COURT OF APPEALS
DECISION
DATED AND FILED

March 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-0699

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

MATTHEW HANNA AND MIRIAM HANNA,

PLAINTIFFS-APPELLANTS,

WEST AMERICAN INSURANCE COMPANY,

INTERVENING-PLAINTIFF,

V.

JAMES H. HOFFMAN, D/B/A HOFFMAN BUILDERS,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

NETTESHEIM, J. Matthew and Miriam Hanna appeal from a summary judgment granted to James H. Hoffman, d/b/a Hoffman Builders (Hoffman). On appeal, the Hannas contend that material issues of fact exist regarding their claims for breach of warranty and intentional, negligent and strict liability misrepresentation against Hoffman. They additionally contend that the trial court erroneously denied their motion to amend their complaint to allege a claim of negligent construction of a residence against Hoffman's corporation, James H. Hoffman Builders, Inc. We uphold the trial court's ruling granting summary judgment to Hoffman on the Hannas' breach of warranty and misrepresentation claims. However, we conclude that the court erred in the exercise of its discretion in rejecting the Hannas' amended complaint. We remand for further proceedings on that portion of the amended complaint which alleges a negligence claim against the corporation.

FACTS

On February 11, 1990, the Hannas offered to purchase a real estate lot and residence from Hoffman. The residence was newly constructed as a "spec" residence by the corporation. The Hannas' offer included a warranty stating that Hoffman "ha[d] no notice or knowledge of any … structural … or other defects of material significance affecting the property." Hoffman counteroffered, stating, "All terms and conditions to remain the same as stated on the Offer to Purchase except the following: …." Hoffman then listed ten modifications to the offer, including a provision that stated, "Buyer accepts Builder's attached one-year call-back warranty." Hoffman signed the counteroffer "James Hoffman, Pres."

The call-back warranty attached to Hoffman's counteroffer stated:

> Warranty: The General Contractor warrants that the building will be constructed in a good and workmanlike manner in quality equal to the standards of the industry and

> warrants that the building constructed under this contract shall be free from defects in material and workmanship beyond normal construction tolerances expected in the trade for a period of one year from … occupancy.… The General Contractor shall remedy any defects due to faulty materials or workmanship, which shall appear during construction or within the one year warranty period.[1]

Like the counteroffer, Hoffman signed the call-back warranty, "James Hoffman, Pres."

The Hannas accepted Hoffman's counteroffer. The parties closed the transaction on March 28, 1990. The closing statement identified Hoffman as the seller and Hoffman again signed the closing statement, "James Hoffman, Pres." The Hannas took occupancy in April 1990.

The following history concerning the Hannas' ensuing problems with the residence is taken from the report of Mike Shadid, a foundation inspector hired by the Hannas. Shadid inspected the property during December 1995 and January 1996. Shadid reported that the Hannas first experienced water in the basement of the residence during the fall of 1990 when water appeared to enter over the tops of the basement walls. The problem repeated in the spring and summer of 1991, the fall of 1992, the spring and summer of 1993, the summer and fall of 1994, and the spring and fall of 1995. During some of these episodes, water also appeared to enter through seams in the walls.

Shadid's report also documented the efforts taken by the Hannas to correct the problem. They hired Lied's Landscaping to install a drainage system designed to divert water away from the residence. Lied's later upgraded the drainage system by installing a catch basin, additional drain tiles and a modified

[1] Although this warranty uses language which contemplates the future construction of the residence, the parties agree that the residence was already constructed at the time of the sale.

downspout at one corner of the residence. Still later, Lied's cut back filter fabric around the drain tiles, domed the exterior water entry grate, installed dams to lead water to the drains, and placed jute erosion control fabric over the sod. The Hannas also consulted with McCoy Contractors, a basement foundation contractor.

Shadid's report further states that in the spring of 1993 the Hannas met with Hoffman, Lied's and McCoy. At this meeting, it was agreed that the above grade portion of the structure would be caulked and that Lied's would perform additional landscaping work. In July 1993, Lied's installed additional drain tile and top soil. In August 1993, McCoy injected epoxy into two seams. In the spring of 1994, Lied's and Hoffman met to address the continuing problem. They decided that additional caulking was necessary and in May 1994, Badger Weatherstripping caulked all apparent openings.

Despite these efforts, the problem persisted. In August 1994, Lied's made further modifications to the grade and drainage system and in November 1995, the Hannas injected additional epoxy into the seams.

Pursuant to Shadid's recommendation, the interior and exterior drain tile system was inspected in January 1996. Inspection holes were broken over selected areas of the interior concrete floor to expose portions of the interior drain tile system. Water was then run through the system so that the flow could be evaluated. On the exterior, a water spud was inserted into the ground. The spud is a long pipe which extends down to the stones over the exterior tiles. Water is then run through the spud and the flow of the water from the exterior tiles to the interior tiles is evaluated.

Based on this inspection, Shadid concluded that the interior drain tiles were not laid on the level, but instead on a "convoluted" (high and low) basis. This interrupted the orderly flow of water through the system. In addition, Shadid observed that one of the interior tiles which was supposed to line up with a bleeder tube was "twisted" such that the hole in the tile did not greet the bleeder tube. This prevented water from entering the tile from the bleeder tube. In addition, Shadid observed that the water from the spud did not travel through the exterior drain tiles, but rather entered the basement through a seam that had previously been injected with epoxy.

To correct the problem, Shadid recommended, among other things, that the foundation walls be excavated to the footings, the exposed wall cracks be patched, the exterior walls be rewaterproofed, the bleeder tubes be cleaned, and new exterior and interior drain tile be properly installed. The estimated cost of all the repairs was $20,000 to $24,000.

PROCEDURAL HISTORY

Based on Shadid's report, the Hannas commenced this action against Hoffman personally on January 8, 1996. The complaint included allegations of: (1) breach of warranty; (2) intentional, negligent and strict liability misrepresentation; and (3) negligent construction of the residence. Hoffman's answer admitted that he and the Hannas had entered into a contract, but otherwise denied the material allegations of the complaint. Hoffman also raised various affirmative defenses including statute of limitations and failure to join a necessary party.

Hoffman then moved for dismissal of the Hannas' complaint and, in the alternative, for summary judgment. As to the breach of warranty claim,

Hoffman contended that the one-year call-back warranty in his counteroffer, not the broader warranty recited in the original offer, governed the parties' agreement and that he had not breached the call-back warranty. However, even if the original warranty in the offer to purchase applied, Hoffman contended that the summary judgment evidence did not establish that he had any notice of any defects under the warranty stated in the original offer. On this same basis, Hoffman sought dismissal of the Hannas' misrepresentation claims, contending that since he had no knowledge of any defects, he had no duty to speak.

Finally, as to the negligent construction claim, Hoffman argued that the evidence demonstrated that his corporation, not he personally, had constructed the residence. Thus, he contended that the corporation was the proper party defendant as to this claim.

Hoffman's motion regarding the negligent construction claim prompted the Hannas to proffer an amended complaint. This amended complaint retained Hoffman as the defendant regarding the breach of warranty and misrepresentation claims. However, the amended complaint substituted the corporation for Hoffman as the defendant regarding the negligent construction claim.

Following the submission of briefs, the trial court issued a written decision and order granting summary judgment to Hoffman as to all claims and further rejecting the Hannas' motion for leave to file the amended complaint. The court dismissed the breach of warranty claim because the summary judgment evidence did not establish that Hoffman had any notice of any defects. The court dismissed the misrepresentation claims because the evidence did not establish that Hoffman had any knowledge which could have formed the basis for a

misrepresentation. The court dismissed the negligent construction claim against Hoffman because the corporation, not Hoffman, had constructed the residence.

The trial court also rejected the Hannas' amended complaint alleging negligent construction against the corporation because the statute of limitations had expired as to that claim. In addition, the court ruled that the Hannas either knew or should have known that the corporation was the entity which had constructed the residence. The Hannas appeal.

DISCUSSION

A. Summary Judgment

Breach of Warranty and Misrepresentation Claims Against Hoffman

The trial court dismissed the Hannas' breach of warranty and misrepresentation claims against Hoffman at summary judgment. An appeal from a grant of summary judgment raises an issue of law which we review de novo by applying the same standards employed by the trial court. *See* ***Estate of Gocha v. Shimon***, 215 Wis.2d 586, 590, 573 N.W.2d 218, 220 (Ct. App. 1997). If a dispute of any material fact exists, or if the material presented on the motion is subject to conflicting *factual* interpretations or inferences, summary judgment must be denied. *See* ***Hansen v. New Holland N. Am., Inc.***, 215 Wis.2d 655, 662, 574 N.W.2d 250, 253 (Ct. App. 1997), *review denied,* 217 Wis.2d 521, 580 N.W.2d 690 (1998). The burden is on the moving party to establish the absence of a genuine issue of material fact and we draw all reasonable inferences in favor of the nonmoving party. *See* ***id***. at 662-63, 574 N.W.2d at 253.

1. Breach of Warranty Claim Against Hoffman

The Hannas' amended complaint alleged that Hoffman breached the warranty in the offer to purchase. This warranty stated, in relevant part, that

Hoffman "ha[d] no notice or knowledge of any … structural … or other defects of material significance affecting the property." Hoffman contends that the one-year call-back warranty recited in his counteroffer superseded the warranty in the offer to purchase.[2] Since the Hannas made no claim under the call-back warranty, Hoffman contends that he was entitled to summary judgment.[3]

The trial court did not address this aspect of Hoffman's argument as to the breach of warranty claim. Instead, the court decided the case on the basis of the broader warranty stated in the offer to purchase. Nonetheless, the court agreed with Hoffman. We, however, agree with Hoffman that the call-back warranty governs here, and we decide this issue on this threshold basis.[4]

The Hannas' original offer to purchase recited a number of warranties, including a warranty that Hoffman had no knowledge of defects. Hoffman's counteroffer stated, "All terms and conditions to remain the same as stated on the Offer to Purchase *except* the following. …." (Emphasis added.) Hoffman then proposed a warranty provision relating to defects which was different from that stated in the offer. This provision stated, "Buyer accepts Builder's attached one-year call-back warranty."

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[2] At oral argument, the Hannas contended that their breach of warranty claim was stated broadly enough to take in the call-back warranty. We disagree. Both the original and amended complaint expressly recited the relevant language of the warranty stated in the offer to purchase, not any of the language recited in the call-back warranty.

[3] Hoffman alternatively argues that the corporation, not he personally, provided the call-back warranty. We reject this argument for the reasons stated in the later portion of this opinion when we discuss the trial court's ruling on the Hannas' amended complaint. *See infra* pp. 14-16.

[4] Our de novo standard of review entitles us to assess a summary judgment on the basis of an issue raised in the trial court but not addressed by that court. *See* ***State v. Courtney E.***, 184 Wis.2d 592, 595, 516 N.W.2d 422, 423 (1994).

This exchange establishes that the Hannas and Hoffman were engaged in "give and take" negotiations regarding the warranty provisions of any agreement they might ultimately achieve. As this court recently said when assessing the intent of contracting parties:

> Both parties advanced certain interests through the agreement. Both parties had input into the agreement before it was signed. Thus, to construe the contract against Kohler would be to ignore the intent of the contracting parties, which was to draft an agreement that would address the needs of both parties.

Kohler Co. v. Wixen, 204 Wis.2d 327, 339, 555 N.W.2d 640, 645 (Ct. App. 1996). The Hannas' contention that they are entitled to sue on the warranty provision in the original offer renders meaningless the parties' subsequent agreement regarding the call-back warranty. As we also said in ***Kohler***, "It is well settled in Wisconsin that a construction which renders contractual language meaningless should be avoided." ***Id***. at 338, 555 N.W.2d at 645.

Since the one-year call-back warranty governs the parties' contract and because the Hannas made no claim under that warranty, we affirm the trial court's dismissal of the breach of warranty claim.

2. Misrepresentation Claims Against Hoffman

The trial court dismissed the Hannas' intentional, negligent and strict liability misrepresentation claims, ruling that the summary judgment evidence did not raise any material issue of fact as to Hoffman's duty to speak. In reviewing this issue, we first address the state of the summary judgment evidentiary record.

Hoffman's affidavit in support of his motion stated, in relevant part, that he had no knowledge of any defects. Hoffman also submitted the deposition testimony of the Hannas acknowledging that they had no reason to believe that Hoffman knew of any defect or problem with the basement walls.

Against Hoffman's summary judgment evidence, the Hannas presented Shadid's report which we have already documented.[5] In addition, they presented a report from Ben G. Olson, a professional engineer. Olson's report documents certain other defects that contributed to the deposit of water over the areas of reported leakage. However, Olson's report does not speak directly to the faulty drain tile system, and it offers nothing which even remotely suggests that Hoffman had a role in creating the defects or that he possessed knowledge regarding the defects such that he had a duty to speak under the law of misrepresentation.

Although Shadid's report details the nature of the problem and the necessary corrective measures, it fails to support a claim that Hoffman had a duty to speak under any theory of misrepresentation law. The Hannas rely on Shadid's affidavit which states that Hoffman "knew, or should have known" that the drain tiles were improperly installed. But Shadid conceded in his deposition testimony that this opinion was premised on the assumption that Hoffman "was present at the time of the installation [and] should have known based upon a visual observation that these drain tiles were installed improperly." Shadid further conceded that he had no knowledge or information which satisfied the premise for his conclusion. And our independent examination of the entire record reveals nothing else which satisfies this premise.

This is a case in which Hoffman's alleged misrepresentation is premised upon his silence. Thus, the question is whether Hoffman had a duty to

[5] Hoffman contends that the Hannas' lack of any discovery in this case supports the trial court's grant of summary judgment. However, the manner in which counterevidence is marshaled does not determine whether summary judgment is appropriate.

speak. Intentional, negligent and strict misrepresentation all require that the defendant have a duty to speak "when information is asked for; or where the circumstances would call for a response in order that the parties may be on equal footing; or where there is a relationship of trust or confidence between the parties." WIS J I—CIVIL 2401, 2402 and 2403. Moreover, under the law of intentional misrepresentation, the defendant has a duty to speak if the fact is known or if the defendant acted in reckless disregard as to the existence of the fact. *See* ***Ollerman v. O'Rourke Co.***, 94 Wis.2d 17, 42, 288 N.W.2d 95, 107 (1980).

Measured against Hoffman's affidavit that he had no knowledge of any defects regarding the property, the reports of Shadid and Olson provide no information which demonstrates, or from which it is reasonable to infer, that Hoffman participated in the creation of the defects or had any basis for even knowing of them. As such, there is no evidence which raises a material issue of fact demonstrating that Hoffman had a duty to speak under any misrepresentation theory alleged by the Hannas.

We affirm the trial court's dismissal of the Hannas' misrepresentation claims.[6]

[6] Hoffman also argues that the economic loss doctrine precludes the Hannas' misrepresentation claims. *See* ***Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.***, 148 Wis.2d 910, 921, 437 N.W.2d 213, 217-18 (1989). We address and reject this argument in the next portion of this opinion which discusses the trial court's rejection of the Hannas' amended complaint. *See infra* pp. 16-17.

B. Leave to Amend the Complaint

Negligence Claim Against the Corporation

Before addressing the Hannas' negligent construction claim, we clarify their stance on this issue. In their appellate briefs, the Hannas argued that the trial court erred by rejecting their amended complaint which substituted the corporation for Hoffman personally as the defendant. However, in the same briefs, the Hannas also argued that the court erred by dismissing their negligent construction claim against Hoffman personally as asserted in their original complaint. Thus, it was unclear to us whether the Hannas were asking that we reinstate their original complaint against Hoffman or that we approve their amended complaint against the corporation as to this claim.

We therefore inquired of the Hannas' counsel at oral argument whether counsel was standing on the original complaint or the amended complaint regarding the negligent construction claim. Counsel responded that he was standing on the amended complaint. Therefore, we will not address the Hannas' argument that the trial court erred by dismissing the negligent construction claim against Hoffman personally.[7]

[7] Because of our uncertainty regarding the Hannas' position on this issue, our notice of oral argument directed the parties to address the effect, if any, of ***Benjamin Plumbing, Inc. v. Barnes***, 162 Wis.2d 837, 470 N.W.2d 888 (1991). There the supreme court repeated the general rule that where an agent contracts on behalf of a disclosed principal, the agent does not become personally liable to the other contracting party. *See* ***id.*** at 848, 470 N.W.2d at 893. However, the court went on to explain how the agent may lose this immunity if the agent does not adequately disclose the corporate status of the principal. *See* ***id***. at 848-60, 470 N.W.2d at 893-98. Given the Hannas' concession in this case that they are standing on their amended complaint which asserts a negligence cause of action against the corporation and not Hoffman, we need not discuss whether the Hannas could have pursued Hoffman personally under ***Benjamin Plumbing***. We will, however, look to ***Benjamin Plumbing*** for assistance when we discuss Hoffman's claim that the call-back warranty bars the negligence claim. *See infra* pp. 14-16.

The issue thus narrows to whether the trial court misused its discretion by rejecting the amended complaint. The law governing the amendment of pleadings is well established. An amendment to the pleadings is within the trial court's discretion and is proper if the amendment does not come at a time when it is likely to cause unfairness, prejudice or injustice. *See* ***Goff v. Seldera****,* 202 Wis.2d 600, 616, 550 N.W.2d 144, 151 (Ct. App. 1996). Amendments shall be "freely given at any stage of the action when justice so requires." Section 802.09(1), STATS.

The trial court rejected the amended complaint against the corporation because the statute of limitations had expired and because the Hannas "at least should have known, if not actually known, that the builder of the home was James H. Hoffman Builders, Inc. and that that's the party they were dealing with." The court additionally said that in balancing the equities, the question was "whether or not an amendment should be allowed at this late stage of litigation."

Although the ultimate question is whether the trial court erred in the exercise of its discretion, Hoffman raises three threshold arguments which pose questions of law. Hoffman contends that: (1) under the parties' agreement, the call-back warranty represents the corporation's only liability to the Hannas; (2) the economic loss doctrine bars any recovery by the Hannas; and (3) the statute of limitations bars the action against the corporation. We address each of these in turn.

Hoffman first argues that the Hannas' negligence claim against the corporation is barred because the corporation's only liability under the contract is via the call-back warranty. This argument assumes, however, that the corporation, not Hoffman, provided the warranty. We reject this assumption. As we have

noted, the contract in this case was between the Hannas and Hoffman. Although Hoffman added the notation "Pres." after his signatures on the counteroffer and the call-back warranty, we do not agree that this served to make the corporation a contracting party in this case.

In ***Benjamin Plumbing, Inc. v. Barnes***, 162 Wis.2d 837, 470 N.W.2d 888 (1991), the supreme court addressed a situation in which a corporate agent had failed to fully disclose the corporate principal. Because the agent had not sufficiently disclosed that he was acting on behalf of a corporation, the court ruled that the agent could be held liable on the contract. *See* ***id.*** at 843-55, 470 N.W.2d at 891-96. We recognize that the issue in ***Benjamin Plumbing*** was whether the agent had lost the immunity which would otherwise apply, whereas here the issue is whether Hoffman or the corporation provided the warranty. Nonetheless, we find the court's language in ***Benjamin Plumbing*** supportive of our conclusion that Hoffman, rather than the corporation, was the contracting party both as to the counteroffer and the call-back warranty.[8]

Here the Hannas proffered an offer to purchase to Hoffman personally. Thereafter, Hoffman never disabused the Hannas of the notion that they were contracting with him personally. He never expressly disclosed the corporate status in his counteroffer or in his call-back warranty. The same situation existed in ***Benjamin Plumbing***. *See* ***id***. at 853, 470 N.W.2d at 895. Also, while Hoffman's signature designation as "Pres." suggests some agency

[8] We also reject Hoffman's concomitant argument that the parties actually made two contracts: the accepted counteroffer between the Hannas and Hoffman and a separate contract under the call-back warranty between the Hannas and the corporation. The call-back warranty was part and parcel of Hoffman's counteroffer. The Hannas accepted that counteroffer. There was but one agreement.

capacity, it does not necessarily signal the nature of the business organization. The same was true in ***Benjamin Plumbing***. *See* ***id***. In addition, the "Pres." designation does not identify the name of the organization. Finally, Hoffman did not expressly disavow personal liability on the contract when he could have done so. The supreme court made the same observation in ***Benjamin Plumbing***. *See* ***id***. at 854, 470 N.W.2d at 895. The court said, "[i]t is within [agents'] power to relieve themselves of liability." ***Id***. at 851, 470 N.W.2d at 894. Most importantly, the court observed that the burden of showing notice of the corporate status is on the agent. *See* ***id***. Hoffman has not met that burden here.

We also take note that this is not a case in which the Hannas contracted for the construction of the residence. If that were the case, they might have learned during the construction process that the corporation was actually building the residence even though their contract was with Hoffman. Rather, the Hannas purchased an already constructed new residence, and their negotiations and contract were with Hoffman, not the corporation. We reject Hoffman's contention that the corporation, rather than he, provided the call-back warranty.[9]

Our holding on this point also disposes of Hoffman's second threshold argument: namely, that the economic loss doctrine bars the Hannas' negligent construction claim. Hoffman relies on ***Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.***, 148 Wis.2d 910, 437 N.W.2d 213 (1989). There, the supreme court held that a commercial purchaser of a product cannot

[9] We appreciate that our analysis of ***Benjamin Plumbing*** and our resultant conclusion that Hoffman provided the call-back warranty might call into question the Hannas' decision to abandon their negligence cause of action against Hoffman personally and to stand upon their amended claim against the corporation. However, this was a strategic call which they were entitled to make.

recover solely economic losses from the manufacturer under negligence or strict liability theories where a warranty given by the manufacturer specifically precludes the recovery of such damages. *See* ***id***. at 921, 437 N.W.2d at 217-18. That ruling was premised on the fact that the manufacturer's warranty extended to purchasers of the product and thus the manufacturer was in privity of contract with the purchaser. *See* ***id***. at 915-16, 437 N.W.2d at 215.

Here, however, as we have just demonstrated, the Hannas' contract was with Hoffman, not the corporation. From this it follows that the Hannas are not attempting to convert a contractual duty into a tort duty. *See* ***McDonald v. Century 21 Real Estate Corp.***, 132 Wis.2d 1, 6, 390 N.W.2d 68, 70 (Ct. App. 1986) ("Wisconsin does not recognize an inherent cause of action for every negligent performance of a contractual obligation. 'In order for such a cause of action in tort to exist, a duty must exist independently of the performance of the contract.'" (quoted source omitted)). The Hannas' negligence claim against the corporation is grounded solely in tort. The claim does not have a contractual root because there never was a contract between the Hannas and the corporation. We reject Hoffman's argument under the economic loss doctrine.

As his third threshold argument, Hoffman contends that the statute of limitations bars the Hannas' action against the corporation. As noted, the trial court cited this as one of its reasons for rejecting the amended complaint. The Hannas respond that the "relation-back" statute, § 802.09(3), STATS., salvages their claim against the corporation. This statute provides, in part:

> If the claim asserted in the amended pleading arose out of the transaction, occurrence, or event set forth … in the original pleading, the amendment relates back to the date of the filing of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the

> period provided by law for commencing the action against such party, the party to be brought in by amendment has received such notice of the institution of the action that he or she will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against such party.

Id.

This statute serves to salvage an otherwise untimely action against a new party to the action if the following four requirements are satisfied: (1) the amendment must relate to the transaction, occurrence or event alleged in the original complaint; (2) the original action must have been timely under the applicable statute of limitations; (3) the new party must have had notice of the institution of the original action such that the party is not prejudiced in maintaining a defense on the merits; and (4) the moving party knew or should have known, but for a mistake concerning the identity of the proper party, that the action would have been brought against such party.

We do not understand Hoffman or the corporation to dispute the first three requirements of the statute. First, the transaction at issue under both complaints is the quality of the construction of the Hannas' residence. Second, the original action was timely under the applicable statute of limitations. Third, the corporation had notice of the original action and is not prejudiced since its president, Hoffman, was the named defendant in that action.

It is the fourth requirement of the statute that Hoffman disputes. Hoffman argues, and the circuit court determined, that the Hannas should have known that the proper party defendant as to this claim was the corporation. But

the court's decision does not allude to any facts which support this conclusion.[10] As our analysis of ***Benjamin Plumbing*** already reveals, it was Hoffman, not the corporation, who entered into the counteroffer and provided the call-back warranty. *Based on the current state of the record*, we hold that the relation-back statute salvaged the Hannas' claim against the corporation.[11] We reject Hoffman's threshold statute of limitations argument.

Thus, we turn to the ultimate question of whether the trial court properly exercised its discretion in rejecting the Hannas' amended complaint against the corporation. Besides relying on the statute of limitations, the court also stated that the Hannas should have known that they were dealing with the corporation, not Hoffman. As a result, the court concluded that the amended pleading came too late.

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[10] Hoffman contends that the Hannas knew that the corporation provided the call-back warranty because their counsel stated in a memorandum in support of the motion to amend their complaint that the corporation, not Hoffman, provided the call-back warranty. However, this statement must be evaluated in its proper context. First, this statement was made *after* Hoffman's motion to dismiss for summary judgment which unequivocally revealed, for the first time, that the corporation had constructed the residence. Second, we question whether counsel's statement in a brief, unless given in the form of a stipulation or express concession on a disputed point, unequivocally represents the correct understanding of the Hannas at the time they accepted the call-back warranty in Hoffman's counteroffer.

Hoffman also points to a February 20, 1990 letter to the Hannas from the corporation and signed by Hoffman which responded to a complaint by the Hannas concerning a problem unrelated to this case. However, this letter does not advise that the corporation constructed the residence. Moreover, the body of the letter states that "Hoffman Builders," not the corporation, will perform the necessary repairs. This letter perpetuates, rather than eliminates, the blurred manner in which Hoffman sometimes conducted his personal and corporate affairs.

[11] We stress that our holding as to the statute of limitations/relation-back issue is based on the current state of the record. Because we are reversing and remanding this case for further proceedings on the negligence claim alleged in the Hannas' amended complaint, we are not foreclosing further challenges to this claim based on additional evidence relevant to the statute of limitations/relation-back issue. Nor do we foreclose any other appropriate challenges to the amended complaint.

But as our analysis under ***Benjamin Plumbing*** has already demonstrated, the Hannas reasonably saw Hoffman as the party with whom they were dealing. Only after Hoffman filed his motions for dismissal and summary judgment were the Hannas sufficiently alerted that they might also have a negligence claim against the corporation. Seven days thereafter, the Hannas filed their proposed amended complaint and three weeks later they presented the court with their memorandum in support of the amended complaint. Thus, the Hannas acted expeditiously once they received the correct information as to who had actually constructed the residence.[12]

Hoffman also notes that the Hannas had not conducted any discovery in this case. While that is true, the Hannas had engaged in nearly six years of extensive investigation into the water problem. This ultimately resulted in Shadid's report which presents at least an arguable basis for a negligence claim.[13] Thus, the Hannas appear ready to stand on Shadid's report, and to a lesser extent Olson's, in support of their negligence theory.

[12] The record in this case does not reveal a formal motion for leave to amend the complaint as required by § 802.09(1), STATS., since the amended complaint was tendered more than six months following the filing of the original summons and complaint. However, Hoffman does not assert this failing as a basis for rejecting the amended complaint. We also note that the six-month deadline for filing an amended complaint without leave of the court had expired a mere eight days prior to the filing of the amended complaint.

[13] We say this with full appreciation that one of the corporation's theories of defense is that the efforts taken by the Hannas to correct the problem either caused the problem in the first instance or at least aggravated the problem. That, however, is a matter for trial should one result from our mandate.

(continued)

As we have already demonstrated, the substitution of the corporation as a proper party defendant did not unfairly change the rules of the game in the middle of the proceedings. Nor did it prejudice the corporation in defending the claim since Hoffman, the original defendant, was the corporate president. Nor does it appear that allowing the amendment would have necessitated a delay in the proceedings. Both parties were already well positioned for trial when Hoffman filed his motion revealing the corporation's role in the construction of the residence. The Hannas swiftly followed with their amended complaint. The amendment did not affect the fairness of the proceedings as to the corporation.

This was a proper case for application of the general rule that an amendment of a pleading is to be freely given. Justice requires that the Hannas be given an opportunity to proceed on their amended complaint as to their negligence claim against the corporation.

We also say this in appreciation of the corporation's further contention that it is not liable as a matter of law because another contractor actually performed the drain tile work. This claim is based on the fact that the contractor is named on Hoffman's witness list. However, the appellate record does not reveal what the substance of this witness' testimony might actually be. Moreover, Hoffman appears to assume that the contractor who performed the drain tile work was an independent contractor and benefits from the general rule that the torts of such a contractor may not be visited on a general contractor. *See* ***Wagner v. Continental Cas. Co.***, 143 Wis.2d 379, 388, 421 N.W.2d 835, 838 (1988). *See also* WIS J I—CIVIL 1022.6. While that may ultimately prove to govern this case, the present record does not establish the relationship between the corporation and the contractor who installed the drain tile system. The contract between the corporation and this subcontractor might alter this general rule. *See* ***Brooks v. Hayes***, 133 Wis.2d 228, 234-49, 395 N.W.2d 167, 169-76 (1986). Also, if the contractor who installed the drain tiles was the corporation's servant rather than an independent contractor, the corporation may be liable. *See, e.g.,* ***Arsand v. City of Franklin***, 83 Wis.2d 40, 45-57, 264 N.W.2d 579, 582-87 (1978).

CONCLUSION

We hold that the trial court properly granted summary judgment to Hoffman on the Hannas' claims for breach of warranty and intentional, negligent and strict liability misrepresentation. However, we further hold that the trial court erred by rejecting the Hannas' amended complaint on their negligent construction claim against the corporation. We reverse this portion of the judgment and remand for further proceedings on the negligence claim asserted against the corporation in the amended complaint.[14]

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

No costs to either party.

Not recommended for publication in the official reports.

[14] We stress that our remand does not necessarily mandate a trial. While that may ultimately result, our remand is for further proceedings *on the amended complaint*.