COURT OF APPEALS
DECISION
DATED AND FILED

April 18, 2000

Cornelia G. Clark
Clerk of Court of Appeals
of Wisconsin

NOTICE

No. 99-0351

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

RINGTRUE, INC.,

PLAINTIFF-RESPONDENT,

V.

HOLLIS MCWETHY, D/B/A HRM CONSULTING,

DEFENDANT-APPELLANT.

ROBERT C. MARTIN, D/B/A RCM CONSULTING INC.,

PLAINTIFF-APPELLANT,

V.

ED SCHOENBECK AND RINGTRUE, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Judgment affirmed in part; reversed in part.*

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

¶1 PER CURIAM. Hollis McWethy, d/b/a HRM Consulting, appeals a judgment awarding $61,351.77 damages to RingTrue, Inc., for breach of a contract to design a computer software program. McWethy contends that (1) the trial court misinterpreted the parties' oral contract; and (2) because the oral contact carried no express or implied warranty, no liability may be premised on breach of warranty.

¶2 We conclude that the contract in question was predominantly for services instead of goods and, therefore, the warranties provided by the Uniform Commercial Code do not apply. We further conclude that the record fails to reflect any specific findings that the parties contracted for an express or implied warranty in fact. Also, the doctrine of implied warranty has not been recognized in Wisconsin in the type of service contract at issue. Accordingly, we reverse the trial court's finding of liability on the part of McWethy.[1]

¶3 In a consolidated action, Robert Martin, d/b/a RCM Consulting, Inc., appeals a summary judgment dismissing his unjust enrichment claim against RingTrue, Inc., and one of its owners, Ed Schoenbach.[2] Martin argues that the trial court erroneously determined that there were no disputes of material fact

[1] Because we resolve the appeal on the grounds stated, we do not reach McWethy's additional allegations of trial court error.

[2] There is a discrepancy in the caption and the record on the correct spelling of "Schoenbach." According to his testimony, the correct spelling is "Schoenbach."

whether Martin's services conferred a benefit. Martin also challenges the trial court's finding at the subsequent trial that he had no contract claim. Because the record supports the trial court's determinations, we affirm the judgment entered against Martin.

I. RingTrue v. McWethy

A. Facts

¶4 Ed Schoenbach, a health care administrator, and his colleague, Raimundas Miskevicius, envisioned developing a computer software system to facilitate accurate patient recordkeeping. Their idea was to develop a computerized system to collect medical, social, educational and employment histories on a patient's first visit to a physician. The data would comply with state and federal regulations relating to patient records and be available to provide narrative reports. No software programs were then available to efficiently assist the clinician, and neither Schoenbach nor Miskevicius had any technical training or experience in computer software design.

¶5 In 1994, while looking for technology to implement this idea, Schoenbach visited a computer store where McWethy worked. After initially discussing his concept, Schoenbach and McWethy met again to further consider its development into a software program. McWethy told Schoenbach that with her nursing and computer background, she could design the software he envisioned. The trial court found:

> McWethy offered to design and furnish a computer software program that could be used with a hand-held unit so patients could answer about 70 questions necessary for medical, psycholog[ical] and psychiatr[ic] professionals. The biographical, demographic and historical information collected by this means would be transferred to a desktop computer and used in narrative form in reports and records required by Federal and

> State authorities. She offered to produce this product at a rate of $50 per hour for her services and Schoenbach accepted.

¶6 In early 1995, Schoenbach and Miskevicius named their program *First Visit Solutions*© and formed RingTrue, Inc., to develop, own and market it. At about the same time, McWethy quit her job at the computer store, formed HRM Consulting, and began work on *First Visit.* The purpose of the software program was expanded to link the biographical data with diagnosis, treatment options, outcome and progress notes. The trial court found that within two weeks after their contract was formed, RingTrue wanted to expand the program to add over 100 bases and thousands of individual fields.

¶7 McWethy incorporated RingTrue's proposed changes into *First Visit*. She billed RingTrue at regular intervals and RingTrue remitted $56,391.77 through December 5, 1995. Miskevicius testified that in December, he received an e-mail message from McWethy that the base program for *First Visit* was complete and "[a]s it stands now if nothing is added and nothing is deleted by Ed and we find no additional bugs … [t]he product is ready for mass production." In addition, as the trial court noted, from the very beginning, McWethy and Schoenbach appeared at trade shows to showcase the program. McWethy stated that her focus was "to get this product finished and launched," and that "customers and their patients will love the use of this tool."

¶8 The court found that on December 5, 1995, when Schoenbach proposed to double the size and add thirteen charts, McWethy warned that she could not guarantee the program as contemplated. The court concluded, "[t]herefore, while the contract grew into something more than originally contemplated, it continued to be a valid and binding contract as mutually modified [until] December 5, 1995."

¶9 RingTrue had engaged David Fitch in October 1995 to develop a product manual for *First Visit.* Fitch testified that McWethy's software contained numerous flaws and that he "ended up with a lot of data corruption, fields not carrying forward the correct information, new forms containing information from previous patients that should not have been there." On Fitch's advice, RingTrue retained Brian Goudelock to evaluate the quality of *First Visit*.

¶10 Goudelock testified that the software program developed by McWethy was structurally flawed and could not be fixed. He said that it had no market value and was unable to be sold. He stated that there were far too many things that would have required rebuilding from scratch. RingTrue subsequently terminated its contract with McWethy and developed *First Visit* using the services of yet another software designer, Stephen Denning. Denning testified that it was quicker to develop *First Visit* from scratch than try to fix it.

¶11 RingTrue filed this action seeking a refund of all sums paid to McWethy and consequential damages.[3] The court found the essential elements of offer, acceptance and consideration were present, and concluded the parties had entered into an enforceable contract contemplating the creation of a marketable and useable software system called *First Visit*. The court found that "[e]ach time Schoenbach presented new questions or ideas of what might be included, he was proposing a modification of the contract." The court determined that McWethy's incorporation of Schoenbach's new ideas into the program signified her acceptance of the modifications and that she felt qualified to perform the work.

[3] RingTrue's complaint alleged numerous alternative theories of recovery. Because on appeal the parties limit their discussion to contract theory, we deem RingTrue's alternative theories of recovery abandoned.

¶12 The court concluded that McWethy breached the contract because she not only failed to create a marketable product, but also failed "to provide that degree of skill and expertise that RingTrue had contracted for and which should have told her that the demands had exceeded the ability of the underlying program she was using." The court found that McWethy's version of *First Visit* did not work and failed to perform to standards necessary to make it marketable. It also found that in the fall of 1995, McWethy was given an opportunity to correct the data corruption and migration errors that were present but was unable to do so.

¶13 The trial court awarded RingTrue damages for the sums paid to McWethy plus consequential damages. This appeal ensued.

B. Discussion

1. Did the trial court misinterpret McWethy's and RingTrue's oral contract and its modifications?

¶14 McWethy does not challenge the trial court's finding that she entered into an oral contract with RingTrue to design and develop a software program to be used by medical, psychological and psychiatric professionals for which she was to be paid $50 per hour. Nor does she challenge the trial court's finding that the parties modified their contract numerous times. She argues, instead, that the trial court misinterpreted the contract and its modifications as one providing for the sale of goods.[4] She claims that the contract was one for services,

[4] Although McWethy contends that the software concept was vague and ill-defined, this argument does not appear to be a challenge to the court's finding that the parties had a contract, rather it appears to challenge the determination that the contract was for goods, not services.

not goods, and accordingly, the trial court applied erroneous standards of law to determine breach.[5]

¶15 RingTrue responds that although the contract is for both goods and services, the court did not err by concluding that the contract was primarily for goods. The parties do not dispute that McWethy agreed to design and develop a new software program using her skill and expertise. They agree she was to be paid hourly. These undisputed facts demonstrate that the contract involved a combination of personal skills, services, time and a product. Accordingly, we agree with RingTrue that the contract was for both goods and services. *See* ***Micro-Managers, Inc. v. Gregory***, 147 Wis. 2d 500, 507, 434 N.W.2d 97 (Ct. App. 1988).

¶16 We disagree, however, that its primary purpose was the sale of goods. Granting that the contract is mixed, the question becomes whether its predominant purpose, reasonably stated, "is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom)." ***Id***. This question requires the interpretation of a contract, a question of law we review de novo. *See* ***id***.

¶17 In ***Micro-Managers***, the court applied the predominant purpose test to a contract for the design and development of a computer software program and concluded that it was predominantly for services. It determined that hourly billing

[5] The parties agree that if the contract is primarily one for the sale of goods, it is subject to art. 2 of the U.C.C. and if it is for services, common law principles apply. *See* ***Micro-Managers, Inc. v. Gregory***, 147 Wis. 2d 500, 508, 434 N.W.2d 97 (Ct. App. 1988).

rates and use of the words "design," "development," "man-days" and "time," connoted the rendition of services, and not the sale of a product. ***Id***. at 508-09.

¶18 In reaching this decision, the ***Micro-Managers*** court recognized that other jurisdictions reach contrary results, but was persuaded by the court's reasoning in ***Data Processing Servs. v. L.H. Smith Oil Corp.***, 492 N.E.2d 314 (Ind. App. 1986). ***Data Processing*** ruled that the contract in question for the development and delivery of a data processing system was predominantly for services, noting that "the sale of computer hardware or generally-available standardized software was not here involved." ***Id***. at 319. ***Data Processing*** found that "DPS was retained to design, develop and implement an electronic data processing system to meet Smith's specific needs." ***Id***. at 318. While a tangible end product may have been incidentally involved, "it is the skill and knowledge of the programmer which is being purchased in the main, not the devices by which this skill and knowledge is placed into the buyer's computer." ***Id***. at 319.

¶19 Here, McWethy's contract with RingTrue is similar to the contract in ***Micro-Managers*** and ***Data Processing***. The parties' transaction focused on McWethy's skill and competence rather than the condition of the product, which had not yet been created. Although the contract contemplated that McWethy's services would achieve a promised result, we are satisfied that its primary purpose was the rendition of services. Its predominant purpose was not to sell a product, but to design and develop the software. It called for McWethy's skill and knowledge as a software developer. The contract paid McWethy hourly. As a result, we conclude as a matter of law that the contract was predominantly one for services. *See* ***Micro-Managers***, 147 Wis. 2d at 508-09.

2. Breach of warranty

¶20 Both parties implicitly agree that McWethy's liability is premised on a breach of warranty. McWethy argues that because there was no contract for the sale of goods, remedies under the U.C.C. for breach of warranty do not apply. She also claims that there is no specific finding or proof of any express or implied warranty and, because her contract was primarily for services, no warranty could be implied in law. We agree.

¶21 "A 'warranty' is an assurance by one party to a contract of the existence of a fact upon which the other party may rely" that is "intended to relieve the promisee of any duty to ascertain the fact for himself, and amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue." ***Micro-Managers***, 147 Wis. 2d at 511. Here, the trial court made no specific finding that McWethy provided an express or implied warranty. It also did not specifically determine that a warranty may be implied in law. When the trial court fails to make a specific finding, the appellate court may (1) affirm the judgment if it is clearly supported by the preponderance of the evidence, (2) reverse if not so supported or (3) remand for further findings of fact and conclusions of law. *See* ***In re T.R.M.,*** 100 Wis. 2d 681, 688, 303 N.W.2d 581 (1981).

¶22 Here, the preponderance of the evidence does not clearly support a finding of an express warranty. RingTrue contends that the trial court found that McWethy promised to develop a marketable program and that the program was not marketable. We are not persuaded. As RingTrue observed, the court premised its determination on its implicit conclusion that the contract was predominantly for the sale of goods. Because the contract in question was predominantly for design

services, not goods, we conclude that this finding is insufficient to establish that McWethy expressly warranted her services. The court did not define the nature, terms, scope or duration of an express warranty or provide a definition of the term "marketable." Neither the record nor the court's findings establish an express warranty for design services.

¶23 RingTrue, nonetheless, points to the trial court's ruling that "[o]ne who contracts for a particular or extraordinary skill or ability is held to a higher degree of diligence and skill." We are unpersuaded that this ruling amounts to a specific finding that the parties' oral contract expresses or implies a warranty. Because the evidence as to the terms of the parties' contract is conflicting, we cannot say that a preponderance of the evidence would clearly support a finding of an express or implied warranty in fact.

¶24 In addition, the trial court did not specifically hold that an implied warranty exists in law. Whether there is an implied warranty in law is a legal question that we review de novo. *See* ***Micro-Managers***, 147 Wis. 2d at 512. Certain types of implied warranties are recognized in Wisconsin. For example, an implied warranty of habitability is recognized as applicable to residences. *See* WIS. STAT. § 704.07. Wisconsin also recognizes implied warranties of workmanlike construction in the case of construction contracts. *See* ***Coulton v. Foulkes***, 259 Wis. 142, 146-47, 47 N.W.2d 901 (1951). Implied warranties are not recognized, however, in other types of contracts, such as implied warranties of quality in the sale of real estate. *See* ***Dittman v. Nagel***, 43 Wis. 2d 155, 160 n.1, 168 N.W.2d 190 (1969).

¶25 With respect to implied warranties in contracts for design services, however, ***Micro-Managers*** stated:

> A number of decisions in other jurisdictions have allowed recovery on the basis of strict liability (or the closely related doctrine of implied warranty) where the injury was due to a defective product supplied or used in the course of rendering a service to plaintiff. Several cases have allowed recovery on the basis of strict liability or implied warranty where "defective services" have been rendered, but these services have been of a relatively routine or simple nature. Where "professional" services are in issue the cases uniformly require that negligence be shown.

Id. at 512 (quoting ***Hoven v. Kelble***, 79 Wis. 2d 444, 461-63, 256 N.W.2d 379 (1977)).

¶26 Thus, ***Micro-Managers*** does not recognize the existence of an implied warranty in the type of service contract at issue in the case at bar.[6] Under ***Micro-Managers***, a claim for defective design services was recognized to be a claim based on negligence. *See* ***id***. at 512-13.[7] Because the doctrine of implied warranty has not been recognized in Wisconsin in the type of contract at issue, breach of implied warranty does not support the imposition of liability in this case.[8]

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[6] Insofar as implied warranties are concerned, ***Micro-Managers***, 147 Wis. 2d at 512-13, recognizes a distinction between professional and non-professional service contracts. ***Micro-Managers*** characterizes a computer design contract as one for professional services. Because the parties have not raised this issue, we decline to address it. ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

[7] We acknowledge the anomaly that ***Data Processing*** recognizes an implied warranty in professional service contracts, but apparently this approach was rejected by ***Micro-Managers***. We are bound by Wisconsin precedent. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

[8] "[A] single set of facts may give rise to actions both in contract and tort, making it difficult to draw a clear distinction between the two actions." ***CLL Assocs. Ltd. Ptshp. v. Arrowhead Pacific Corp.***, 174 Wis. 2d 604, 618, 497 N.W.2d 115 (1993) (Abrahamson, J., dissenting); *see also* ***Brown v. Ellison***, 304 N.W.2d 197, 201 (Iowa 1981) (Professional malpractice suits are closely similar to actions for breach of implied warranty in a construction contract because both arise from the breach of an implied agreement to use an expected standard of care.).

(continued)

C. Conclusion

¶27 The parties' briefs do not discuss a theory of liability based on negligence.[9] We do not abandon our neutrality to develop this theory for them. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987). Because we conclude that the contract in question was predominantly for services instead of goods, the warranties provided by the U.C.C. do not apply. *See* ***Micro-Managers***, 147 Wis. 2d at 508. Also, the trial court made no specific findings that the parties contracted for an express or implied warranty in fact. The record would not by a preponderance of evidence clearly support such findings. Additionally, the doctrine of implied warranty has not been recognized in Wisconsin in the type of design service contract at issue. Accordingly, we reverse the trial court's finding of liability on the part of McWethy.

II. Martin v. RingTrue

¶28 In the spring of 1995, in response to the growing size of the project, McWethy suggested that Schoenbach meet with her brother, Robert Martin, a

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RingTrue elected to proceed in contract, and the parties do not address the potential negligence issue as a basis of liability. Therefore, we need not address the implications of the economic loss doctrine on a tort claim for the negligent provision of services. *See* ***Biese v. Parker Coatings***, 223 Wis. 2d 18, 30 n.11, 588 N.W.2d 312 (Ct. App. 1998).

For a discussion of issues related to the breach of the expected standard of computer software design care, *see* Richard Glaser & Leslee Lewis, *Redefining the Professional: The Policies and Unregulated Development of Consultant Malpractice Liability*, 72 U. DET. MERCY L. REV. 563, 580 (Spring 1995), and cases cited within. The parties' briefs do not develop these issues. *See* ***Gulrud***, 140 Wis. 2d at 730.

[9] The parties' briefs confine their discussion of liability solely to warranty theories. We have no duty to consider any issues other than those presented to us. *See* ***Waushara County v. Graf,*** 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992).

computer consultant who works with large databases and complex systems. Martin and two engineers met with Schoenbach for two days in May of 1995. In deposition testimony, Martin explained that "The purpose of that meeting would be to, for [Schoenbach] to describe [the] system that he wanted built, and for us to gather enough information so that we could produce a proposal."

¶29 Martin recommended several changes to the program. Schoenbach did not use Martin's suggestions and did not contract with him to upgrade the program. Martin billed Schoenbach $7,000 for the two-day consultation. RingTrue did not pay, and Martin brought this action to collect his fee, based upon contract and unjust enrichment. The trial court granted RingTrue summary judgment dismissing Martin's unjust enrichment claim, finding that Martin's services had no benefit. After trial on the remaining contract claim, the trial court found that the parties had no contract and dismissed Martin's contract claim.

¶30 Martin argues that the trial court erroneously entered summary judgment dismissing his unjust enrichment claim because there were disputed issues of fact whether RingTrue received any benefit from meeting with Martin. We are unpersuaded. When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08.

¶31 Martin claims the meeting consisted of consultation by two engineers at $1,500 and Martin's $2,000 per day consultation fee.[10] Martin

[10] Martin also relies on Schoenbach's and Martin's trial testimony. When reviewing summary judgment, we review the record before the trial court at the time of the summary (continued)

advised Schoenbach how data could be arranged in a data base, how it could be backed up for safety, and various options for the development, testing and marketing of the program. He contends that he presented Schoenbach with information that could have been incorporated in the software program and, even though Schoenbach rejected his suggestions and negotiations did not lead to a contract, the information itself was valuable.

¶32 To demonstrate a claim for equitable relief based on unjust enrichment, a plaintiff must establish: (1) the plaintiff conferred a benefit upon the defendant; (2) the defendant knew of the benefit; and (3) it is inequitable for the defendant to accept or retain the benefit without paying its value. *See* ***Puttkammer v. Minth***, 83 Wis. 2d 686, 688-89, 266 N.W.2d 361 (1978). "A claim of unjust enrichment does not arise out of an agreement entered into by the parties, but, rather, depends on the law that, as between the parties a person, unjustly enriched by the conduct or efforts of the other, must pay for the benefit conferred or return it." ***Lawlis v. Thompson***, 137 Wis. 2d 490, 499 n.1, 405 N.W.2d 317 (1987).

¶33 We are persuaded by the Seventh Circuit Court of Appeals' reasoning that "the mere fact that work or labor has been done for another does not give rise, by itself, to a duty to compensate." ***Johnson v. Gudmundsson***, 35 F.3d 1104, 1114 (7th Cir. 1994). For example, "where preliminary services are conferred for business reasons, without the anticipation that reimbursement will directly result, but rather, with the expectation of obtaining a hoped-for contract and incidental to continuing negotiations related thereto, quasi contractual relief is

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judgment proceedings. To the extent that Martin relies on testimony that was admitted at a later trial, his argument is rejected.

unwarranted." ***Id***. In each case, the court must carefully weigh the particular circumstances to determine whether the equities require relief. *See* ***id***.

¶34 Here, the trial court considered the circumstances and determined that relief was unwarranted. It pointed out that the meeting was to provide to the consultant information to use and was "in the nature of what the consulting service would be doing to give [RingTrue] a finished product." The meeting therefore was preliminary to contract negotiations with the expectation of obtaining a hoped-for contract. We conclude that the trial court properly determined the undisputed facts did not support an unjust enrichment claim.

¶35 Last, RingTrue argues that the trial court erred when it determined that the parties did not have a contract. Whether the parties entered into an oral contract is a question of fact. *See* ***Gerner v. Vasby***, 75 Wis. 2d 660, 661-62, 250 N.W.2d 319 (1977). When parties disagree as to their recollection of the oral contract's terms, the determination of its terms also presents a question of fact. *See* ***Dreazy v. North Shore Publ. Co.***, 53 Wis. 2d 38, 44-45, 191 N.W.2d 720 (1971). Martin argues that the record establishes that RingTrue anticipated paying for his consulting services because at the end of the meeting, Schoenbach took out his checkbook. Schoenbach testified, however, that he offered to pay for some of the expenses of having the meeting at the hotel and did not anticipate paying a $7,000 consulting fee. The trial court believed Schoenbach's version of the event. Because the trial court, not this court, determines the weight and credibility of testimony, we do not reverse its determination on appeal. *See* WIS. STAT. § 805.17(2).

By the Court.—Judgment affirmed in part; reversed in part. Costs to McWethy against RingTrue; costs to RingTrue against Martin.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.