COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP7 **Cir. Ct. No. 2011CV211**

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

OSTRENGA EXCAVATING, INC.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

CLEVELAND CONSTRUCTION, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT,

WAL-MART REAL ESTATE BUSINESS TRUST AND FEDERAL INSURANCE COMPANY,

DEFENDANTS.

APPEAL and CROSS-APPEAL from a judgment and CROSS-APPEAL from an order of the circuit court for Green Lake County: MARK T. SLATE, Judge. *Judgment reversed in part; order affirmed in part; reversed in part and cause remanded with directions.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 NEUBAUER, C.J. Cleveland Construction, Inc., (CCI) appeals from a judgment awarding Ostrenga Excavating, Inc., $55,276. Ostrenga cross-appeals from the judgment, conditionally challenging the circuit court's determination on summary judgment if we reverse the judgment entered after trial. We conclude that the jury's verdict awarding CCI only $48,724 in damages is unsupported by any credible evidence. The absence of credible evidence to support the jury's verdict on this issue carried through to additional questions addressing Ostrenga's damages. Therefore, based on the current record and posture of this appeal, we order a new trial on damages. In addition, we conclude that the circuit court properly awarded CCI partial summary judgment on the implied-in-fact contractual issue, but erred in dismissing Ostrenga's misrepresentation claims based on the economic loss doctrine, and did not err in granting Ostrenga leave to amend its complaint to add a breach of contract claim.

BACKGROUND

The Work

¶2 CCI, a general contractor, invited bids on a project to construct a Wal-Mart Supercenter in Berlin, Wisconsin. Ostrenga, an excavator, bid on the project, and after communications between the parties regarding the scope of work and the price, sent CCI a proposed scope of work quoting a price of $1,049,951. On May 13, 2011, the same day as Ostrenga submitted the revised bid of $1,049,951, CCI issued an "authorization to proceed" with the excavation, noting that a formal subcontract would be issued in the amount of $1,049,951, "including Addendums #1 thru #8, the Bid Questions and state sales tax." The authorization to proceed advised Ostrenga that it was to "strictly follow the Sequence of

Construction" as indicated in the documents. The authorization to proceed included a blank subcontract for Ostrenga's review. There was no price in the blank subcontract. Ostrenga did not sign the blank subcontract. In response to provisions in the blank subcontract, Ostrenga submitted an insurance certificate and wage rate form, acknowledging that it was being submitted "as required by written contract." On May 23, 2011, Ostrenga commenced work at the site.

¶3 Melissa Kennin, the vice-president of Ostrenga, contacted CCI to discuss provisions in the subcontract, but she did not receive a response.

Exchanges Between the Parties

¶4 On June 16, 2011, Ostrenga stopped working at the site. The following day, Ostrenga informed CCI that it would not continue working until certain issues at the site were addressed; specifically, the condition of the soil represented during the bidding process did not reflect its actual condition, and the civil engineer had concluded a new drainage system would have to be designed in order to alleviate the excess water on site. Ostrenga said that before it could continue with the work it would need "[a] contract and appropriate change orders," the revised plans for the new drainage system, and the deduction Ostrenga had given during the bidding process for use of on-site soils as backfill placed back into the bid.

¶5 A few hours later, CCI forwarded a completed subcontract (second subcontract) to Ostrenga. The second subcontract indicated that CCI agreed to pay Ostrenga $1,036,825.

¶6 On June 21, 2011, CCI sent a letter to Ostrenga asserting that the parties had entered into a subcontract on May 13, 2011, when it received the

authorization to proceed, and then a full copy of the subcontract on June 17, 2011. Currently, CCI said, Ostrenga was in default, citing numerous articles contained in the subcontract.

¶7 Ostrenga replied in a letter the same day, asserting that there was no subcontract between the parties. The subcontract as written was unacceptable. Until the issues Ostrenga raised, including the problems with the soil, were addressed, Ostrenga could not proceed.

¶8 On June 24, 2011, CCI declared Ostrenga in material breach of the subcontract and informed Ostrenga that CCI would "immediately begin supplementation of Ostrenga."

The Pleadings

¶9 On November 18, 2011, Ostrenga commenced this action against, among others, CCI, to recover damages for the work performed by seeking to foreclose on a $271,440 bond, alleging intentional and negligent misrepresentation, and unjust enrichment.

¶10 CCI answered and counterclaimed for breach of contract.

The Motions for Summary Judgment

¶11 CCI moved for partial summary judgment, arguing, as relevant, that there was an "implied-in-fact contract" between the parties. In support, CCI pointed to the fact that the parties acted as if they were subject to a contract, consisting of the authorization to proceed, the subcontract, and the specifications and soils report that preceded them. Ostrenga commenced work on the project, which it would not have done if it believed there was no contract. Ostrenga

submitted a certificate of insurance as required under article eight of the subcontract which, again, it would not have done if there was no contract.

¶12 If there was a contract, then, CCI argued, Ostrenga's claim for unjust enrichment had to be dismissed because unjust enrichment existed only in the absence of a contract.

¶13 CCI asserted Ostrenga's claims for intentional and negligent misrepresentation should be dismissed under the economic loss doctrine. CCI argued that the court had to look to the purpose of the general contract and not the subcontract for excavation. The purpose of the general contract was to construct a Wal-Mart Supercenter, a product; hence, the contract between the parties was subject to the economic loss doctrine.

¶14 Ostrenga opposed and cross-moved for partial summary judgment, arguing that there was "an implied-in-fact contract" between the parties, but CCI was incorrect as to what constituted the implied-in-fact contract. The implied-in-fact contract was not the authorization to proceed, soils report, specifications and blank subcontract; rather, the implied-in-fact contract was CCI's promise to pay Ostrenga for the services it provided. This meant that CCI had to pay Ostrenga for the reasonable value of its services.

¶15 Ostrenga further argued that, contrary to CCI's contention, an implied-in-fact contract, which is a quasi contract, does not defeat a claim for unjust enrichment.

¶16 Finally, Ostrenga argued that the economic loss doctrine did not bar Ostrenga's claims for intentional and negligent misrepresentation because Ostrenga performed a service and did not produce a product. At the very least, the

contract between the parties called for a mix of products and services, with the latter predominating.

The Decision on Summary Judgment

¶17 The court granted partial summary judgment to CCI, concluding that there was an implied-in-fact contract between the parties, and that the contract consisted of all the documentation CCI provided to Ostrenga until it left the work site. In doing so, the court found that the undisputed facts showed that CCI requested services by soliciting bids and that Ostrenga responded to that request by itemizing thirty-two tasks it would perform. After communications between the parties, the original request that Ostrenga complete thirty-two tasks was reduced to thirty and, as a result, Ostrenga's original bid price of $1,076,245 was reduced to $1,049,951. Ostrenga then submitted an insurance certificate and a wage sheet, as required in the blank subcontract. Ostrenga complied with CCI's request for services by beginning work and performed the work required by the document CCI sent it. Ostrenga continued working for about a month, demonstrating that both parties thought Ostrenga was complying with CCI's request for services. Although the subcontract was unsigned, the parties knew what was to be done and the cost of doing it: the parties mutually agreed on the scope of the work and the price of $1,049,951. This was the only discussion of price between the parties. There was no discussion of payment on a time and materials basis, as Norbert Dantinne and Roger Ostrenga, both of Ostrenga, testified during their depositions. Since CCI had paid one of Ostrenga's subcontractors for some of the work it had done, as alleged in the complaint, it was clear that CCI received something of value. Thus, there was an implied-in-fact contract between the parties. Further, based on the foregoing, that contract consisted of all the documentation CCI had provided to Ostrenga up to that point.

¶18 Since there was a valid and enforceable contract between the parties, there was no basis for Ostrenga to claim unjust enrichment. Thus, the court granted CCI summary judgment dismissing Ostrenga's claim for unjust enrichment.

¶19 The court also granted CCI summary judgment dismissing Ostrenga's claims of intentional and negligent misrepresentation. The dispositive contract was not the contract between the parties but the one between CCI and Wal-Mart which called for the construction of a store. The construction of a store is a product, not a service; therefore, the economic loss doctrine barred Ostrenga's claims for intentional and negligent misrepresentation.

Ostrenga's Motion for Leave to Amend the Complaint

¶20 On January 16, 2014, a month after the court's decision on the motions for summary judgment, Ostrenga moved for leave to amend the complaint to assert a claim for breach of contract. Ostrenga argued that, in light of the court's decision on the motions for summary judgment determining that there was a contract between the parties, the trier of fact now had to determine who breached that contract. Ostrenga argued that it had not unduly delayed in seeking leave, having done so promptly after the court's decision on the motions for summary judgment. Granting leave would not prejudice CCI because the trial had not yet been scheduled. Further, the facts relevant to this issue were the same ones raised in Ostrenga's original complaint; thus, no additional discovery was necessary. But, if additional discovery was necessary, Ostrenga was available. The proposed amended complaint alleged that CCI breached the contract by failing to pay Ostrenga for the services, material, and labor it performed, totaling $170,557.

¶21 CCI opposed Ostrenga's motion for leave to amend the complaint, arguing that there was no justification to allow Ostrenga to allege a new theory of recovery based on breach of contract after its original unjust enrichment theory, asserted more than two years ago, had been foreclosed by the court's decision on summary judgment finding an implied-in-fact contract. Ostrenga had not acquired new information that it lacked at the outset, and its new theory was inconsistent with its original theory that there was no contract. Therefore, the interests of justice did not require granting Ostrenga's motion for leave to amend the complaint.

¶22 The court granted Ostrenga leave to amend the complaint. The court concluded that no prejudice would result from granting the amendment. Trial had not been scheduled, and additional time existed for discovery. The court permitted CCI to recover costs caused by Ostrenga's late amendment and unfairness as the result of same.

Ostrenga's Case

¶23 On Ostrenga's case, it presented testimony from Kennin; Stephen Navarre, formerly a project manager and estimator with Ostrenga; and Roger Ostrenga, the owner of Ostrenga.

¶24 Ostrenga presented testimony through its witnesses explaining why it proceeded without signing the subcontract or negotiating its terms, the problems it encountered at the site with excessive water and soil that did not match reports it received and could not be used as backfill, and that it was trying to address these problems with CCI and not terminate its work.

¶25 Ostrenga asked the jury to award it the reasonable value of the work it had done. Both Roger and Navarre acknowledged that this was "a negotiated fixed price" job, and "not a time and material job." The damages being sought, however, were based on time and materials. The cost of time and materials totaled $170,557. This was cost only, not profit. This figure did not include the money that CCI paid to Ostrenga's subcontractors. In other words, while Ostrenga had originally sought over $200,000, this did not account for the money that CCI had paid to Ostrenga's subcontractors.

CCI's Case

¶26 On CCI's case, it presented testimony from Michael Swalley, a project manager with CCI, and Neil Krause, a foreman with Krause Excavating.

¶27 CCI presented evidence on the condition of the site, the plan for how the work would proceed, deviations Ostrenga made from the plan, and the breakdown of the relationship between Ostrenga and CCI.

¶28 When Ostrenga departed, the work site "wasn't left in an acceptable condition." The work site had been fallow for a week or two and ponding resulted. CCI's witness, Neil, described it as "pretty much a mess. There were holes everywhere, trees, stumps, piles of dirt, some of the topsoil had been stripped. There was water laying everywhere. It took a lot to get it manageable."

¶29 CCI's witness, Swalley, testified that, as a result of Ostrenga leaving, CCI had to "[s]crambl[e] to find another contractor" so that the schedule did not "suffer any further." CCI contacted other contractors to see who might replace Ostrenga. When contractors came to the site to review it and bid on the work, CCI requested that the contractors account for the work Ostrenga or its

subcontractors had already done and give CCI "a credit" because CCI was "not going to pay twice for that" same work. CCI chose Krause Excavating which already had a contract to perform utility work at the site. Krause's original estimate was $1,150,000 with a $104,500 credit for the work Ostrenga and its subcontractors had already completed. Neil made that determination by walking through the site and estimating what had been completed. Ultimately, the contract price was $1,146,108. The $100,000 difference between Krause's price and that of Ostrenga was because CCI "had to get them on site." This number also reflected an additional $35,513 for five culvert replacements off site, a deduction of $44,000 because CCI was going to provide a pond liner, an additional $30,000 for a "ring road" around the building, an additional $10,000 in overtime to get the project back on schedule, an additional $69,095 for off-site grading and stone placement, and the $104,500 credit for the work Ostrenga and its subcontractors did, for a total of $1,146,108. This was an "apples to apples comparison of Krause and Ostrenga's contract values."

¶30 Krause was given change orders, such as pumping water, which cost $12,000, but these were not included in the $1,146,108 number. Swalley testified that the change order to pump the water was what Ostrenga had been seeking and, had Ostrenga stayed, CCI would have paid the change order to Ostrenga for that work. Swalley pointed out that Ostrenga's June 17, 2011 letter was "[n]ot even close" to how one would request a change order.

¶31 In addition to the $1,146,108 for Krause to complete the job, CCI paid $36,392 to Wisconsin Lake and Pond Resources for the pond liner, and CCI paid Ostrenga's subcontractors: $46,600 to Green Resources for clearing and grubbing, $8935.50 to Michael's Materials for materials it provided to the site, $1537.50 to Darnick Trucking for materials it supplied to the site, and $5272.50 to

Ridge Stone Products for material it supplied to the site, for a total of $98,737.50. Thus, the cost of supplementation—Krause's contract ($1,146,108) plus the above payments ($98,737.50)—was $1,244,845.50. From this, CCI subtracted Ostrenga's bid of $1,049,951 for a total of $194,894.50. CCI was seeking this amount in damages, which reflected extra expenses incurred by CCI in completing the work. CCI then added the overhead and profit in the amount of twenty-five percent or $48,723.63 on the additional expenses CCI paid to complete the work, as called for in the subcontract.[1]

¶32 Thus, the total damages CCI claimed were $243,618.13.

¶33 Neil described the project as "[t]errible … a fight … [that] didn't go easy." He explained that it was a "wet spring" with a lot of rain and flooding. Nevertheless, Krause was able to dry the soil using a disc and dry method and "eventually" use the site soil as backfill. Krause was able to do so, "[f]or the most part," within the scope of contract; in other words, some change orders were required.

[1] The blank subcontract 31.6 provided to Ostrenga addressed damages for breach:

> In the event of supplementation or termination, Subcontractor shall not be entitled to any further payment until the Subcontract Work has been completed and accepted by CCI, the Architect and the Owner and not until final payment is received by CCI[.] Subcontractor shall be liable to CCI for all expenses incurred by CCI in supplementing or completing Subcontractor's Work, including performance costs of whatever amount, together with overhead and profit in the amount of twenty-five (25%) percent, the reasonableness of which is specifically agreed to by Subcontractor. In addition to the foregoing, Subcontractor shall be liable to CCI for all other losses, expenses, damages and costs, including attorneys fees incurred by CCI as a result of any supplementation or termination of this Agreement[.]

Jury Instructions and Special Verdict Form Conference

¶34 Prior to trial, Ostrenga requested an instruction on quantum meruit. CCI objected, arguing that there was no need to apply quantum meruit because the parties had negotiated and agreed upon a specific price.

¶35 The court overruled CCI's objection, concluding that in the case of an implied-in-fact contract, the law said that "quantum meruit is the measure of services rendered."

¶36 Later on during the conference, the court expressed concern about the "completely separate theories of contract law being thrown at the jury." The court explained,

> Well, no doubt, Ostrenga's argument is going to be, we did something, we should get paid for it. And [counsel for CCI], your argument's going to be, well, they did something, but they didn't live up to the contract and we had to bring somebody in to do what it is they were supposed to have done. Not only did it cost us more than we agreed to pay them, we have all these other damages that we have. And the jury's going to have to come up with the amount of damages that [CCI] had, and then they're going to be offset by the amount of damages that Ostrenga says that they did, and then whatever those numbers are, that's what the numbers are. I agree with you, [counsel for CCI], we have the problem of, is, if he believed the contract's good, are they entitled to anything, but we're down this road already, and I'm not quite sure how we got there other than it's in the amended complaint with the quantum meruit argument. So we have two arguments. Ostrenga's is going under quantum meruit saying, we did something under the implied in fact contract. We should get paid for it. [Counsel for CCI], you're arguing under a breach of contract, they breached the contract and shouldn't get paid anything for it.
>
> ….
>
> Which is not normally how we have jury [trials] to determine damages….

> ….
>
> … I'll admit I'm going to have, during the trial, no doubt, going to have a hard time differentiating the two theories here. I think a normal jury is going to get completely lost in what it is they're supposed to determine. I mean, we've really got two different lawsuits going on here at the same time by the amended complaint and the counterclaim. No doubt, whoever—is going to appeal this, and we'll let the Court of Appeals figure it out.

¶37 Subsequently, after both parties had rested, the court denied Ostrenga's request to ask the jury if CCI breached the implied-in-fact contract based on CCI's failure to pay Ostrenga. The court reasoned that if Ostrenga's claim was that CCI breached by not paying it the amount owed, that was "going to fall out in the other questions when we ask about what the damages are."

¶38 The court instructed the jury on breach of contract and told it that if there was a breach, the person damaged is entitled to fair and reasonable compensation for all loss suffered because of the breach. The injured party should be placed in the position in which he or she would have been had the contract been performed. In addition, the court advised the jury that if Ostrenga in good faith rendered services to CCI, the jury may award Ostrenga the "reasonable value of such services."

Special Verdict Form and the Jury's Verdict

¶39 The special verdict form read as follows:

> Question 1:
> Did Ostrenga Excavating, Inc. and Cleveland Construction, Inc. enter into a contract for work at the Berlin, Wisconsin Wal-Mart project?
>
> ANSWER: The Court has already answered this question "yes."

Question 2:
Was the contract between the parties implied-in-fact?

ANSWER: The Court has already answered this question "yes."

Question 3:
What documents comprise the contract between Ostrenga Excavating, Inc. and Cleveland Construction, Inc. at the Berlin, Wisconsin Wal-Mart project?

ANSWER: The Court has already answered that the contract consists of all documents exchanged between the parties before Ostrenga Excavating, Inc. left the work site on June 16, 2011.

Question 4:
Did Ostrenga Excavating, Inc. substantially complete all work required by the contract?

ANSWER: No
(yes or no)

If your answer to Question 4 is "no," answer Question 5. If your answer is "yes" do not answer Question 5 and go to Question 6.

Question 5:
What are Cleveland Construction, Inc.'s damages arising out of Ostrenga Excavating, Inc.'s failure to substantially complete all work required by contract, if any?

ANSWER: $ 48,724.00

Question 6:
What sum of money will fairly and reasonably compensate Ostrenga Excavating, Inc. for the goods or services it rendered to Cleveland Construction, Inc., if any?

ANSWER: $ 104,000.00

If your answer to Question 6 is zero, do not answer Question 7. Date and sign the bottom. If you answer Question 6 with any amount of money, answer Question 7.

> Question 7:
> What sum of money should be deducted from the money due to Ostrenga Excavating, Inc. for credit given by Cleveland Construction, Inc., if any?
>
> ANSWER: $ 0.00

CCI's Motion for a New Trial

¶40 CCI moved for a new trial, arguing that it was improper to give the jury a quantum meruit instruction in combination with special verdict question six, and that the special verdict form was confusing and illogical.

The Decision on the Motion for a New Trial

¶41 The court concluded that a new trial was warranted in the interests of justice. The court reasoned as follows:

> After two days of trial, the jury returned a verdict stating that Ostrenga did not substantially complete all work required by the contract…. The jury answered this question by obviously rounding up to the nearest dollar the damages requested by [CCI] for the 25 percent of overhead and profit in the amount of $48,723.63. Although Ostrenga may argue that it is unknown how or why the jury came up with this specific number, it is clear to this Court that is the amount asked by [CCI] for its overhead and profit. [CCI] argues that the jury granting only this amount of damages is illogical because [CCI] could not be entitled to overhead and profit if the underlying damages were not awarded. They [equate] this to a jury awarding only interest on a claim for both principal and interest. The jury determined that Ostrenga was entitled to $104,000 to compensate them for the services it rendered to [CCI].
>
> The jury did not … find that any money should be deducted from the money due Ostrenga for credit given by [CCI]. The jury answered this question, zero.
>
> The Court will note that Ostrenga did not dispute, nor did Ostrenga present any evidence to the contrary, that [CCI] paid Ostrenga's subcontractors in the amount of $98,737.50.

The biggest argument is what, if any, money should be due to Ostrenga for the work it did on the project prior to leaving the site. Ostrenga claims that it is due $170,557. Cleveland argues that the work that Ostrenga did should only be valued at $104,000. There was testimony and evidence submitted by both parties as to what the value of the work by Ostrenga was.

The Court, having had the luxury of time to review the evidence and the jury questions, has several concerns with regards to the verdict questions.… The jury answered this [question number five] $48,724. The jury did not give [CCI] any damages for the subcontractors that were paid in the amount of $98,737.50. Ostrenga did not dispute that it did not pay the subcontractors, and [CCI] ultimately paid them. The Court does not know why the jury did not grant damages to [CCI] in the amount [CCI] paid to the subcontractors.

… The jury answered this question [question number six] $104,000. This is the exact amount of money that [CCI] credited Ostrenga for the work that Ostrenga did, and [CCI] presented testimony to this through Krause. Interestingly, the question does not state how much money should be paid to Ostrenga. It asks what sum of money will fairly and reasonably compensate Ostrenga. The jury certainly could have looked at the $104,000 which it gave as a verdict in Question 6 and believed that that adequately and fairly and reasonably compensated Ostrenga because [CCI] had already given the credit to Ostrenga. In other words, reading that question now, it is not clear whether or not the jury is granting a judgment against [CCI] for Ostrenga in the amount of $104,000 or merely agreeing with [CCI] that this is the right amount to credit Ostrenga. It [is] not clear what the jury intends to do with the $104,000.

Question number 7 states: What sum of money should be deducted from the money due Ostrenga … for credit given by [CCI], if any? To read that question another way would be, how much money is Ostrenga due by [CCI]. The answer is zero.

The Court is concerned that the attorneys and the Court may have lost sight of the proverbial forest for looking at the trees. That is, we were all aware who submitted the questions and what the intent of the questions were, but the Court does not believe that the jury had any knowledge of that. The Court doesn't believe now, in hindsight, the questions are simple or easy to understand. The question

> is, did the jury know that the Questions 4 and 5 were submitted by [CCI] and 6 and 7 by Ostrenga? Did the jury know that answers to 5, 6 and 7 would determine the judgment amount and who would owe what amount of money? The special verdicts certainly don't state that at any place.
>
> Reading Question 5, the jury could determine Ostrenga owes [CCI] $48,724 and Ostrenga was fairly compensated the $104,000 in the credit [CCI] gave Ostrenga. The jury may have decided not to give [CCI] any additional money for the additional amount paid to Krause, thereby Ostrenga would owe [CCI] $48,724. Another way to read the verdict would be Ostrenga owes [CCI] the $48,724 but then should be given a credit of $104,000. This begs the question, does that then give a judgment against [CCI] for Ostrenga or not?
>
> The last question, what sum of money should be deducted to Ostrenga for credit given to [CCI], if any, is zero. Does this mean that the jury did not want [CCI] to pay Ostrenga any money? The Court cannot speculate or guess what it is that the jury meant to do. From reading the special verdicts and the evidence introduced at trial, the Court is unsure what judgment should be entered against what party and for how much. If the Court cannot determine it, how could the jury do so?

Ostrenga's Motion for Reconsideration

¶42 Ostrenga moved for reconsideration, arguing that the fact that the circuit court disagreed with the jury's verdict was not grounds to disturb it.

The Decision on the Motion for Reconsideration

¶43 The court agreed with Ostrenga, reversing itself, and denied CCI's motion for a new trial. The court reasoned that its job was not to reconcile or correct what the jury had done, that the court did not agree with the jury's verdict, but that was not enough to overturn it. The jury decided to award Ostrenga $104,000 in damages and that decision was "final."

The Judgment

¶44 The court entered a judgment awarding Ostrenga $55,276 in damages, representing the difference between the $104,000 purportedly awarded to Ostrenga and the $48,274 awarded to CCI.

¶45 CCI appeals from the judgment and Ostrenga cross-appeals from the judgment and the order partially granting CCI summary judgment

DISCUSSION

Summary Judgment Standard

¶46 Summary judgment is warranted where "there is no genuine issue as to any material fact" and that party "is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (2015-16).[2] Review of a circuit court's ruling on summary judgment is de novo, employing the same methodology. ***Chapman v. B.C. Ziegler & Co.***, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425. First, "the court examines the pleadings to determine if a claim has been stated and whether a material issue of fact is presented." ***Oddsen v. Henry***, 2016 WI App 30, ¶24, 368 Wis. 2d 318, 878 N.W.2d 720. If so, "then the court examines the moving party's affidavits or other proof to determine if the moving party has made a prima facie case for summary judgment." ***Id.*** "If the moving party has made a prima facie case for summary judgment," then the court examines the opposing proof to determine if there is a disputed issue of any material fact. ***Id.***, ¶¶24-25.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Law of Implied-in-Fact Contracts

¶47 For a contract to exist, there must be an offer, acceptance, and consideration. ***Goossen v. Estate of Standaert***, 189 Wis. 2d 237, 247, 525 N.W.2d 314 (Ct. App. 1994). "The essence of an implied in fact contract is that it arises from an agreement circumstantially proved." ***Theuerkauf v. Sutton***, 102 Wis. 2d 176, 184, 306 N.W.2d 651 (1981). In order to recover on a theory of an implied-in-fact contract, the plaintiff must prove that the defendant requested the plaintiff to perform services, the plaintiff complied with the request, and the services were valuable to the defendant. ***Id.*** at 185. Upon that showing, a plaintiff "has established a prima facie case of the existence of a promise on the part of the defendant to pay the plaintiff for the reasonable value of the services." ***Id.*** This is because, "according to the ordinary course of dealing and common understanding of [contracting parties], the existence of such facts establish a rebuttable presumption that the parties mutually intended fair payment." ***Id.*** In order to avoid liability, a defendant must come forward with proof to rebut this presumption. ***Id.*** at 186. Ultimately, it must be "shown that the parties, by their words, their conduct, or course of dealing, came to a mutual agreement and this determination in turn depends upon an objective assessment of the parties' external expressions of intention as distinguished from their undisclosed intentions." ***Id.*** Whether a contract is implied in fact may be determined on summary judgment. ***Bong v. Cerny***, 158 Wis. 2d 474, 481-82, 463 N.W.2d 359 (Ct. App. 1990).

¶48 Here, CCI made a prima facie showing of entitlement to summary judgment and, in opposition, Ostrenga failed to raise a material issue of fact. Following CCI's request for bids to excavate the project site and after discussions between the parties regarding the scope of work and the price, Ostrenga submitted

a bid of $1,049,951. Then, CCI sent Ostrenga the authorization to proceed, advising that Ostrenga was to strictly follow the sequence of construction set forth in the documents. CCI also provided the blank subcontract and, referring to the insurance requirements in the subcontract, stated that Ostrenga was not to commence work until the insurance certificates were provided. Ostrenga complied by sending the insurance certificate as required by the subcontract and then commenced working at the site as required by the document CCI sent to it. Ostrenga worked at the site for nearly a month before it terminated its work, and CCI received value from Ostrenga's work.

¶49 These facts are undisputed and they demonstrate, as a matter of law, that there was an offer, acceptance, and consideration. *See* 1 WILLISTON ON CONTRACTS § 1:5, Westlaw (database updated May 2016) ("An implied-in-fact contract requires proof of the same elements necessary to evidence an express contract."); *see, e.g.*, ***Fieldhouse Landscape, Inc. v. Gentile***, 12 Wis. 2d 418, 420-21, 107 N.W.2d 491 (1961). As the court aptly summarized, in a thorough and well-considered written decision, "Both parties knew what was expected of the other. [CCI] expected the tasks to be performed by Ostrenga and Ostrenga knew they would be paid by [CCI] for doing the tasks." There was a mutual agreement. The circuit court properly granted CCI summary judgment on the issue of whether there was an implied-in-fact contract between the parties.[3]

[3] On summary judgment, the parties argued that the court should decide as a matter of law that either there was an implied-in-fact contract or there was no contract at all. On appeal, Ostrenga does not challenge the circuit court's finding that there was an implied-in-fact contract on the basis there are disputed issues of fact.

The Documents Making Up the Implied-in-Fact Contract

¶50 Ostrenga contends that the circuit court's conclusion that the implied-in-fact contract consisted of the documents the parties shared before Ostrenga left the work site is "flawed as a matter of law" because this ended up constituting "an express contract."

¶51 We see no error in the circuit court's determination. The single case Ostrenga cites, ***Theuerkauf***, 102 Wis. 2d at 176, does not support Ostrenga's contention that, as a matter of law, two parties to a contract cannot impliedly and mutually assent to terms written down on a piece of paper, particularly the term of price and the scope of the work. *See* ***Stromsted v. St. Michael Hosp. of Franciscan Sisters***, 99 Wis. 2d 136, 142 n.5, 299 N.W.2d 226 (1980) (noting that the difference between an express contract and an implied-in-fact contract is the mode of expressing assent); RESTATEMENT (SECOND) OF CONTRACTS § 4 (AM. LAW INST. 1981) (same); *see also* ***Thomson v. United States***, 357 F.2d 683, 689, 692 (Ct. Cl. 1966) (holding that measure of damages in implied-in-fact contract was the amount stipulated in appraiser's bid for services sent to U.S. Attorney's Office). If the parties' "words, their conduct, or course of dealing" can show a mutual agreement, so also can papers exchanged between the parties. *See* ***Theuerkauf***, 102 Wis. 2d at 186.

¶52 Next, Ostrenga argues that the circuit court erred in not including the second subcontract CCI sent to Ostrenga as part of the documents making up the implied-in-fact contract. The reason the other documents constituted the implied-in-fact contract was because Ostrenga assented to them by its continued performance of the work without any objection. The second subcontract,

however, was sent after Ostrenga had left the site and, thus, it did not assent to the second subcontract by virtue of any continued performance.

Economic Loss Doctrine

¶53 The economic loss doctrine is a judicially created rule that recognizes that contract law is better suited than tort law to deal with purely economic loss in the commercial arena. ***Insurance Co. of N. Am. v. Cease Elec., Inc.***, 2004 WI 139, ¶15, 276 Wis. 2d 361, 688 N.W.2d 462. The economic loss doctrine applies to claims of misrepresentation.[4] *See* ***Kaloti Enters. v. Kellogg Sales Co.***, 2005 WI 111, ¶42, 283 Wis. 2d 555, 699 N.W.2d 205; ***Tietsworth v. Harley-Davidson, Inc.***, 2004 WI 32, ¶29, 270 Wis. 2d 146, 677 N.W.2d 233.

¶54 Under the economic loss doctrine, "a purchaser of a product cannot recover from a manufacturer on a tort theory for damages that are solely economic." ***Linden v. Cascade Stone Co., Inc.***, 2005 WI 113, ¶6, 283 Wis. 2d 606, 699 N.W.2d 189 (citation omitted). Economic damages are those arising because the product does not perform as expected, including damage to the product itself or monetary losses caused by the product. ***Id.*** "[W]hen a contract covers both products and services, the economic loss doctrine bars [certain] claims if the predominant purpose of the contract is to provide a product." ***Kalahari Dev., LLC v. Iconica, Inc.***, 2012 WI App 34, ¶23, 340 Wis. 2d 454, 811 N.W.2d

[4] In its complaint, Ostrenga alleged that CCI intentionally misrepresented the condition of the soil and water at the site and that CCI would compensate Ostrenga for its continued performance. Ostrenga, however, does not argue that these misrepresentations fraudulently induced Ostrenga into entering into the implied-in-fact contract, which otherwise would fall within the narrow exception to the economic loss doctrine for intentional misrepresentation. *See* ***Kaloti Enters. v. Kellogg Sales Co.***, 2005 WI 111, ¶42, 283 Wis. 2d 555, 699 N.W.2d 205. Indeed, conceding the same, Ostrenga fails to respond to CCI's argument that there is no fraudulent inducement claim.

825. In making the determination of whether a contract is predominately for a product or a service, we look to the "totality of the circumstances," "both subjective and objective," such as the primary objective the parties hoped to achieve by the contract. ***Linden***, 283 Wis. 2d 606, ¶22; *see* ***1325 N. Van Buren, LLC v. T-3 Grp., Ltd.***, 2006 WI 94, ¶42, 293 Wis. 2d 410, 716 N.W.2d 822.

¶55 Here, Ostrenga contends the contract at issue was for services, or at a minimum, predominately for services, and thus the economic loss doctrine does not apply.[5] CCI responds that the circuit court correctly determined that the contract at issue for the predominant purposes test is not the implied-in-fact contract between CCI and Ostrenga that called for excavation work, but the contract between CCI and Wal-Mart that called for the construction of a Wal-Mart Supercenter. *See* ***Linden***, 283 Wis. 2d 606, ¶¶12, 17. CCI argues that the construction of a commercial building is a contract for a product, relying on ***1325 N. Van Buren***, 293 Wis. 2d 410, ¶50, and ***Linden***, 283 Wis. 2d 606, ¶¶23-25.

¶56 As an initial matter, we question the parties' reliance on an economic loss analysis, given that Ostrenga is the seller of services—not a buyer whose expectations as to a product's performance were disappointed. The losses Ostrenga seeks are not for loss of a product's value, but to be compensated for its work. Nevertheless, as the parties have addressed the economic loss doctrine's general applicability to their contractual relationship, we will do so as well.

[5] Ostrenga contends for the first time in its reply brief that the economic loss doctrine does not apply to implied-in-fact contracts. We, however, do not consider arguments raised for the first time in a reply brief. ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶30 n.6, 305 Wis. 2d 658, 741 N.W.2d 256.

¶57 We agree with Ostrenga that ***Linden*** does not control, because in ***Cease***, where there was a direct service contract between a general contractor and its subcontractor, it was that service contract that was examined for purposes of the economic loss doctrine analysis. ***Cease***, 276 Wis. 2d 361, ¶¶2, 16-21. Here, CCI does not provide either facts or argument to show that the contract between CCI and Ostrenga for excavation services was not for services. *See* ***Linden***, 283 Wis. 2d 606, ¶24 (excavation among services listed). Therefore, the predominant purposes test of the economic loss doctrine, as applied in ***Linden***, does not bar Ostrenga's claims for misrepresentation. CCI provides no other basis to affirm the circuit court's dismissal of the misrepresentation claims.[6] The order on summary judgment dismissing Ostrenga's misrepresentation claims is reversed and the matter remanded for further proceedings on its misrepresentation claims.

Unjust Enrichment

¶58 The circuit court properly granted CCI summary judgment dismissing Ostrenga's claim for unjust enrichment. Since there was a valid and enforceable contract between the parties—the implied-in-fact contract—unjust enrichment does not apply. *See* ***Continental Cas. Co. v. Wisconsin Patients Comp. Fund***, 164 Wis. 2d 110, 118, 473 N.W.2d 584 (Ct. App. 1991); *see also* ***W.H. Fuller Co. v. Seater***, 226 Wis. 2d 381, 386 n.2, 595 N.W.2d 96 (Ct. App. 1999); 1 WILLISTON ON CONTRACTS § 1:6, Westlaw (database updated May 2016)

[6] In ***Cease***, the supreme court rejected the argument that the services exception should apply only to professional services, such as accountants, attorneys, engineers, architects, and other professionals, and not those services that result in tangible improvement to objects, such as real property. ***Insurance Co. of N. Am. v. Cease Elec., Inc.***, 2004 WI 139, ¶¶49-52, 276 Wis. 2d 361, 688 N.W.2d 462.

("A court properly resorts to quasi-contract [restitution or unjust enrichment] only in the absence of an express contract or contract implied-in-fact.").

Leave to Amend the Complaint

¶59 CCI contends that the circuit court erroneously exercised its discretion in granting leave to Ostrenga to amend the complaint to add a claim for breach of contract.

¶60 When a party files a motion to amend the complaint after a motion for summary judgment has been granted, there is no presumption in allowing the amendment. ***Mach v. Allison***, 2003 WI App 11, ¶27, 259 Wis. 2d 686, 656 N.W.2d 766 (2002). Rather, the party requesting leave "must present a reason for granting the motion that is sufficient, when considered by the trial court in the sound exercise of its discretion, to overcome the value of the finality of judgment." ***Id.*** Other considerations include "why the party has not acted sooner, the length of time since the filing of the original complaint, the number and nature of prior amendments … the nature of the proposed amendment," and "the effect on the defendant." ***Id.*** Standing alone, a lack of prejudice to the party opposing leave to amend "is not a sufficient reason … because that does not give appropriate weight to the value of the finality of judgment." ***Id.***

¶61 A circuit court's decision on a motion to amend is discretionary. ***Piaskoski & Assocs. v. Ricciardi***, 2004 WI App 152, ¶30, 275 Wis. 2d 650, 686 N.W.2d 675. A circuit court's discretionary decision will not be disturbed unless it failed to exercise its discretion, the facts do not support its decision, or it applied the wrong legal standard. ***Id.*** An appellate court will search the record for reasons to sustain the circuit court's exercise of discretion. ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶11, 305 Wis. 2d 658, 741 N.W.2d 256.

¶62 Here, the amendment did not undermine the finality of the summary judgment because CCI's breach of contract claim, as well as Ostrenga's lien foreclosure claim seeking recovery for its work, were both still pending. It was clear throughout the case that both parties were asserting as a factual matter that the other party had failed to abide by their agreement and that they were owed damages—both of which were at issue in the parties' respective pending claims. Once the court determined there was an implied-in-fact contract, Ostrenga's assertion that it was CCI who breached came as no surprise. CCI did not suffer any prejudice because discovery had not yet been completed and the trial was not yet scheduled. CCI was permitted to conduct additional discovery and seek recovery of additional costs from Ostrenga unfairly caused by its late amendment. The circuit court did not erroneously exercise its discretion in permitting amendment.

¶63 Regardless, permitting Ostrenga to assert a breach-of-contract claim did not make a difference. The circuit court declined to submit a question to the jury asking if CCI breached the implied-in-fact contract, which is unchallenged on appeal. The fundamental principle of damages for breach of contract involving partial performance is that the nonbreaching party is entitled to the value of the performance promised minus the value of what the breaching party actually rendered, which was what the court ultimately submitted to the jury. 24 WILLISTON ON CONTRACTS § 64:1, Westlaw (database updated May 2016). The court's damages instruction, permitting Ostrenga to recover for the value of its work, addressed Ostrenga's claim that it was owed money by CCI. In short, the granting of leave did not matter.

The Measures of Damages

¶64 CCI contends that the circuit court erred in submitting "competing theories" of damages—direct and consequential damages for CCI based on Ostrenga's breach of the implied-in-fact contract and quantum meruit for Ostrenga based on it being entitled to recover the reasonable value of materials furnished and labor provided to CCI. The circuit court should have instead determined as a matter of law which measure of damages was appropriate. We see no error.

¶65 Contrary to CCI's contention, the court did not submit inappropriate compensatory measures of damages to the jury. Again, when a breaching party partially performs, the nonbreaching party is entitled to the value of the performance promised minus the value of what the breaching party actually rendered. 24 WILLISTON ON CONTRACTS § 64:1, Westlaw (database updated May 2016); *see also* ***id.*** at § 66:14 ("A construction contractor who fails to perform substantially under the contract can recover at most only in quantum meruit for the value of the work, and the measure of such recovery, where the performance is incomplete but remediable … [is] the unpaid contract price minus the cost to complete, plus any other damages suffered by the owner, not to exceed the benefit actually received by the owner."). Double recovery or duplicate damages for a single injury are not permitted. ***Id.*** at § 64:1.

¶66 Here, the court determined that there was an implied-in-fact contract between the parties with mutual obligations—Ostrenga was to perform the work identified in its bid, and CCI was to pay $1,049,951 to Ostrenga for that work. If the jury found that Ostrenga breached the implied-in-fact contract by failing to substantially perform, which the jury did, the court instructed the jury that CCI was entitled to fair and reasonable compensation for its loss caused by the breach.

CCI identified the additional expenses it contended it incurred in having to hire a new excavator and to pay Ostrenga's subcontractors as a result of Ostrenga's breach, i.e., the value of the performance promised, or the cost to complete the contract.

¶67 Moreover, the facts established that Ostrenga partially performed—so the jury was tasked with determining whether and how to compensate Ostrenga for the value of the performance rendered. Here, neither party offered a damages analysis based on the agreed upon total contract price—so they both appropriately turned to the reasonable value of the work done. *See* ***Seater***, 226 Wis. 2d at 386 n.2 (noting that for a contract implied in fact, the theory of recovery is quantum meruit); ***Fieldhouse***, 12 Wis. 2d at 420 (measure of damages under an implied-in-fact contract "is the reasonable value of the materials furnished and labor performed"); ***Ramsey v. Ellis***, 168 Wis. 2d 779, 785, 484 N.W.2d 331 (1992). Ostrenga provided materials and furnished labor at the project site, and it was entitled to seek recovery for the reasonable value of its work even if it breached the implied-in-fact contract. *See generally* ***Kreyer v. Driscoll***, 39 Wis. 2d 540, 546, 159 N.W.2d 680 (1968) (stating that where contractor did not substantially perform, he was still entitled to be reimbursed for the services and material he provided on a theory of quantum meruit). The damages of CCI and Ostrenga would then offset each other.

¶68 CCI complains that the circuit court instructed the jury that if Ostrenga in good faith rendered services to CCI, the jury may award Ostrenga the "reasonable value of such services." CCI challenges this measure, given that there was an agreed-upon contract price. However, as noted above, CCI's damage calculation of Ostrenga's work was based on the value of the work Ostrenga did—as determined by the new excavator after reviewing the site. CCI did not offer a

damage calculation of Ostrenga's work based on the total contract price. In any event, the jury certainly could have considered the contract price in determining the fair value.

¶69 The jury was properly advised as to the compensatory measure of damages for each party's damage claim.

The Jury's Verdict as Contrary to the Evidence

¶70 CCI contends that the jury's verdict awarding it only $48,274, representing its profit and overhead, was contrary to the weight of the evidence and warrants a new trial. There would be no basis to award CCI profit and overhead without also awarding it the damages upon which the profit and overhead was based. Further, the $98,737.50 CCI paid to Ostrenga's subcontractors was undisputed. There was simply no conflicting inference to make from the evidence. CCI was entitled to at least its undisputed damages.

¶71 A party may move to set aside a verdict and for a new trial when the jury's verdict is contrary to the weight of the evidence. *See* WIS. STAT. § 805.15(1). When such a challenge is raised, the jury's verdict will not be disturbed if there is "any credible evidence" to support it. *See* ***Giese v. Montgomery Ward, Inc.***, 111 Wis. 2d 392, 408, 331 N.W.2d 585 (1983). Further, the evidence must be viewed in the light most favorable to the verdict. ***Weber v. Chicago & Nw. Transp. Co.***, 191 Wis. 2d 626, 632, 530 N.W.2d 25 (Ct. App. 1995).

¶72 As CCI correctly contends, there is no credible evidence to support the jury's decision to award CCI $48,724 and nothing else. Ostrenga unpersuasively argues that "there is no evidence that the jury awarded [CCI] its

'overhead and profit,' as the amount awarded is different than the amount [CCI] argued represented its overhead and profit." The figure CCI sought as profit and overhead was $48,723.63; so, the jury obviously rounded the figure up by thirty-seven cents, as the circuit court also concluded.

¶73 The jury could not rationally award CCI its profit and overhead without also awarding CCI the damages upon which it was based. CCI's damage request for $48,723.63 in profit and overhead was twenty-five percent of the $194,894.50 in additional costs incurred to complete the site work. The $48,724 figure could not be reached without first determining that CCI incurred additional costs to supplement the cost of Ostrenga's work and pay Ostrenga's subcontractors and then multiplying that figure by the twenty-five percent figure in the subcontract.

¶74 Ostrenga offers varying explanations of how the jury could have awarded $48,724, but none of them are rational. For example, Ostrenga argues that the nearly $100,000 more Krause bid for the project could have been because the "site conditions were not as represented by" CCI and these "poor site conditions" required extra work or other factors unrelated to Ostrenga. But, if, as Ostrenga argues, the additional $100,000 Krause bid was caused by the site conditions, rather than as a result of Ostrenga's breach, then the jury should not have awarded CCI any money. Again, the twenty-five percent for "profit and overhead" had to be based on an underlying number. If CCI had no underlying damages, then twenty-five percent of nothing should have been nothing.

¶75 Similarly, Ostrenga argues that the jury could have disallowed CCI's claims seeking reimbursement for its payment of Ostrenga's subcontractors. If the

jury did so and determined that CCI should not be awarded this money, then, again, twenty-five percent of nothing would be nothing.

Questions Six and Seven of the Special Verdict Form

¶76 CCI also argues that questions six and seven of the special verdict form were duplicative and confusing and resulted in a double recovery for Ostrenga. Question six was intended to allow the jury to award Ostrenga more in damages for the value of its work than the credit allowed in CCI's damage calculations (i.e., if the jury adopted Ostrenga's damage request based on time and materials of approximately $170,000, rather than the amount CCI credited, $104,000). Question seven was intended to prevent a double recovery because CCI's damage calculations gave Ostrenga a credit of $104,000. CCI argues that the jury/court provided Ostrenga with a double recovery: the jury found that Ostrenga was entitled to $104,000 for its work, as did CCI. Because the circuit court then awarded that amount to Ostrenga, when CCI had already subtracted that amount in its damage calculations, Ostrenga recovered twice. CCI argues that question six was open to two interpretations: (1) either the $104,000 is the money CCI owed to Ostrenga in addition to the credit CCI already gave it, meaning Ostrenga would be paid $208,000 even though there was no proof to support this figure and Ostrenga was not even seeking this much in damages or (2) the $104,000 is simply what Ostrenga should have been credited for its work. Although the court concluded it was the former, it was much more likely the latter. In other words, most likely the jury meant CCI was correct in crediting Ostrenga with $104,000 for the work it performed, and Ostrenga was not entitled to any other compensation.

¶77 The circuit court has wide discretion in framing a special verdict form. *See* ***Runjo v. St. Paul Fire & Marine Ins. Co.***, 197 Wis. 2d 594, 602, 541 N.W.2d 173 (Ct. App. 1995); *see generally* WIS. STAT. § 805.12. An appellate court will not interfere with a special verdict form if appropriate questions cover all the material issues of fact. ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 22, ¶12, 308 Wis. 2d 103, 746 N.W.2d 762. However, "[a] misleading verdict question that may cause jury confusion is a sufficient basis for a new trial." ***Kelly v. Berg***, 2015 WI App 69, ¶34, 365 Wis. 2d 83, 870 N.W.2d 481.

¶78 We agree with the circuit court's initial assessment that in formulating the special verdict form it "may have lost sight of the … forest for … the trees." As noted above, the damages instructions to the jury were straightforward—the nonbreaching party is entitled to the value of the performance promised minus the value of what the breaching party actually rendered. The verdict form failed to provide that guidance. First, there is no indication in question five that the jury was to offset the value of Ostrenga's work against the value of the performance promised. The offset of $104,000 was incorporated into CCI's damage calculation, but it is not referenced in question five. While this question alone might be said to clearly and appropriately seek the jury's net calculation, the inclusion of question six separately addressing Ostrenga's damages undermined any clarity. There is no guidance to the jury as to whether the next questions about the value of Ostrenga's work and the credit given in questions six and seven, were in addition to, or incorporated as components of, the damages identified in response to question five. There is no point of reference *on the special verdict form* for the "credit" identified in question seven. Although it appears that the parties and the court intended for it to reference CCI's damage

analysis, which the parties assumed would be evaluated and accepted or rejected in question five, the verdict did not provide any such guidance.

¶79 Since the jury's award of $48,724, just profit and overhead, and no underlying damages for extra costs incurred to finish the job, was unsupported by any credible evidence, we have no basis to determine what the jury's answer to the credit question is based on, much less whether the $104,000 should be awarded by the court, or not. Without any reference point for the "credit" on the special verdict or in the jury's answers, we agree that the verdict can be read two ways—either that the jury intended to award Ostrenga $104,000 in damages or to disallow it because it had already been given as a credit in CCI's damage calculations. We agree with the circuit court's initial reaction to the jury's answers in light of the special verdict—that the jury had no guidance in determining "who would owe what amount of money."

¶80 In light of our determination, we need not address CCI's remaining contentions regarding the amounts paid to the subcontractors.

REMAND AND CONCLUSION

¶81 As set forth above, the circuit court properly granted summary judgment determining that there was an implied-in-fact contract between the parties and that it consisted of all the documents the parties shared before Ostrenga left the work site. The circuit court properly granted summary judgment dismissing Ostrenga's claim for unjust enrichment. The circuit court also properly granted Ostrenga leave to amend the complaint.

¶82 However, the jury's verdict awarding CCI only $48,724 is not supported by any credible evidence, and consequently, the same can be said for

the subsequent answers. The circuit court should not have reversed itself and declined to order a new trial. Neither party challenges the jury's verdict finding that Ostrenga failed to substantially perform, nor does CCI contend that Ostrenga is not entitled to compensation for the reasonable value of the work it performed. We, thus, order a new trial on the issue of damages arising from Ostrenga's failure to substantially perform, to be offset by the reasonable value of the work Ostrenga provided.

¶83 As to the misrepresentation claim, as noted above, the economic loss doctrine does not apply to this contract providing excavation services. CCI has not provided any facts or argument to suggest that this is anything other than a service contract.

¶84 CCI did not develop any other grounds to affirm the circuit court's dismissal of the misrepresentation claims, which are not based on the typical economic loss scenario—a buyer seeking to recover for the failure of a product to perform as expected. Here, Ostrenga is the seller, and its allegations and argument only articulate a claim for compensatory recovery for the work it performed.[7]

¶85 As the parties did not address any consequences arising from reinstatement of the misrepresentation claims, we decline to do so. While Ostrenga requested consideration of the misrepresentation claims only if we

[7] We note that the sparse allegations of Ostrenga's complaint, as well as its summary judgment briefing, set forth only the claim that Ostrenga should be paid for its work, because CCI promised to reimburse it for continuing to work, despite running into different site conditions. In short, its only articulated complaint is that CCI refused to compensate it for the work it performed. If this yields the same compensatory damages as Ostrenga's damages arising from the parties' contractual relationship, these claims may be irrelevant. On remand, CCI may pursue dismissal of these claims on other grounds.

ordered a new trial, on this record we order a new trial on damages only, and thus, the status of its interest in pursuing these claims is unclear. Accordingly, we remand for further proceedings to consider the merits of these claims and/or determine the impact, if any, of the misrepresentation claims on the contract dispute.

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

Not recommended for publication in the official reports.