COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-3066

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

TKO, LTD., A WISCONSIN CORPORATION, D/B/A MODERN CASH REGISTER SYSTEMS,

PLAINTIFF-RESPONDENT,

V.

WAYNE MANTERNACH AND GRAYFIELD DEVELOPMENT, LLC.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Wayne Manternach and Grayfield Development, LLC. (Grayfield) appeal from a summary judgment granted in favor of TKO, Ltd.

On appeal, Grayfield contends that the summary judgment was in error both as to TKO's claim and Grayfield's counterclaims. We conclude that the circuit court properly granted summary judgment on the counterclaims, but erred in granting it on TKO's original claim. We therefore reverse the summary judgment in favor of TKO on its claim, but affirm the judgment regarding the counterclaims. Resultantly, the award of attorney's fees is also reversed because the appellate issue stemming from it is rendered moot.

Grayfield contracted with TKO for restaurant management software and equipment. Grayfield made an initial payment on the system, which was delivered and went "live." Manternach averred that the system did not operate as expected. Grayfield ultimately purchased another system from a different supplier and did not pay the balance due on the contract. TKO sued on the contract; Grayfield brought counterclaims of breach of warranty, breach of implied warranty, intentional misrepresentation, negligent misrepresentation and violation of § 100.18, STATS. The circuit court granted summary judgment in TKO's favor, and this appeal followed.

Grayfield first contends that the circuit court erred in granting summary judgment on TKO's claim because the issue of whether the system was in good working order remained unresolved. We agree. Although it is true that Grayfield's admissions by default are not without pertinence to this question, we are unconvinced that they effectively compelled summary judgment here.

TKO warranted that "upon delivery the equipment shall be in good working order." A Grayfield representative averred that they began to use the system on about July 31, 1996, that serious problems were present from the start, that TKO was notified by phone of the problem on the first day the system was used, and that a TKO representative "was at the restaurant about four times between mid-August and November, 1996, trying to repair or work on the system so that the cash register would communicate with the back office computer"[1] and that "[h]e was never able to fix the problem."

On summary judgment, the moving party has the burden to establish the absence of a disputed issue as to any material fact. *See* ***Grams v. Boss,*** 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980). Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment. *See* ***id.*** at 338-39, 294 N.W.2d at 477. On the strength of the averments made on behalf of Grayfield, we must conclude that an issue of material fact exists concerning TKO's warranting the system to be in "good working order."

On this point, TKO contends that Grayfield waived any claim under the warranty by failing to make a written claim within ten days of the delivery of the

[1] We note that one of Grayfield's admissions was that TKO never represented to Grayfield that the system "was capable of simultaneously reporting sales made at the cash registers to the computer located in the office of the restaurant." However, in its reply to Grayfield's counterclaims, TKO admitted that it represented to Grayfield that the system could be programmed to report sales from the front cash registers to the kitchen and the office. Again, a disputed issue of material fact exists.

system. We do not agree. Although the contract does specify that "[a]ll claims for goods shall be deemed waived unless made in writing and delivered to MODERN CASH REGISTER SYSTEMS within ten days after delivery of goods to Customer," that provision is not part of the warranty paragraph. Rather, the warranty explicitly runs for ninety days from delivery and makes no mention of written notice as a means of invoking the warranty. We are unconvinced that the ten-day limit on the claim for goods subverts the plain language of the warranty granting ninety days. We therefore reverse the circuit court's grant of summary judgment on TKO's contract claim.

We turn now to Grayfield's challenges to the dismissal of its five counterclaims. We begin by noting that Grayfield has not argued on appeal, in either its brief-in-chief or in reply, from its express or implied warranty counterclaims. We deem them abandoned. *See* ***State v. S.H.,*** 159 Wis.2d 730, 738, 465 N.W.2d 238, 241 (Ct. App. 1990). We conclude that the remaining three counterclaims were all properly dismissed by virtue of Grayfield's admission that it did not rely upon any written or oral statements by TKO beyond the contract itself.

We first address what Grayfield denominates as its counterclaim for "fraudulent misrepresentation."[2] While Grayfield cites no authority for its definition, we note that any of the three varieties of misrepresentation requires that the party must rely upon the representation to its damage. *See* ***Ollerman v. O'Rourke Co.,*** 94 Wis.2d 17, 24-25, 288 N.W.2d 95, 99 (1980). Here, one of Grayfield's admissions was that "[p]ursuant to the Sales Contract, the purchaser did not rely on any statements of plaintiff, either written or oral, that are not made a part of said Sales Contract, either by the provisions of paragraphs 4 or 9 thereof, or expressly by the terms of the contract document." Grayfield has therefore admitted that it did not rely upon any representation made by TKO.

Grayfield attempts to distinguish this admission by resort to the "[p]ursuant to the Sales Contract" phrase; this attempt is unavailing. Grayfield argues that because of this qualifier, "the admission only states that the contract says what it says" and "does no more than raise the question of what the agreement was between the parties as to the system's capabilities." We cannot agree. The admission states that Grayfield did not rely on any written or oral statements of TKO's beyond the sales contract itself. Reliance is an element of a

[2] It is of no consequence whether Grayfield intends "fraudulent misrepresentation" as a blanket term for both its intentional and negligent misrepresentation counterclaims set forth in its answer or as a synonym for intentional misrepresentation. *See* ***Ollerman v. O'Rourke Co.,*** 94 Wis.2d 17, 24, 288 N.W.2d 95, 99 (1980). Both torts contain the element of reliance. *See* ***id.*** at 25, 288 N.W.2d at 99.

misrepresentation claim. *See* ***id.*** Grayfield's admission is therefore fatal to its misrepresentation counterclaim.

Turning to Grayfield's statutory fraudulent representation counterclaim, made pursuant to § 100.18(1), STATS., we note that the admission concerning a lack of reliance is again dispositive. Grayfield argues that a claim under this statute does not require reliance. We cannot agree. In ***Tim Torres Enterprises, Inc. v. Linscott,*** 142 Wis.2d 56, 416 N.W.2d 670 (Ct. App. 1987), this court stated that "[s]ection 100.18(11)(b)2, Stats., states that '[a]ny person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss.' We interpret this section as requiring a *causal connection* between the practices found illegal and the pecuniary losses suffered." ***Id.*** at 70, 416 N.W.2d at 675 (emphasis added). While this interpretation does not use the term "reliance," we conclude that, at least for the case at bar, a causal connection is tantamount to reliance.[3] We therefore hold that the circuit court properly dismissed Grayfield's § 100.18 counterclaim.

Finally, we address the award of attorney's fees. The circuit court awarded attorney's fees pursuant to the sales contract, although neither party

[3] Grayfield attempts to distinguish this language by stating that "Grayfield could establish damage without any reliance on the representations, simply by showing a causal link between the false representations and pecuniary damage. While such an action may be difficult, it is not impossible." However, Grayfield makes no attempt at suggesting how that might be accomplished.

identifies the particular contractual terms involved. In any event, because of our reversal of TKO's underlying claim, we deem the attorney's fee award premature, and therefore moot. *See* ***Warren v. Link Farms, Inc.,*** 123 Wis.2d 485, 487, 368 N.W.2d 688, 689 (Ct. App. 1985).[4]

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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

[4] While we need not and do not reach the merits of Grayfield's challenge to the circuit court's refusal to grant a hearing on attorney's fees, we note that where, as here, a party is explicitly required only to "voice any objections to the amounts," we consider it prudent for the court to entertain such objections, even when made only by letter.