COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-2903

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

ERLAND ANDERSON, D/B/A ANDERSON DAIRY SYSTEMS,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

DALE PETERSON,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Barron County: EDWARD R. BRUNNER, Judge. *Affirmed.*

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

PER CURIAM. Erland Anderson, d/b/a Anderson Dairy Systems, appeals and Dale Peterson cross-appeals a judgment awarding Peterson $150,000 for Anderson's negligent misrepresentations regarding a Bou-Matic milking system, minus $12,768 Peterson owed on the open account. Anderson argues that: (1) Peterson should not have been allowed to amend his pleadings to allege

negligent misrepresentation; (2) the trial court should have granted summary judgment on the misrepresentation claims because the representations constituted Anderson's opinion, facts not yet in existence and "puffery," and are barred by the economic loss doctrine; (3) Anderson should be granted a new trial because the trial court erroneously allowed the testimony of Peterson's expert witness and a rebuttal witness and (4) the court should have dismissed the negligent misrepresentation claim for lack of proof. Peterson argues that (1) the court erred when it overturned the jury verdict and awarded damages on the open account; (2) the court should not have granted summary judgment striking his rescission and deceptive advertising claims; and (3) the court erred when it refused to instruct the jury that time was of the essence in this contract. We reject all of these arguments and affirm the judgment.

The trial court properly exercised its discretion when it allowed Peterson to amend his pleadings to allege negligent misrepresentation. *See* ***John v. John***, 153 Wis.2d 343, 365, 450 N.W.2d 795, 804 (Ct. App. 1989). Peterson's counsel requested to amend the pleadings as a result of materials he received from Bou-Matic in discovery as well as Anderson's deposition. The court granted a ninety-day continuance to allow additional time for trial preparation. Anderson has identified no specific prejudice that arose from the amendment. We conclude that the trial court reasonably balanced the parties' competing interests when it allowed the amendment and postponed the trial.

The trial court properly refused to grant summary judgment dismissing the negligent misrepresentation claims. Anderson argues that his representations are not actionable because they are only his opinions, not based on present or preexisting facts, and constitute only puffery, an exaggeration made by a seller, the truth or falsity of which cannot be precisely determined. *See* ***Gardner***

v. Gardner, 190 Wis.2d 216, 244, 527 N.W.2d 701, 710 (Ct. App. 1994); ***U.S. Oil v. Midwest Auto Servs.***, 150 Wis.2d 80, 87, 440 N.W.2d 825, 827 (Ct. App. 1989); ***Loula v. Snap-On Tools Corp.***, 175 Wis.2d 50, 54, 498 N.W.2d 866, 868 (Ct. App. 1993). To be entitled to summary judgment, Anderson had to establish that there were no genuine issues of material fact and that he was entitled to judgment on these issues as a matter of law. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987).

Anderson's own recitation of facts in his argument for summary judgment establishes disputes of material fact. The parties presented conflicting evidence whether the milking system was inoperable and whether Anderson misrepresented his own training and experience. The Bou-Matic computerized milking system's ability to identify individual cows, isolate sick cows, maintain reproduction and breeding records and eliminate the need for other record keeping systems arguably constituted false representations of present facts rather than forecasts of future events or puffery. The evidence presented at summary judgment did not conclusively establish whether specific promises were made regarding the completion date or who bore the blame for the failure to meet the deadline.[1]

[1] Anderson incorrectly argues that the statute of frauds, § 402.201(1), STATS., requires such a commitment to be inviting to be enforceable. The statute of frauds requires some writing sufficient to indicate that a contract for sale has been made between the parties. The writing is not insufficient because it omits a term agreed upon. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. *See* ***First Bank v. H.K.A. Enterprises Inc.***, 183 Wis.2d 418, 422-23, 515 N.W.2d 343, 345 (Ct. App. 1994). The only three definite and invariable requirements as to the memorandum are that it must evidence a contract for the sale of goods, it must be "signed" a word which includes any authentication which identifies the party to be charged, and it must specify a quantity. ***Id***. The omission of a written completion deadline does not render the oral agreement unenforceable under § 402.201(1), STATS.

Anderson's argument that the economic loss doctrine bars recovery was not adequately presented to the trial court and will not be addressed on appeal. Whether the economic loss doctrine should apply to misrepresentation claims and whether it applies to an installer who has a separate warranty from that granted by the manufacturer of the goods were not well developed in the trial court. The evidence did not focus on important considerations such as whether the Bou-Matic system damaged other property, and the jury made no findings on that important issue. *See* ***Tony Spychalla Farms, Inc. v. Hopkins Agric. Chem. Co.***, 151 Wis.2d 431, 437-38, 444 N.W.2d 743, 747 (Ct. App. 1989). The factual basis for deciding the legal issues was not adequately presented at the summary judgment stage and the jury was never asked to resolve important factual disputes upon which our analysis must rest. Therefore, we conclude that the issue was inadequately preserved for appeal.

Anderson argues that he is entitled to a new trial based on errors in the trial or in the interest of justice based on the trial court's decisions allowing two of Peterson's witnesses to testify. Dr. Michael Behr, Peterson's economic expert, testified regarding Peterson's lost income that he attributes to failures of the Bou-Matic milking system. Anderson argues that Behr's testimony and report included losses from "phantom cows," and that he was erroneously permitted to present testimony regarding milk production losses as well as capital loss based on his claim that Peterson was unable to replace cows over a three-year period. The accuracy of Behr's testimony goes to its weight, not its admissibility. *See* ***Rollie Johnson Plumbing & Heating Serv. v. State***, 70 Wis.2d 787, 796, 235 N.W.2d 528, 533 (1975). The trial court allowed the parties to argue in support of or in opposition to the opinions of both sides' experts. Anderson cross-examined Behr and argued that his witnesses were more credible and accurate. The trial court

properly allowed the jury to determine Behr's credibility. In fact, the jury returned a verdict awarding Anderson much less than Behr's calculations.

Anderson also argues that the court should not have allowed the "expert testimony" of Dennis Neuman, a dairy farmer who testified regarding problems with his Bou-Matic milking system, which Anderson did not install. Anderson argues that Neuman was not disclosed as an expert and his lay opinion was not helpful in determining any issue of fact. Neuman testified regarding cow comfort problems and injuries his cows suffered from the exit reel and curb on the system. Neuman's non-expert observations regarding the effect the system had on his cows reasonably related to whether Peterson's losses could be attributed to the milking system rather than poor farming practices as alleged by Anderson. The trial court properly exercised its discretion when it concluded that this probative value was not substantially outweighed by any danger of unfair prejudice. *See* § 904.03, STATS.

Anderson argues that the trial court should have granted his motion to dismiss at the close of Peterson's case for lack of evidence. His argument is partially based on the erroneous statement that this court should construe the evidence in the light most favorable to the appellant. Before taking a case from the jury, the court must construe the evidence in the light most favorable to the party against whom dismissal is sought. *See* ***Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Const. Corp.***, 96 Wis.2d 314, 336, 291 N.W.2d 825, 836 (1980). Peterson's agricultural engineering expert testified to vacuum leaks, problems with the exit reel and sequence gates, and disputed Anderson's representations regarding cow indexing. His testimony, in combination with Peterson's and veterinary evidence regarding the cows' health and milk production allowed a reasonable inference that Anderson's misrepresentations caused Peterson damage.

In his cross-appeal, Peterson challenges the trial court's decision to change the verdict to award Anderson $12,768 on an open account. The $148,000 purchase price for the milking system was added to Peterson's open account. He did not complete all of the payments on that account. The jury separately awarded Peterson $150,000 for damages incurred due to the milking system's failure to perform as represented. Any damages Peterson suffered should be included in that award. The record discloses no basis for Peterson's failure to complete payment on the open account for all of the goods and services he received. There is no credible evidence to support the jury's finding that Peterson owed nothing on the open account. *See* ***Foseid v. State Bank of Cross Plains***, 197 Wis.2d 772, 787, 541 N.W.2d 203, 209 (Ct. App. 1995).

Peterson next argues that the trial court erred when it failed to allow him to pursue claims for rescission, intentional fraud and deceptive advertising. The trial court correctly concluded that there is no basis for rescinding the contract.[2] Peterson did not reject the goods within a reasonable time after their delivery and did not notify Anderson or Bou-Matic of his election to rescind until that claim was raised in the pleadings. This does not constitute timely rejection of goods or seasonable notification to the seller under §§ 402.602 and 402.608, STATS. Peterson continued to use the milking parlor from March 1995 to December 1997, when he first claimed a right of rescission. A contract may only be rescinded when a party has breached the contract in a substantial manner so serious as to destroy its essential objects or purpose. *See* ***Appleton State Bank v.***

[2] Peterson acknowledges that he was required at some point to choose between affirming the contract and seeking damages or rescinding the contract. *See* ***Baumgarten v. Bubolz***, 104 Wis.2d 210, 216, 311 N.W.2d 230, 233 (Ct. App. 1981). He does not indicate when he intended to make that choice.

Lee, 33 Wis.2d 690, 692-93, 148 N.W.2d 1, 2 (1967). Peterson's continued use of the system demonstrates that the flaws are not so serious as to destroy the essential object or purpose of the sales contract.

Peterson's argument that the trial court improperly dismissed his deceptive advertising claim was not properly preserved for appeal. Peterson's recovery on the negligent misrepresentation claim renders moot any arguments he has regarding other theories for recovery except where other remedies are allowed. The deceptive advertising claim differs from the other causes of action in that it allows an award for actual attorney fees. When the trial court asked Peterson's counsel to explain the basis for the deceptive advertising claim which appeared to present the same issues as the misrepresentation claim, counsel responded "the remedy, I think is the same, but they are somewhat different claims." Based upon counsel's statement that the remedies are the same, the trial court reasonably chose to limit the numerous theories Peterson sought to present for recovery of the same damages based on the same proofs. We view counsel's assertion that the remedies would be the same as invited error that cannot be reviewed on appeal. *See* ***Richards v. Land Star Group***, 224 Wis.2d 829, 842-43, 593 N.W.2d 103, 109 (Ct. App. 1999).

Finally, Peterson argues that the trial court erroneously refused to instruct the jury that time was of the essence in the written contract. The record contains no rulings by the trial court with respect to the jury instructions. We cannot review the trial court's discretionary decision without a full record explaining its decision. In addition, Peterson's argument is based on the false assertion that time is made of the essence when the contract provides that payment is not due until completion. Time is not of the essence in a contract unless it is clear that the parties intended to make it so. *See* ***Appleton State Bank v. Lee***, 33

Wis.2d at 693, 148 N.W.2d at 3. The record before this court does not support instructing the jury that time was of the essence.

By the Court.—Judgment affirmed. No costs on appeal.

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