COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2428 **Cir. Ct. No. 2006CV21**

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

BOB THOMPSON & SONS, INC., D/B/A THOMPSON'S SAND AND GRAVEL,

PLAINTIFF,

V.

SHUYLER H. VAN GORDEN,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

V.

PINEWOOD REALTY, INC., ABC INSURANCE COMPANY AND WALTER R. TIBBITTS,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sawyer County: NORMAN L. YACKEL, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Shuyler Van Gorden appeals a summary judgment dismissing various misrepresentation claims against Pinewood Realty, Inc., and Walter Tibbitts. The circuit court concluded Van Gorden suffered purely economic loss when the Department of Natural Resources frustrated his development plan by designating his recently purchased property an island. We affirm.

BACKGROUND[1]

¶2 This case involves the sale of property on the Chippewa Flowage in Sawyer County. In 1999, the owner, Walter Tibbitts, entered into a listing contract with licensed real estate broker Stephen Bodenschatz. The contract obligated Bodenschatz and his company, Pinewood, to market the western portion of Tibbitts' parcel to prospective purchasers. Tibbitts would retain ownership of the eastern portion of his property, and Bodenschatz would receive a commission based on the sale price of the western parcel.

¶3 A narrow strip of land connected the eastern portion of Tibbitts' property with the portion he desired to sell. During high water periods the ground softened and at times became submerged, which made crossing difficult. Shortly after he purchased the property in 1993, Tibbitts reinforced the crossing with large concrete slabs to improve access. The four- to ten-inch-thick slabs were placed

[1] While the background facts are not disputed, Van Gorden and Pinewood have unnecessarily complicated our review of the record. Van Gorden's brief contains inaccurate record citations, while Pinewood cites record entries but omits page citations. We recommend that each review WIS. STAT. RULE 809.19(1)(d)-(1)(e), requiring "appropriate references to the record." Future violations may result in penalties. *See* WIS. STAT. RULE 809.83(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

below the high water mark, and water would occasionally fill the channel despite their placement.

¶4 On September 19, 2000, Shuyler Van Gorden, an experienced real estate investor, purchased the western portion of Tibbitts' parcel. Bodenschatz, acting on Tibbitts' behalf, prepared the offer to purchase, which detailed Van Gorden's development plans for the property. Van Gorden intended to subdivide the land and create several residential parcels, selling all but a single parcel he would retain. To hasten the sale of the subdivided parcels, Van Gorden entered into a listing agreement with Bodenschatz. Bodenschatz and Pinewood promised to use reasonable efforts to procure purchasers for the subdivided parcels, and in return would be paid a commission based upon the sale price. Bodenschatz obtained offers to purchase four of Van Gorden's subdivided parcels, but only the sale of two parcels to Jim Schilling was completed.

¶5 The sale to Schilling required Van Gorden to improve the concrete roadway, which provided the only road access to the property. Van Gorden, through Bodenschatz, hired Bob Thompson & Sons, Inc., to grade and widen the road. Soon after the improvements began, the Department of Natural Resources (DNR) halted the project because Van Gorden failed to obtain necessary permits. During its investigation, the DNR determined the Van Gorden property was an island and notified Van Gorden that the concrete slab "bridge" was an illegal fill of the lake bed.

¶6 Had Sawyer County taken a similar stance, the DNR's designation of the property as an island could have complicated Van Gorden's effort to subdivide and sell his property. A Sawyer County ordinance requires that a developer of island lots own at least one mainland access lot on the Flowage for

every two developed island lots. SAWYER COUNTY, WI, ORDINANCE § 4.413. To successfully complete his development plans while complying with the ordinance, Van Gorden would have had to purchase three mainland lots along the Flowage to provide access to the parcels he wished to sell. It does not appear the county ever designated the property an island, nor does it appear Van Gorden requested that the county make such a determination. Instead, he had the land appraised and sold to the Public Land Trust for $650,000, which was half of the appraised value.

¶7 Bob Thompson & Sons, Inc., brought suit against Van Gorden on February 10, 2006, seeking satisfaction of a lien claim for the roadwork done prior to the DNR's intervention.[2] Van Gorden's answer included third-party complaints against Tibbitts and Pinewood for negligent, strict, and intentional misrepresentation. He sought damages for "loss of profit, loss of value of property, benefit of the bargain losses, out of pocket losses, interest and other consequential damages." At a hearing on cross-motions for summary judgment, Tibbitts and Pinewood asserted that summary judgment was appropriate based on our supreme court's then-recent decision in ***Below v. Norton***, 2008 WI 77, 310 Wis. 2d 713, 751 N.W.2d 351, in which the court held the economic loss doctrine applicable to residential real estate contracts. The circuit court agreed and granted summary judgment for Tibbitts and Pinewood, stating, "And whether that new case covers this, I guess the [c]ourt would find that it does." Van Gorden appeals.

[2] The circuit court granted Van Gorden's motion for summary judgment against Bob Thompson & Sons, Inc. That decision is not the subject of this appeal.

ANALYSIS

¶8 As an initial matter, Van Gorden argues we must remand the action to the circuit court for findings of fact and conclusions of law. There is no need to do so. First, "[c]ircuit courts do not make 'findings' of fact in ruling on a summary judgment motion." ***Camacho v. Trimble Irrev. Trust***, 2008 WI App 112, ¶11, 313 Wis. 2d 272, 756 N.W.2d 596. A court's need to make factual findings would necessarily *preclude* summary judgment because summary judgment is appropriate only when no genuine issues of material fact exist. *See* WIS. STAT. § 802.08(2). Second, Van Gorden incorrectly claims the circuit court "made absolutely no conclusions of law." This is not a case in which remand is appropriate because the basis for the court's dismissal is unclear. *See* ***Below***, 310 Wis. 2d 713, ¶7. The circuit court unambiguously concluded the economic loss doctrine barred Van Gorden's claims, which is a conclusion of law.

¶9 We review the circuit court's decision to grant summary judgment de novo. ***Snyder v. Badgerland Mobile Homes, Inc.***, 2003 WI App 49, ¶7, 260 Wis. 2d 770, 659 N.W.2d 887. We will affirm that decision if the record demonstrates no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). On review, we use the same methodology as the trial court. ***Union Pac. R.R. Co. v. Motive Equip., Inc.***, 2006 WI App 58, ¶7, 291 Wis. 2d 236, 714 N.W.2d 232; *see also* ***Snyder***, 260 Wis. 2d 770, ¶8 (discussing methodology). "We do value any analysis that the trial court has placed in the record." ***Motive Equip.***, 291 Wis. 2d 236, ¶7.

¶10 The economic loss doctrine is a judicial rule that prevents contracting parties from recovering in tort for purely economic or commercial losses associated with the contractual relationship. ***Van Lare v. Vogt, Inc.***, 2004

WI 110, ¶19, 274 Wis. 2d 631, 683 N.W.2d 46 (quoting ***Tietsworth v. Harley-Davidson, Inc.***, 2004 WI 32, ¶23, 270 Wis. 2d 146, 677 N.W.2d 233). The economic loss doctrine has expanded since its relatively modest origin in ***Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.***, 148 Wis. 2d 910, 437 N.W.2d 213 (1989), in which the court applied the doctrine to bar negligence and strict liability claims of a commercial purchaser against a manufacturer, to possess "one of the broadest coverages in the United States." Ralph C. Anzivino, *The Fraud in the Inducement Exception to the Economic Loss Doctrine*, 90 MARQ. L. REV. 921, 930 (2007). The doctrine's primary policy justifications are "(1) to maintain the fundamental distinction between tort law and contract law; (2) to protect commercial parties' freedom to allocate economic risk by contract; and (3) to encourage the party best suited to assess the risk [of] economic loss, the commercial purchaser, to assume, allocate, or insure against that risk." ***Kaloti Enters., Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶28, 283 Wis. 2d 555, 699 N.W.2d 205 (quotations omitted) (alteration in original). As a practical matter, the rule prevents a party from "eschewing the more limited contract remedies and seeking [the broader array of] tort remedies." ***Insurance Co. of N. Am. v. Cease Elec., Inc.***, 2004 WI 139, ¶24, 276 Wis. 2d 361, 688 N.W.2d 462.

¶11 Determining the type of loss alleged is critical when analyzing whether the economic loss doctrine applies. *See* ***Prent Corp. v. Martek Holdings, Inc.***, 2000 WI App 194, ¶19, 238 Wis. 2d 777, 618 N.W.2d 201. Our supreme court has defined economic loss as "damages resulting from inadequate value because the product is inferior and does not work for the general purposes for which it was … sold." ***Kaloti Enters.***, 283 Wis. 2d 555, ¶29 (quotation omitted). Recovery for economic loss refers to recovery as a result of a product failing in its intended use or failing to live up to a contracting party's expectations. ***Id.***

¶12 Van Gorden concedes his alleged damages amount to purely economic loss; at least, Van Gorden does not dispute Pinewood's characterization of his losses, and we deem the matter conceded. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (unrefuted arguments are deemed conceded). But we note the damages alleged—including the difference between the purchase price of the property as a peninsula and the sale price of the property as an island—are classic economic losses. *See* ***Northridge Co. v. W.R. Grace & Co.***, 162 Wis. 2d 918, 926, 471 N.W.2d 179 (1991) (direct economic loss includes the difference between the value of what is received and its value as represented).

¶13 We must also consider the risk that caused the economic loss in determining whether to apply the doctrine. ***Prent Corp.***, 238 Wis. 2d 777, ¶19. In ***Prent Corp.***, we concluded the economic loss doctrine barred negligent misrepresentation claims brought by the commercial purchaser of a product. ***Id.***, ¶24. In ***Van Lare***, our supreme court extended the scope of the doctrine to cover strict liability misrepresentation claims in a commercial real estate context. ***Van Lare***, 274 Wis. 2d 631, ¶¶31, 34. Intentional misrepresentation claims arising out of a contractual relationship are generally barred, save for a small group of cases in which the "fraud in the inducement" exception is applicable. *See* ***Digicorp, Inc. v. Ameritech Corp.***, 2003 WI 54, ¶3, 262 Wis. 2d 32, 662 N.W.2d 652. The economic loss doctrine therefore precludes each of Van Gorden's misrepresentation claims in the absence of a recognized exception. *See* ***Van Lare***, 274 Wis. 2d 631, ¶28.

¶14 Van Gorden urges us to allow his intentional misrepresentation claim by applying the fraud in the inducement exception to the economic loss doctrine. Though we have recognized the fraud in the inducement exception since

our decision in ***Douglas-Hanson Co. v. BF Goodrich Co.***, 229 Wis. 2d 132, 598 N.W.2d 262 (Ct. App. 1999), *overruled by* ***Digicorp, Inc.***, 262 Wis. 2d 32, ¶51, its scope was unclear until the supreme court adopted what it characterized as a "narrow" form of the exception in ***Kaloti Enters.***, 283 Wis. 2d 555, ¶42. The exception is applicable only if (1) the plaintiff has proven the five elements of an intentional misrepresentation claim; (2) the misrepresentation occurred before the contract was formed; and (3) the fraud was extraneous to, rather than interwoven with, the contract. ***Kaloti Enters.***, 283 Wis. 2d 555, ¶42 (citing ***Digicorp***, 262 Wis. 2d 32, ¶¶47, 52). The court reasoned that this narrow exception served the policies underlying the economic loss doctrine. ***Id.***, ¶46.

¶15 We conclude the fraud in the inducement exception is inapplicable. Van Gorden argues the fraud was extraneous to the contract because it "does not go to the performance of the contract and does not make the property defective." We disagree. The property's character as an island is interwoven with the purchase agreement. Interwoven misrepresentations "concern[] 'the quality or character of the goods sold.'" ***Id.***, ¶43 (quoting ***Huron Tool & Eng'g Co. v. Precision Consulting Servs., Inc.***, 532 N.W.2d 541, 545 (Mich. App. 1995)). Misrepresentations concerning the quality or character of the goods are either "(1) expressly dealt with in the contract's terms, or (2) if they are not dealt with explicitly in the contract's terms, … go to reasonable expectations of the parties to the risk of loss in the event the good purchased did not meet the purchaser's expectations." ***Id.***

¶16 Though the island designation is not dealt with explicitly in the contract's terms, the contract reflects the parties' allocation of the risk of loss in the event the physical characteristics of the property were misrepresented. The contract permitted Van Gorden to inspect the property he was purchasing.

Van Gorden knew of his inspection right and exercised it on several occasions. Van Gorden chose not to exercise his contractual right to hire an inspector. These provisions indicate the parties considered the risk that the property would be inadequate for Van Gorden's planned development. That Van Gorden disclosed his development ambitions in the purchase offer renders his argument for application of the fraud in the inducement exception even more implausible. The economic loss doctrine encourages the purchaser, who is best situated to assess the risk of economic loss, to allocate that risk, and we will not undermine the doctrine by permitting Van Gorden to pursue tort remedies. We conclude that any fraud that occurred was interwoven with the purchase agreement. The fraud in the inducement exception to the economic loss doctrine is therefore inapplicable.

¶17 Van Gorden's invocation of the fraud in the inducement exception also fails because he has not established a prima facie case for intentional misrepresentation. A claim for intentional misrepresentation requires proof of five elements: (1) the defendant made a factual representation; (2) the representation was untrue; (3) the defendant made the representation either knowing it was untrue or recklessly without caring whether it was true or false; (4) the representation was made with intent to defraud and induce another to act upon it; and (5) the plaintiff believed the statement to be true and relied on it to his or her detriment. ***Kaloti Enters.***, 283 Wis. 2d 555, ¶12. In addition, "[a] person in a business deal must be under a duty to disclose a material fact before he can be charged with a failure to disclose." ***Id.***, ¶13 (quoting ***Southard v. Occidental Life Ins. Co.***, 31 Wis. 2d 351, 359, 142 N.W.2d 844 (1966)).

¶18 Van Gorden cites a variety of statutory and administrative code provisions to demonstrate Bodenschatz had a duty to disclose all material adverse facts. *See, e.g.*, WIS. STAT. § 452.01(1e)(a)1.; WIS. ADMIN. CODE § RL 24.07

(Nov. 2007). Any duty arising under these provisions presupposes a broker knew or should have known of the existence of a material adverse fact. However, the timing of the DNR's island designation is undisputed; it occurred *after* the sale to Van Gorden was completed. At the time of the sale, Bodenschatz and Tibbitts could not have known about the DNR's island designation because the designation had not yet occurred. Our conclusion is supported by Bodenschatz's listing agreement with Van Gorden, which promised Bodenschatz a sizeable commission based upon the sale of the subdivided parcels. Bodenschatz had a financial interest in seeing the Van Gorden property developed and sold, a fact suggesting he had no knowledge of any adverse condition which would have frustrated Van Gorden's development plans.

¶19 Despite the timing of the DNR designation and Bodenschatz's financial interest in development, Van Gorden claims Tibbitts' placement of the cement slabs, and Bodenschatz's knowledge of their placement, should have given rise to a reasonable belief on their part that the property was an island. We cannot accept this argument because the inference Van Gorden would have us draw from these facts is unreasonable. Van Gorden observed the cement slabs during his inspections and could not have reasonably believed their placement occurred naturally. The only reasonable inference one could draw upon viewing the slabs is that their placement was the result of human efforts. To the extent the presence of the slabs revealed this fact, Tibbitts, Bodenschatz and Van Gorden each possessed identical knowledge. Thus, it was not unreasonable for all three parties to treat the property as a peninsula. We have found no evidence in the record supporting the view that Tibbitts' and Bodenschatz's representations or omissions regarding the character of the property were untrue when they were made, nor have we found evidence that they knowingly misrepresented the nature of the parcel. As these

requirements are vital to Van Gorden's intentional misrepresentation claim, we reject his argument for applying the fraud in the inducement exception.

¶20 In a final attempt to evade the economic loss doctrine, Van Gorden contends the doctrine does not apply because his contract with Bodenschatz was purely for brokerage services. *See* ***Cease Elec., Inc.***, 276 Wis. 2d 361, ¶52 (economic loss doctrine not applicable to contracts for services). The relevance of Van Gorden's listing contract with Bodenschatz is unclear. None of Van Gorden's misrepresentation claims arise from his marketing relationship with Bodenschatz, so whether the economic loss doctrine applies is irrelevant. Van Gorden appears to ask us, without citation to authority, to conclude as a matter of law that Bodenschatz was Van Gorden's broker in the initial purchase from Tibbitts. Because that purchase agreement clearly indicates that Bodenschatz was acting as Tibbitts' agent, we decline to do so.

CONCLUSION

¶21 We conclude Van Gorden's tort claims are barred by the economic loss doctrine. Because the purchase agreement indicates the parties contemplated the risk that the property would not meet Van Gorden's expectations, Van Gorden cannot show the alleged misrepresentations regarding the property's character are extraneous to the contract. Additionally, Van Gorden has not established a prima facie claim for intentional misrepresentation. As the fraud in the inducement exception is applicable only upon proof of both elements, we affirm the circuit court's decision granting summary judgment.

By the Court.—Judgment affirmed.

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