

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 18, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP3361

Cir. Ct. No. 2003CV201

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**BRET L. MAY, TINA L. MAY, INDIVIDUALLY AND AS PARENTS AND
NATURAL GUARDIANS OF MIKAYLA MAY, A MINOR, AND BAILEY MAY,
A MINOR,**

PLAINTIFFS-APPELLANTS,

**PREFERRED ONE HEALTH BENEFITS ADMINISTRATION, INC., A
MINNESOTA NON-PROFIT CORPORATION LICENSED TO CONDUCT
BUSINESS IN WISCONSIN,**

PLAINTIFF,

V.

**TIMOTHY A. BONNGARD, REX A. MAUGHAN AND ALLIED INSURANCE
COMPANY, AN OUT-OF-STATE CORPORATION CONDUCTING BUSINESS IN
THE STATE OF WISCONSIN,**

DEFENDANTS-RESPONDENTS,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

INTERVENOR-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Burnett County: MICHAEL J. GABLEMAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Bret and Tina May, individually and on behalf of their children, Mikayla and Bailey, appeal a summary judgment granted in favor of Timothy Bonngard, Rex Maughan and Allied Insurance Company. The Mays additionally appeal the order denying a motion for leave to amend their amended complaint. The Mays argue the circuit court erred by (1) ruling that the amended complaint did not allege facts sufficient to support a breach of contract/warranty claim; and (2) denying the Mays’ motion for leave to amend the amended complaint. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 In September 2003, the Mays filed suit against Bonngard, Maughan, and Big Rivers Insurance Agencies. Under a heading entitled “General Allegations,” the Mays recounted that beginning in 2000, Bonngard and Maughan designed and began construction on a single-family residence in Grantsburg. In September 2001, the Mays entered into a purchase agreement for the residence, allegedly relying on Bonngard and Maughan’s representations that they employed the necessary skill, expertise, personnel, and experience to construct the residence “in a workmanlike fashion, and in accordance with applicable building laws, codes, ordinances, and regulations.” The Mays claimed that construction defects, noncompliance with applicable building standards, and other deficiencies caused water infiltration and subsequently, mold growth in the new residence. The Mays claimed that the resultant mold seriously damaged both the structural integrity of the residence as well as the family’s physical and mental health. The Mays’

complaint listed three causes of action: (1) breach of statutory warranty; (2) negligent design and construction; and (3) “consumer protection/deceptive trade practices” in violation of the Wisconsin Consumer Act. In October 2003, the Mays amended their complaint to correctly identify Allied Insurance Company as the defendants’ insurer.

¶3 Bonngard and Maughan filed motions for summary judgment, arguing that the Mays’ claims of breach of statutory warranty and “consumer protection/deceptive trade practices” did not state valid causes of action under Wisconsin law. With respect to the Mays’ tort claims of negligent design and construction, Bonngard and Maughan argued the tort claims were barred by the economic loss doctrine and not otherwise salvageable under any of the exceptions to the doctrine.

¶4 In August 2004, the Mays filed a motion for leave to amend their amended complaint to add a cause of action for breach of contract/warranty and remove their breach of statutory warranty and deceptive trade practices claims. At a hearing on Bonngard’s and Maughan’s summary judgment motions, the Mays stipulated to dismissal of the breach of statutory warranty and deceptive trade practices claims, but challenged Bonngard’s and Maughan’s arguments regarding their negligence claim. The circuit court ultimately granted summary judgment in favor of Bonngard and Maughan.

¶5 At a subsequent motion hearing, counsel for the Mays acknowledged that the distinct causes of action in the amended complaint did not include a breach of contract claim. Counsel nevertheless argued that the amended complaint alleged sufficient facts to sustain a cause of action for breach of contract. The circuit court disagreed. Alternatively, the Mays moved for leave to amend their

amended complaint on grounds of excusable neglect. The circuit court denied the motion, and this appeal follows.

ANALYSIS

¶6 This court reviews summary judgment decisions independently, applying the same standards as the trial court. *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶7 On appeal, the Mays argue the circuit court erred by ruling that the amended complaint did not allege facts sufficient to support a breach of contract/warranty claim. We are not persuaded. As Bonngard and Maughan acknowledge, Wisconsin's rules of pleading and practice "are to be liberally construed to secure a just, speedy and inexpensive determination of every action." *Welzien v. Kapec*, 98 Wis. 2d 660, 661, 298 N.W.2d 98 (Ct. App. 1980). However, a party cannot rely on the liberal construction of pleadings to supply a missing or forgotten claim. *See Wilson v. Continental Ins. Co.*, 87 Wis. 2d 310, 319, 274 N.W.2d 679 (1979).

¶8 Although the "General Allegations" section of the Mays' amended complaint discussed a "purchase agreement" between the parties, the Mays sought relief only under the theories of negligence, breach of statutory warranty and violations of the Wisconsin Consumer Act. A review of the amended complaint in conjunction with these delineated causes of action would not put an opposing party on notice that the Mays were pursuing a breach of contract cause of action. Moreover, counsel for the Mays admitted it was an "oversight" not to plead breach

of contract. Therefore, the circuit court properly refused to construe the amended complaint to include the “missing or forgotten” breach of contract claim. *See id.*

¶9 Alternatively, the Mays argue the circuit court erroneously exercised its discretion by denying their motion for leave to amend the amended complaint. Although amendments to pleadings are governed by WIS. STAT. § 802.09(1) (2003-04),¹ a circuit court’s decision whether to permit an amendment to a complaint more than six months after it has been filed is within the discretion of the circuit court. *Employees Local 1901 v. Brown County*, 146 Wis. 2d 728, 737, 432 N.W.2d 571 (1988). A circuit court properly exercises its discretion when it considers the relevant facts, applies the correct law, and articulates a reasonable basis for its decision. *Krebs v. Krebs*, 148 Wis. 2d 51, 55, 435 N.W.2d 240 (1989). Therefore, this court will affirm a discretionary decision by a circuit court as long as the court reasonably exercised its discretion. *State v. Davis*, 2001 WI 136, ¶28, 248 Wis. 2d 986, 637 N.W.2d 62.

¶10 Refusal to allow an amendment would be an erroneous exercise of the court’s discretion when (1) “justice requires an amendment of the pleadings; or (2) ... it appears that an omission is material, and that such omission or failure is through mistake, inadvertence, surprise, or excusable neglect.” *Wiegel v. Sentry Indem. Co.*, 94 Wis. 2d 172, 184-85, 287 N.W.2d 796 (1980). Here, the Mays

¹ WISCONSIN STAT. § 802.09(1) provides, in relevant part:

A party may amend the party’s pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires.

argue their failure to articulate a breach of contract/warranty cause of action in the amended complaint was the product of excusable neglect. At the hearing on their motion to amend the amended complaint, counsel for the Mays stated:

As this case came to our office, I think it was used primarily as a tort case or injury; and obviously, the Court having granted summary judgment on that issue already, I think it's not going to be a surprise to say that that claim did not shape up the way we anticipated it would.

Obviously, sitting here today, I do wish that we had considered a contract claim from the get go or at least a complaint specifically labeled breach of contract.

As noted above, counsel also conceded that the failure to include a claim for breach of contract in the amended complaint was an "oversight."

¶11 In denying the motion to amend the amended complaint, the circuit court considered the interest of justice, as well as the Mays' excusable neglect argument. The court, noting that the law prefers to afford litigants a day in court and a trial on the issues, acknowledged that the denial of the Mays' motion would foreclose their breach of contract claim. The court also recognized, however, "society's interest in prompt adjudication and the probability that a policy which excused or tolerated a lawyer's neglect would foster delay in litigation and lower the quality of legal representation." Ultimately, the court concluded the interest of justice did not require an amendment and counsel's "oversight" was not tantamount to excusable neglect. Because the court properly exercised its discretion, we affirm the order denying the Mays' motion for leave to amend their amended complaint.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

