COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1184 **Cir. Ct. No. 2014CV3774**

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

ALAN D. MIRON AND CARLA A. MIRON,

PLAINTIFFS-APPELLANTS,

ZURICH AMERICAN INSURANCE COMPANY,

SUBROGATED-PLAINTIFF,

V.

MNI, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

Before Kessler, Brennan and Brash, JJ.

¶1 BRASH, J. Alan and Carla Miron appeal an order granting MNI, Inc.'s motion for summary judgment. The Mirons argue that the circuit court erred when it ruled that neither the misrepresentation, concealment, nor fraud exception to Wisconsin's construction statute of repose, WIS. STAT. § 893.89 (2011-12), were applicable to their claims against MNI.[1] We disagree and affirm.

BACKGROUND

¶2 On October 8, 1999, Dayton Hudson Corporation (DHC) sent MNI a request for a fee proposal (RFP) for fixture installation at a Target store located in Milwaukee. The RFP provided that the work "must commence on May 15, 2000, with substantial completion no later than July 7, 2000." The RFP also contained a document entitled "General Conditions of the Contract for Construction." Among other things, this document required MNI to perform their work in a workmanlike manner and to guarantee that all work would be of good quality, free from faults and defects.

¶3 On October 26, 1999, MNI submitted a proposal to install the fixtures at the Target store within the designated timeframe, including preconstruction work, tear down work, and fixture installation. DHC accepted MNI's proposal, and MNI performed the fixture installation work at the Target store in the agreed upon timeframe. MNI substantially completed the fixture

[1] All references to WIS. STAT. § 893.89 are to the 2011-12 version. All other references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

installation in July of 2000. The relevant portions of the work MNI completed included the installation of fixture walls.[2]

¶4 In the spring of 2011, H.J. Martin and Son, Inc. was contracted to demolish the Target store at issue here. At that time, Alan Miron was employed by H.J. Martin as a laborer. Miron assisted in the demolition of the Target store and was tasked with the demolition of the fixture walls. On June 28, 2011, during the course of demolition, a fixture wall fell on Miron, injuring him. It was subsequently determined that a wall cleat, which secures the fixture wall in place, had only been screwed into drywall and not into wood backing.[3]

¶5 On May 5, 2014, the Mirons commenced the underlying action against MNI, alleging negligence and a safe place violation. In their negligence claim specifically, the Mirons alleged that MNI "concealed and misrepresented the negligently installed and deficiently secured wall." On March 3, 2015, MNI filed a motion for summary judgment arguing that WIS. STAT. § 893.89 barred the Mirons' claims.[4] On March 31, 2015, the Mirons filed their response to MNI's motion for summary judgment. In their brief, the Mirons argued that there is a

[2] Portions of the record use the term "focal walls" instead of "fixture walls." For clarity, we use the term "fixture walls" throughout this opinion.

[3] According to the Mirons, in order to be properly installed, the fixture walls needed to be secured by two cleats, one bolted to the concrete floor and another long vertical cleat secured to the interior wall. The vertical cleat must be secured to the interior wall by being screwed into wood backing behind the drywall.

[4] MNI also filed a motion for sanctions, which was denied. MNI is not contesting that denial in this appeal.

genuine issue of material fact as to whether the exceptions found in § 893.89(4)(a)—misrepresentation, concealment, or fraud—apply.

¶6 A hearing on MNI's motion for summary judgment was held on April 20, 2015. In addition to arguing that WIS. STAT. § 893.89 barred the Mirons' claims, MNI argued at the hearing that there was insufficient evidence to support the conclusion that MNI installed the fixture wall at issue. At the conclusion of the hearing, the circuit court granted MNI's motion for summary judgment, finding that § 893.89 barred the Mirons' claims and that no exceptions applied. This appeal follows.

ANALYSIS

¶7 Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery responses show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08 (2011-12). "A factual issue is 'genuine' if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party." ***Schmidt v. Northern States Power Co.***, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294 (citation omitted). A fact is material if it is "'of consequence to the merits of the litigation.'" ***Id.*** (citation omitted).

¶8 Summary judgment methodology requires us to first "discern whether the pleadings set forth a claim for relief as well as a material issue of fact." *See* ***Swatek v. County of Dane***, 192 Wis. 2d 47, 62, 531 N.W.2d 45 (1995). If so, the "inquiry shifts to the moving party's affidavits or other proof to determine whether a *prima facie* case for summary judgment has been presented." ***Id.*** If the moving party has made a *prima facie* case, we evaluate the affidavits and other submissions by the opposing party to determine "whether there 'exist

disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to a trial.'" *See* ***id.*** (citation omitted).

¶9 On a motion for summary judgment, "all reasonable inferences must be drawn in favor of the non-moving party." ***Williamson v. Steco Sales, Inc.***, 191 Wis. 2d 608, 624, 530 N.W.2d 412 (Ct. App. 1995). Where "'only one reasonable inference may be drawn from the undisputed facts,'" however, we draw that conclusion as a matter of law. *See* ***Zielinski v. A.P. Green Indus., Inc.***, 2003 WI App 85, ¶7, 263 Wis. 2d 294, 661 N.W.2d 491 (citation omitted). Speculation or conjecture is not enough to create a genuine issue of material fact. *See* ***id.***, ¶16. Whether summary judgment was properly granted by the circuit court is a question of law that we review *de novo*. *See* ***Schmidt***, 305 Wis. 2d 538, ¶24.

¶10 The Mirons concede that the *prima facie* elements of WIS. STAT. § 893.89 were satisfied, barring their claims. On appeal, therefore, the only argument made by the Mirons is that one or more of the exceptions in § 893.89(4)(a)—misrepresentation, concealment, or fraud—apply. In response, MNI argues that the evidence in the record is insufficient as a matter of law to create an issue of fact as to any of the exceptions in § 893.89(4)(a). Alternatively, MNI argues that the evidence is insufficient as a matter of law to support the conclusion that MNI caused the alleged defect in the fixture wall.

I. Wisconsin's Construction Statute of Repose

¶11 The Mirons argue that sufficient evidence exists to support the conclusion that one or more of the three exceptions found in WIS. STAT. § 893.89(4)(a)—misrepresentation, concealment, or fraud—apply, allowing their claims to survive. We disagree.

¶12 In pertinent part, WIS. STAT. § 893.89 states:

> **(1)** In this section, "exposure period" means the 10 years immediately following the date of substantial completion of the improvement to real property.
>
> **(2)** Except as provided in sub. (3), no cause of action may accrue and no action may be commenced, including an action for contribution or indemnity, against the owner or occupier of the property or against any person involved in the improvement to real property after the end of the exposure period, to recover damages for any injury to property, for any injury to the person, or for wrongful death, arising out of any deficiency or defect in the design, land surveying, planning, supervision or observation of construction of, the construction of, or the furnishing of materials for, the improvement to real property….
>
> …
>
> **(4)** This section does not apply to any of the following:
>
> (a) A person who commits fraud, concealment or misrepresentation related to a deficiency or defect in the improvement to real property.

¶13 The primary goal of statutory interpretation is "to ascertain and give effect to the intent of the legislature," and that inquiry begins with the language of the statute. ***Lake City Corp. v. City of Mequon***, 207 Wis. 2d 155, 162, 558 N.W.2d 100 (1997). We first determine whether the meaning of the statute is plain, and in doing so examine the text of the statute as well as the context in which the words are used. *See* ***Brunton v. Nuvell Credit Corp.***, 2010 WI 50, ¶16, 325 Wis. 2d 135, 785 N.W.2d 302. "In construing a statute, we favor a construction that fulfills the purpose of the statute over one that undermines the purpose." *See* ***id.***, ¶17. Statutory interpretation is a question of law that we review *de novo*. *See* ***Crisanto v. Heritage Relocation Servs., Inc.***, 2014 WI App 75, ¶13, 355 Wis. 2d 403, 851 N.W.2d 771.

¶14 The purpose of statutes of repose in general is "'to protect both plaintiffs and defendants from litigating claims in which the truth may be obfuscated by death or disappearance of key witnesses, loss of evidence, and faded memories.'" ***Landis v. Physicians Ins. Co. of Wis., Inc.***, 2001 WI 86, ¶52, 245 Wis. 2d 1, 628 N.W.2d 893 (citation omitted). One of the purposes of WIS. STAT. § 893.89 in particular is "to protect contractors who are involved in the permanent improvements to real property." ***Peter v. Sprinkmann Sons Corp.***, 2015 WI App 17, ¶23, 360 Wis. 2d 411, 860 N.W.2d 308. We have previously concluded that "[t]he legislature enacts a statute of repose to cut off 'a right of action regardless of the time of accrual' because it has expressly decided 'not to recognize rights after the conclusion of the repose period.'" *See* ***id.***, ¶17 (citation omitted). Again, the Mirons do not dispute that the requirements that trigger § 893.89 were met and that the only way they can prevail is if one or more of the exceptions in § 893.89(4)(a)—misrepresentation, concealment, or fraud—apply. We examine each exception in turn.

A. Misrepresentation

¶15 The Mirons argue that there were two instances that constituted actionable misrepresentations and invoked the misrepresentation exception in WIS. STAT. § 893.89(4)(a). The first instance of alleged misrepresentation arises from MNI's initial proposal to perform work at the Target store, wherein MNI "promised to complete its work in a workmanlike manner and failed to do so." We disagree.

¶16 Claims for misrepresentation require a representation of fact that is untrue. ***Hennig v. Ahearn***, 230 Wis. 2d 149, 164, 601 N.W.2d 14 (Ct. App. 1999). Representations speak only to then-existing facts. ***Wausau Med. Ctr., S.C.***

v. Asplund, 182 Wis. 2d 274, 291, 514 N.W.2d 34 (Ct. App. 1994). '"[P]romises or representations of things to be done in the future are not statements of fact. Statements of fact must relate to present or preexisting facts, not something to occur in the future."' ***Id.*** (citation omitted). We conclude, therefore, that MNI's promise to perform the fixture installation in a workmanlike manner and its alleged failure to do so is not an actionable misrepresentation that could invoke the exception in WIS. STAT. § 893.89(4)(a).

¶17 The second instance of alleged misrepresentation occurred when MNI submitted its invoice for payment, at which point the Mirons argue that MNI generally and impliedly affirmed that all of its work was completed satisfactorily. We disagree.

¶18 "There are three types of misrepresentation: strict liability for misrepresentation, negligent misrepresentation, and intentional misrepresentation." ***Ramsden v. Farm Services of N. Cent. Wis. ACA***, 223 Wis. 2d 704, 713, 590 N.W.2d 1 (Ct. App. 1998). Intentional misrepresentation is synonymous with fraud. ***Doe v. Archdiocese of Milwaukee***, 2005 WI 123, ¶21 n.4, 284 Wis. 2d 307, 700 N.W.2d 180. Therefore, misrepresentation, as used in WIS. STAT. § 893.89(4)(a), refers to either negligent misrepresentation or strict liability for misrepresentation. *See* ***Brunton***, 325 Wis. 2d 135, ¶16 (to determine whether the meaning of the statute is plain we examine the text of the statute as well as the context in which the words are used).

¶19 "The elements of negligent misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant was negligent in making the representation; and (4) the plaintiff believed that the representation was true and relied on it." ***Malzewski v. Rapkin***, 2006 WI App

183, ¶20, 296 Wis. 2d 98, 723 N.W.2d 156. The Mirons satisfy the first element of negligent misrepresentation—the alleged representation of fact in this instance occurred when MNI submitted its invoice for payment, impliedly affirming that all of its work was satisfactorily completed. As to the second element of negligent misrepresentation, however, the Mirons' argument fails.

¶20 The Mirons rely on the deposition testimony of Paul Fogarty and an affidavit of Scott Schneider to support their negligent misrepresentation claim. Fogarty, a project manager for MNI, testified generally that for a vertical cleat to be properly installed, it has to be screwed into wood behind the drywall, not merely into drywall or sheetrock. Fogarty, however, never saw the fixture wall in question. Additionally, Schneider stated in an affidavit that he was an employee of H.J. Martin, he supervised the demolition of the Target store, he was present when the fixture wall in question fell on Miron, and he inspected the fixture wall and its cleat after it fell on Miron. Schneider stated that the cleat "had only been screwed into the drywall and not into wood backing as is required."

¶21 This evidence, while indicative of the condition of the fixture wall and its vertical cleat on or about June 28, 2011, does not address its condition at the time MNI submitted its invoice for payment in July of 2000. The Mirons make no showing that, at the time MNI submitted its invoice, the fixture wall was not properly installed. Our independent review of the record reveals no such evidence. Without some evidence from which one could reasonably infer that the fixture wall was not properly installed at the time MNI submitted its invoice, the Mirons' negligent misrepresentation claim fails. *See* ***Zielinski***, 263 Wis. 2d 294, ¶16 (speculation or conjecture is not enough to create a genuine issue of material fact). Because we find that the Mirons failed to satisfy the second element of negligent misrepresentation, we need not address the remaining elements. *See*

Miesen v. DOT, 226 Wis. 2d 298, 309, 594 N.W.2d 821 (Ct. App. 1999) (we decide cases on the narrowest grounds possible). Accordingly, we conclude that MNI did not negligently misrepresent their work regarding the fixture installation when it submitted its invoice for payment.

¶22 We now address the issue of strict liability misrepresentation. The elements of strict liability misrepresentation are:

> (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant made the representation based on his or her personal knowledge, or was so situated that he or she necessarily ought to have known the truth or untruth of the statement; (4) the defendant had an economic interest in the transaction; and (5) the plaintiff believed that the representation was true and relied on it.

Malzewski, 296 Wis. 2d 98, ¶19. As with negligent misrepresentation, the Mirons fail to point to any evidence in the record that shows MNI knew or should have known that the fixture wall was improperly installed at the time it submitted its invoice for payment to DHC.

¶23 Furthermore, a major flaw with the Mirons' argument is that there is an implied covenant in every construction contract that the work will be performed in a workmanlike manner. *See, e.g.* ***Milwaukee Cold Storage v. York Corp.***, 3 Wis. 2d 13, 25, 87 N.W.2d 505 (1958). "[A]ccompanying every contract there is a common law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done." ***Id.*** If the misrepresentation exception in WIS. STAT. § 893.89(4)(a) was interpreted to apply whenever a contractor affirms that its work was completed properly by invoicing the purchaser for payment, a contractor would never be afforded the protections of the statute of repose. The purpose of § 893.89 is "to protect contractors who are involved in

permanent improvements to real property." ***Peter***, 360 Wis. 2d 411, ¶23. To follow the Mirons' interpretation, therefore, would eviscerate the intent of the statute of repose and lead to absurd results. *See* ***Brunton***, 325 Wis. 2d 135, ¶¶16-17. We conclude, therefore, that there is insufficient evidence to support the Mirons' claim that the misrepresentation exception of § 893.89(4)(a) applies.

B. Concealment

¶24 "[A] finding of concealment requires evidence that a defendant took affirmative steps to hide the violation itself." ***Laskin v. Siegel***, 728 F.3d 731, 735 (7th Cir. 2013). Where the plaintiff "failed to put forth evidence from which a reasonable fact finder could conclude that defendants…took affirmative steps to conceal," summary judgment is appropriate. ***Johnson v. Meriter Health Servs. Emp. Ret. Plan***, 29 F. Supp. 3d 1175, 1204 (W.D. Wis. 2014). The Mirons argue that because a reasonably careful installer should have noticed that the cleat was being affixed to drywall and not wood, the particular installer actually knew and actively concealed that alleged defect when he completed installation of the fixture wall. We disagree.

¶25 Even viewing the evidence in the light most favorable to them, the Mirons' concealment claim is not supported by the evidence. The only conclusion possibly supported by the evidence is that MNI installed the wall that fell on Miron and this installation was done negligently. Negligence alone does not constitute an exception to the statute of repose. To prevail on their argument that MNI concealed the defect in the fixture wall, the Mirons would have to provide evidence showing that someone for whom MNI was responsible "took affirmative steps to hide" the negligent installment of the fixture wall. *See* ***Laskin***, 728 F.3d at 735. Our independent review of the record reveals no such evidence. We

conclude, therefore, that there is insufficient evidence to support the Mirons' claim that the concealment exception of WIS. STAT § 893.89(4)(a) applies.

C. Fraud

¶26 Generally, fraud is synonymous with intentional misrepresentation. ***Doe***, 284 Wis. 2d 307, ¶21 n.4. To prove fraud by intentional misrepresentation, the plaintiff must show that:

> (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant knew the representation was untrue or made it recklessly; (4) the representation was made with *intent to deceive* and induce the plaintiff to act upon it to the plaintiff's pecuniary damage; and (5) the plaintiff believed the representation to be true and relied on it.

Tietsworth v. Harley-Davidson, Inc., 2004 WI 32, ¶70 n.38, 270 Wis. 2d 146, 677 N.W.2d 233. (emphasis added).

¶27 We agree with the circuit court that the Mirons failed to put forth any evidence showing that MNI intended to deceive DHC regarding the installation of the fixture wall. *See* ***id.*** As discussed above in Sections I-A and I-B regarding misrepresentation and concealment, respectively, if the Mirons cannot prove that an actionable representation occurred, and if they cannot prove intent to deceive or conceal, then they cannot prove fraud. *See* ***id.***; *see also* ***Doe***, 284 Wis. 2d 307, ¶49 ("As a general rule, a 'misrepresentation' is required to support a claim of fraud."). We conclude, therefore, that there is insufficient evidence to support the Mirons' claim that the fraud exception of WIS. STAT § 893.89(4)(a) applies.

¶28 In summary, we find that there is no genuine issue of material fact as to whether the Mirons' action is barred by WIS. STAT. § 893.89. Accordingly, we conclude that summary judgment was properly granted by the circuit court.

¶29 MNI also argues that there is insufficient evidence as a matter of law to support a reasonable conclusion that MNI caused the alleged defect. Because we conclude that the Mirons' claims are barred by WIS. STAT. § 893.89, we need not reach this argument. *See* ***Miesen***, 226 Wis. 2d at 309 (we decide cases on the narrowest grounds possible).

¶30 For the foregoing reasons, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.