ability to transfer the titles to the tractors after the auction "were made with a reckless disregard of whether the statements were true or false." We do not believe there was substantial evidence of reckless behavior by Wachovia given the events preceding the auction, namely the sheriff's levy on the Van Loons' vehicles and the parties' agreement to sell the vehicles at a private auction, which was confirmed by a district court order prior to that auction. Although Wachovia could arguably "have been more careful by making further inquiry" as to the status of the titles prior to the auction "that is insufficient to prove that [it] acted in reckless disregard of the truth." *Magnusson Agency*, 560 N.W.2d at 29.

We accordingly conclude there was insufficient evidence to justify submitting the fraudulent misrepresentation claim to the jury. The district court thus erred in denying Wachovia's motions for directed verdict and for judgment notwithstanding the verdict on that claim. Based on our holding in this regard, we further conclude there was no basis for the punitive damages claim to be submitted to the jury. *See id.* (finding plaintiff's punitive damages claim failed along with its fraudulent misrepresentation claim); *see also* Iowa Code § 668A.1(1)(a), (b) (setting forth the standards required to support an award of punitive damages).

B. Negligent Misrepresentation.

Wachovia next claims that the economic loss doctrine applies to bar Van Sickle's negligent misrepresentation claim, which sought damages for "purely economic losses related to the loss of use of the vehicles while awaiting transfer of title to them."[5] We agree.

The economic loss doctrine is a "generally recognized principle of law that plaintiffs cannot recover in tort when they have suffered only economic harm." *Richards v. Midland Brick Sales Co., Inc.*, 551 N.W.2d 649, 650 (Iowa Ct. App. 1996). It was "originally conceived and developed to restrict the product liability torts of negligence and strict liability." Steven C. Tourek, Thomas H. Boyd, & Charles J. Schoenwetter, *Bucking the "Trend": The Uniform Commercial Code, the Economic Loss Doctrine, and Common Law Causes of Action for Fraud and Misrepresentation*, 84 Iowa L. Rev. 875, 876 (1999) (hereinafter Tourek, et al.).

The rationale for the doctrine was first articulated in *Seely v. White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965) where the court explained that the distinction the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss rests

> on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products . . . . A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.

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[5] We note, contrary to Van Sickle's assertion, that Wachovia's claim regarding the economic loss doctrine is confined to the negligent misrepresentation claim. We therefore need not and do not address whether the doctrine would also apply to bar Van Sickle's fraudulent misrepresentation claim.

The United States Supreme Court echoed this rationale in its adoption of the doctrine in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, stating if the "development [of product liability] were allowed to progress too far, contract law would drown in a sea of tort." 476 U.S. 858, 866, 106 S. Ct. 2295, 2300, 90 L. Ed. 2d 865, 874 (1986). "Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums." *Id.* at 874, 106 S. Ct. at 2304, 90 L. Ed. 2d at 879.

Despite its origins, the economic loss doctrine has not been limited to product liability suits. It has been extended in various jurisdictions to include additional areas of tort law, including fraud, negligence, tortious interference, defamation, conversion, and breach of fiduciary duty. *See* Mark A. Olthoff, *If You Don't Know Where You're Going, You'll End up Somewhere Else: Applicability of Comparative Fault Principles in Purely Economic Loss Cases*, 49 Drake L. Rev. 589, 592 n.16 (2001). Some commentators, however, have urged against the doctrine's widespread application. *See, e.g.*, Tourek, et al. at 876.

Our supreme court has addressed the compensability of economic loss damages in tort cases on several occasions. *See Determan v. Johnson*, 613 N.W.2d 259, 261-63 (Iowa 2000) (conducting comprehensive review of Iowa cases addressing the economic loss doctrine). The first case to address the issue in Iowa was *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 125 (Iowa 1984) where the plaintiffs sued a bridge contractor for damages they alleged to have sustained in the operation of their retail businesses as a result of a public bridge closing for repairs. The court

determined that under such circumstances the plaintiffs could not recover for their purely economic losses under an ordinary negligence theory, adopting the general rule "that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable." *Nebraska Innkeepers*, 345 N.W.2d at 126. A contrary rule, according to the court, "would open the door to virtually limitless suits, often of a highly speculative and remote nature." *Id.* at 127.

The economic loss doctrine has been expanded and refined by our courts in several subsequent cases. *See Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103, 107 (Iowa 1995) (finding plaintiff could not recover under tort theories of liability because the product at issue, a cattle growth hormone, simply failed to do what it was supposed to do); *Nelson v. Todd's Ltd.*, 426 N.W.2d 120, 123 (Iowa 1988) (extending doctrine to bar claims based on strict liability where a product sold by defendant failed to perform as expected but caused no physical injury to person or property); *Richards*, 551 N.W.2d at 651 (determining the remedy for the economic loss associated with the alleged failure of bricks used in the construction of plaintiff's home was in contract). *But see American Fire & Cas. Co. v. Ford Motor Co.*, 588 N.W.2d 437, 439-40 (Iowa 1999) (declining to apply doctrine and permitting tort recovery for economic damages when a truck "start[ed] itself on fire," damaging both the truck and its contents). Our supreme court most recently addressed the doctrine in *Determan*, in which a purchaser of a home sued the sellers "under several different negligence theories" after discovering significant structural problems in the home. 613 N.W.2d at 260-61.

In finding the plaintiff could not recover under tort law, the court in *Determan* applied the following multi-factor test culled from the aforementioned cases:

> In deciding the proper remedy for the plaintiff's loss, we look to the nature of the defect, the type of risk, and the manner in which the injury arose. In addition, the type of damages that the plaintiff seeks to recover is necessarily relevant to our consideration of these factors.

Id. at 263 (internal quotations and citations omitted). The line to be drawn is one between tort and contract rather than between physical harm and economic loss. *Id.* at 262. The factors identified in *Determan* "bear directly on whether the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to a particular claim." *Id.* Thus, where the loss relates to a consumer's "disappointed expectations due to deterioration, internal breakdown or non-accidental cause, the remedy lies in contract." *Id.* This is so because "contract law protects a purchaser's expectation interest that the product received will be fit for its intended use." *Tomka*, 528 N.W.2d at 107; *see also Richards*, 551 N.W.2d at 651 ("Purely economic losses usually result from the breach of a contract and should ordinarily be compensable in contract actions, not tort actions.").

With this framework in mind, we conclude Van Sickle's negligent misrepresentation claim against Wachovia is barred by the economic loss doctrine. Van Sickle's claim is based on its disappointed expectations in its ability to use the tractors it purchased at the auction due to the delay in receiving the titles. Its claim is thus similar to the claims presented in *Nelson* and

Richards, in which the plaintiffs sought recovery for economic losses they allegedly sustained when the defendants' products failed to function as expected due to defects in the products themselves. *See Nelson*, 426 N.W.2d at 121 (meat curing agent failed to cure meat); *Richards*, 551 N.W.2d at 650 (bricks purchased for home construction chipped and cracked). The damages sought by Van Sickle for "business injury, economic injury, lost opportunity, and loss of the use of the vehicles" are purely economic and more appropriately recompensed by the "expectation-bargain protection policy" of contract law. *See Nelson*, 426 N.W.2d at 124 ("When a buyer loses the benefit of his bargain because the goods are defective . . . he has his contract to look to for remedies. Tort law need not, and should not, enter the picture.").

We know of no reason why the economic loss doctrine as articulated by our courts in the above-detailed cases would not apply to the negligent misrepresentation claim presented in this case.[6] We recognize that the majority of our courts' cases in which the economic loss doctrine has been applied have concerned product liability actions or defective construction claims. But, our supreme court has never expressly confined the doctrine to those contexts or articulated any rationale for the doctrine that would suggest it should be limited in such a manner. *But see Sain*, 626 N.W.2d at 129 (reversing district court's grant of summary judgment to defendant on a negligent misrepresentation claim involving information provided by a high school guidance counselor); *Kemin*

[6] Van Sickle simply, and incorrectly, argues that the economic loss doctrine does not preclude recovery by way of tort actions.

Indus., Inc. v. KPMG Peat Marwick LLP, 578 N.W.2d 212, 220 (Iowa 1998) (reading *Nelson* as limited to deciding whether purely economic injuries are recoverable under a theory of strict liability in tort, in rejecting plaintiff's argument that Iowa Code chapter 668 was not applicable to a professional negligence case).[7]

Our conclusion is buttressed by several federal cases applying Iowa law in similar contexts and reaching the same conclusion as we do here. *See Holden Farms, Inc. v. Hog Slat, Inc.*, 347 F.3d 1055, 1063 (8th Cir. 2003) (finding a pre-contract formation negligent misrepresentation claim was barred by the economic loss doctrine); *Maynard Coop. Co. v. Zeneca, Inc.*, 143 F.3d 1099, 1102-03 (8th Cir. 1998) (applying doctrine to bar consumer's negligent misrepresentation claim based on product's failure to perform as expected); *Conveyor Co. v. Sunsource Tech. Servs., Inc.*, 398 F. Supp. 2d 992, 1012-13 (N.D. Iowa 2005) (finding the doctrine barred a negligent misrepresentation claim based on plaintiff's unfulfilled expectations with respect to quality of product). *But see Johnson v. Land O'Lakes, Inc.*, 18 F. Supp. 2d 985, 1001 (N.D. Iowa 1998) (applying our supreme court's decision in *Kemin* to find that the doctrine did not foreclose plaintiffs' tort claims in a Uniform Commercial Code grain contract case).

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[7] We note that the applicability of the economic loss doctrine was not presented as an issue or discussed by the court in *Sain*. We additionally note that the court's reading of *Nelson* in *Kemin* was not mentioned by our supreme court in the later case of *Determan*, 613 N.W.2d at 261, in which it "review[ed its] line of cases" "consider[ing] the compensability of economic loss damages in tort," and as we previously stated adopted a multi-factor test to be used in determining whether a particular claim is cognizable in tort or contract. Furthermore, Van Sickle does not argue that either *Sain* or *Kemin* prevents the application of the doctrine in this case.

We also note that other jurisdictions have applied the economic loss doctrine to bar a plaintiff's recovery of purely economic losses in negligent misrepresentation cases. *See, e.g.*, *Apollo Group, Inc. v. Avnet, Inc.*, 58 F.3d 477, 480 (9th Cir. 1995); *Bailey Farms, Inc. v. NOR-AM Chem. Co.*, 27 F.3d 188, 191-92 (6th Cir. 1994); *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 620 (3rd Cir. 1995). *But see Vermont Plastics, Inc. v. Brine, Inc.*, 824 F. Supp. 444, 451-52 (D. Vt. 1993) (holding economic loss rule did not bar plaintiff's recovery for negligent misrepresentation); *accord Bronster v. U.S. Steel Corp.*, 919 P.2d 294, 307 (Haw. 1996); *Nota Constr. Corp. v. Keyes Assocs., Inc.*, 694 N.E.2d 401, 405 (Mass. Ct. App. 1998).

As our supreme court stated in *American Fire & Casualty*, 588 N.W.2d at 438, "[a]lthough much could be said for the views of those courts in disagreement with us,[8] we cast our lot in" *Tomka*, *Nelson*, and *Nebraska Innkeepers*. We believe those cases, together with *Determan*, established an analysis that leads to our conclusion here, although the answer is less than clear.[9]

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[8] Some courts have reasoned that applying the economic loss doctrine to bar recovery for the tort of negligent misrepresentation ignores the express wording of Restatement (Second) of Torts section 552, which allows a plaintiff to recover for any "pecuniary loss" suffered by a party relying on the misrepresentation. *See, e.g.*, *Bronster*, 919 P.2d at 305. "Pecuniary loss," according to these courts, is by its very definition "economic loss." *Id.* Our supreme court has utilized section 552 to help define the tort of negligent misrepresentation in Iowa. *See Sain*, 623 N.W.2d at 123-124.

[9] Each party's routing statement asserts that this case involves the application of established principles of Iowa law. However, the parties thereafter strongly and at length disagree as to both what those established principles are and how they might apply in this case.

IV. CONCLUSION.

Upon viewing the evidence in the light most favorable to Van Sickle, we conclude the district court erred in denying Wachovia's motions for directed verdict and judgment notwithstanding the verdict as to the fraudulent misrepresentation and negligent misrepresentation claims. There was insufficient evidence presented at trial to justify submitting the fraudulent misrepresentation claim to the jury. Based on our holding in this regard, we further conclude there was no basis for the punitive damages claim. Finally, we conclude the negligent misrepresentation claim is barred by the economic loss doctrine. The judgment of the district court is therefore reversed.

REVERSED.