COURT OF APPEALS
DECISION
DATED AND FILED

April 3, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1244

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

LAWRENCE E. GILSON AND CHRISTINE M. GILSON,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

WILLIAM M. OVERBECK,

DEFENDANT-THIRD-PARTY PLAINTIFF-CO-APPELLANT,

V.

JAMES YUNK,

THIRD-PARTY DEFENDANT,

WILSON MUTUAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J, and Peterson, J.

¶1 HOOVER, P.J. Lawrence and Christine Gilson and William Overbeck appeal a summary judgment dismissing Overbeck's insurer, American Family Mutual Insurance Company, and James Yunk's insurer, Wilson Mutual Insurance Company. The judgment also dismissed the Gilsons' tort claims. The Gilsons challenge the circuit court's decision on three general grounds. They contend that their tort claims were erroneously dismissed under the economic loss doctrine and policy exclusions. They assert that the court erred when it failed to address their statutory claims under WIS. STAT. §§ 100.18 (fraudulent trade representations) and 94.72 (commercial feed regulations).[1] Finally, the Gilsons argue that even if the tort and statutory claims were properly dismissed, their breach of contract claim is an "occurrence" under the policy and the insurance companies should defend the claims. Overbeck appeals on similar grounds. We reject their arguments and affirm the circuit court.

FACTS

¶2 The Gilsons allege that they entered into an oral contract with Overbeck to purchase feed corn for their cattle. They contend that an essential contract term was that the corn have less than 26% moisture content. The Gilsons

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

assert that before the corn was loaded into their silo, they requested proof of the moisture content. They claim that the delivery truck driver told them that he forgot the documents but would bring them with the next load. The driver allegedly "repeatedly assured" the Gilsons that the feed had less than 26% moisture content. When the documents were not produced with the next load, the Gilsons state that the driver "indicated that the defendant, William M. Overbeck would personally deliver proof."

¶3 Before the final load was delivered, the Gilsons had a sample of the corn tested for moisture. They maintain that the test indicated 38% to 43% moisture content. The Gilsons report that they immediately called Overbeck and informed him that the feed was not acceptable because it did not conform to the express moisture content requirement in their agreement. The Gilsons claim that they demanded removal of the unacceptable feed already delivered, but that Overbeck refused.

¶4 The Gilsons complain that they had no other place to store replacement feed and were forced to utilize the nonconforming feed. They report that over the next several months, the cattle became ill and many died. The Gilsons allege that the nonconforming feed not only contained too much moisture, but also contained a toxic mold that contaminated the entire cattle herd.

¶5 The Gilsons sued Overbeck and his insurer for breach of contract, fraudulent misrepresentation, negligent misrepresentation, strict liability, injury to business, negligence per se (as evidenced by a violation of WIS. STAT. § 94.72, "ch. 94, and pertinent provisions of the Wisconsin Administrative Code"), and a violation of WIS. STAT. § 100.18. The Gilsons claimed damages for lost production, lost cattle, lost feed, cost of replacement cattle, cost of replacement

feed, and cattle medications and veterinarian bills. They also sought punitive damages.

¶6 In a separate small claims action, Overbeck sued James Yunk for corn combining and transportation fees. Overbeck contended that Yunk, not Overbeck, owned the feed delivered to the Gilsons. Overbeck claimed that he was only hired to harvest and transport the corn. Yunk then sued the Gilsons to obtain payment for the feed they received. Since these actions concerned the same set of facts, they were consolidated.

¶7 After consolidation, in his amended third-party complaint, Overbeck claimed that the Gilsons placed their order through another broker, Joseph Pagel, and that Overbeck was not a party to the agreement. Overbeck claims that he did not make representations to the Gilsons about the fitness of the feed corn. Finally, if liable, Overbeck sought indemnification and contribution from Yunk and Pagel.[2]

¶8 American Family, Yunk, Wilson Mutual Insurance Company and Overbeck filed summary judgment motions. The court granted Wilson's and American Family's summary judgment motions, dismissing them from the case. The court also dismissed Gilsons' common law tort claims as to all parties, under the economic loss doctrine. It determined that disputes of material facts precluded dismissing Overbeck and Yunk with regard to the breach of contract claim. The court also concluded that contribution may be allowed between Overbeck and Yunk.

[2] Pagel was named as a party. However, the court granted his unopposed summary judgment motion and dismissed him from the action. No one appeals Pagel's dismissal.

¶9 The Gilsons obtained a stay of their remaining claims against Overbeck and Yunk and now appeal the court's decision dismissing the insurance companies and their tort claims. Overbeck also appeals.

STANDARD OF REVIEW

¶10 Whether summary judgment was appropriately granted presents a question of law that we review independently of the circuit court. ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 266, 593 N.W.2d 445 (1999). When reviewing summary judgments, we utilize the same analysis as the circuit court and apply WIS. STAT. § 802.08(2). *See* ***State v. Dunn***, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). "Summary judgment must be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." ***Wausau Tile***, 226 Wis. 2d at 266 (citation omitted.)

ANALYSIS

I. TORT DAMAGES

¶11 The Gilsons contend that the circuit court erred when it applied the economic loss doctrine to limit their damages and dismiss the defendant insurance companies. Specifically, they argue that the economic loss doctrine does not bar intentional misrepresentation tort damages, citing ***Douglas-Hanson Co., Inc. v. BF Goodrich Co.***, 229 Wis. 2d 132, 144-46, 598 N.W.2d 262 (Ct. App. 1999). Further, the Gilsons argue that because they suffered damage to "other property," in this case, their herd, the economic loss doctrine does not limit their negligence, misrepresentation and injury to business claims. We do not address these issues, however, because we conclude that the Gilsons failed to demonstrate a dispute of

material fact with respect to causation. Therefore, their intentional and negligent misrepresentation claims fail regardless of the economic loss doctrine.[3]

¶12 The Gilsons allege that Overbeck intentionally misrepresented the corn's moisture content, thereby inducing them to contract with him.[4] They submit that the record contains disputed facts as to whether Overbeck knew the moisture was significantly higher than represented. However, the factual dispute regarding the alleged misrepresentation is not material because the outcome is the same. We conclude, as did the circuit court, as a matter of law that the Gilsons failed to demonstrate that the moisture misrepresentation caused the harm.

¶13 A claim for intentional misrepresentation requires the plaintiff to prove three elements:

> (1) a false representation of fact; (2) made with intent to defraud and for the purpose of inducing another to act upon it; and (3) upon which another did in fact rely and was induced to act, resulting in injury or damage.

D'Huyvetter v. A.O. Smith Harvestore Prods., 164 Wis. 2d 306, 320, 475 N.W.2d 587 (Ct. App. 1991).

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[3] The Gilsons focus on the two exceptions to the economic loss doctrine, implicitly conceding that the doctrine precludes their negligent misrepresentation and strict liability claims. Therefore, we do not address these claims further. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned).

[4] The Gilsons also contend that Overbeck intentionally misrepresented the lack of corn mycotoxin, the poison that the Gilsons' veterinarian stated caused the cattle illnesses and deaths. However, they provide no record cites for this claim and, furthermore, they concede that Overbeck was not aware of the mycotoxins that caused the damage. We therefore do not address any misrepresentation concerning mycotoxins. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, n.3, 292 N.W.2d 370 (Ct. App. 1980).

¶14 A plaintiff's superseding act may relieve a defendant of liability. ***Stewart v. Wulf***, 85 Wis. 2d 461, 475, 271 N.W.2d 79 (1978). "A superseding cause is an intervening force which relieves an actor from liability for harm which his negligence was a substantial factor in producing." ***Id.*** (quoting RESTATEMENT (SECOND) OF TORTS § 440 (1965)). An intervening cause is defined as a force that "actively operates in producing the harm to another after the actor's negligent act or omission has been committed." ***Id.*** (citing RESTATEMENT, *supra* at § 441(1)). Determining whether an act is a superceding cause is a question of law. ***Id.***

¶15 The Gilsons failed to show that they relied on the misrepresentation to their pecuniary damage. The evidence establishes that the Gilsons were in the best position to evaluate the risk of feeding the corn to their cattle. When they fed the corn to the cows, they already knew the moisture was higher than allegedly represented. Their decision to nevertheless feed it to their cattle caused the damage and superseded Overbeck's misrepresentation.

¶16 Although the circuit court disposed of the Gilsons' "other property" argument on other grounds, we affirm for the reasons expressed above. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995). It is undisputed that the Gilsons fed the corn to their cattle after they knew the moisture exceeded their specifications. They allege on appeal that they had no alternative but to feed the nonconforming corn to their cows, but they do not support this allegation with any facts in affidavits or deposition testimony. *See* WIS. STAT. § 802.08(3). The Gilsons did not pay Overbeck or Yunk for the corn and therefore theoretically had use of these funds to purchase replacement feed. The record establishes that they were experienced cattle farmers and specified the particular corn moisture content for a reason. As a result, the Gilsons were in the best position to determine the risk of feeding excessively moist corn to their herd.

Even if the cattle could be considered "other property," we conclude as a matter of law that the Gilsons' decision to use the corn as feed, knowing that its moisture exceeded specifications, superseded the causal effect of Overbeck's alleged misrepresentation.

¶17 This discussion also disposes of Overbeck's contentions. Both parties raise other arguments concerning the tort claims that we do not address because our analysis is dispositive.[5] *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

II. STATUTORY DAMAGES

¶18 The Gilsons argue that the economic loss doctrine does not bar their claims brought under WIS. STAT. §§ 100.18[6] and 94.72.[7] Further, they contend that the policy provides coverage for their statutory claims.

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[5] For example, it is unnecessary to discuss the economic loss doctrine further.

[6] It is not clear on which subsection of WIS. STAT. § 100.18 the Gilsons rely. Subsection (1) provides in relevant part:

> No person, firm, corporation or association, or agent or employe thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any … merchandise … with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase … of any … merchandise … shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be ... disseminated, circulated, or placed before the public, in this state, [a] statement or representation of any kind to the public relating to such purchase [of] merchandise … to the terms or conditions thereof, which … statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

Subsection (11)(b)2 provides in relevant part:

> Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of

(continued)

¶19 The challenge under WIS. STAT. § 100.18 is resolved by the above analysis. WISCONSIN STAT. §§ 100.18(1) and (11)(b)2 require that the misrepresentation cause the pecuniary damage. American Family's policy requires the good or product sold by the insured to cause the harm. Wilson's policy requires that an "occurrence"[8] cause the property damage. We conclude that the alleged occurrence—misrepresentation of the moisture content—did not cause the harm. Rather, it was Gilsons' decision to use the feed after learning of its moisture content that superseded any harm caused by the alleged misrepresentation.

¶20 The WIS. STAT. § 94.72(8) claim also fails because there is no evidence that the corn was "adulterated" at the time it was delivered. Under WIS.

> competent jurisdiction and shall recover such pecuniary loss, together with costs, including reasonable attorney fees ….

[7] It is also not clear on which subsection of WIS. STAT. § 94.72 the Gilsons rely. Subsection (8) provides in relevant part:

> (a) No person may sell or distribute any feed product which is adulterated or misbranded.
>
> (b) A feed product is adulterated if:
>
> 1. It bears or contains any poisonous or deleterious substance which may render it injurious to the health of animals or which is unsafe within the meaning of section 406, 408 or 409 of the federal food, drug and cosmetic act, 21 USC 346, 346a and 348.
> ….
>
> 4. Its composition or quality falls below or differs from that which it is purported or represented to possess by its labeling.

The Gilsons do not specify which provision(s) of "ch. 94 and pertinent provisions of the Wisconsin Administrative Code" they rely on, nor do they state any related arguments or provide record citations. We do not address their undeveloped arguments. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).

[8] An "occurrence" is "an accident, including repeated exposures to similar conditions, that results in **bodily injury** or **property damage** during the policy period."

STAT. § 94.72(8)(b)1, the corn would be adulterated if it is unsafe under 21 U.S.C. §§ 346, 346a or 348. Sections 346 and 348 regulate poisonous or deleterious substances added to any food. Although evidence shows that the moisture content exceeded contract specifications, there is no evidence that Overbeck or Yunk added mycotoxin to the corn prior to delivery. In fact, the Gilsons' veterinarian's deposition reveals that mycotoxin naturally occurs in corn. Moreover, while § 346a protects against excessive pesticide chemical residue, there is no evidence that pesticides caused the mycotoxin presence or growth. Finally, the corn was not incorrectly labeled under § 94.72(8)(b)4. The circuit court properly dismissed these claims.

III. CONTRACT DAMAGES

¶21 The Gilsons argue that, at a minimum, their contract claim is covered by the policy. Aside from the causation issue, we observe that generally, "[t]here is no coverage for breach of contract because a breach of contract is not an occurrence." ARNOLD P. ANDERSON, WISCONSIN INSURANCE LAW § 5.36 (4th ed. 2000). In ***Wausau Tile***, the supreme court analyzed a policy in all material respects identical to the policies at issue in this case. *See* ***id.*** at 267, n.18. ***Wausau Tile*** held that a breach of contract or warranty is not an occurrence. ***Id.*** at 268-69. Similarly, we conclude that the circuit court properly dismissed the insurers from the present action because the complaint does not allege an occurrence within the meaning of the policy.

By the Court.—Judgment affirmed.

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