

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2011AP1047

Cir. Ct. No. 2006CV2057

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**C&M HARDWARE, LLC, MICHAEL KOLTZ, WENDY KOLTZ,
CORNELIUS ROEMAAT AND LYNN ROEMAAT,**

PLAINTIFFS-APPELLANTS,

v.

TRUE VALUE COMPANY,

DEFENDANT-RESPONDENT,

PATRICIA NEUMANN,

DEFENDANT.

APPEAL from an order of the circuit court for Brown County:
MARK A. WARPINSKI, Judge. *Affirmed in part; reversed in part and cause
remanded for further proceedings.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 SHERMAN, J. C&M Hardware, LLC, Michael Koltz, Wendy Koltz, Cornelius Roemaat, and Lynn Roemaat (collectively, C&M) appeal an order of the circuit court dismissing on summary judgment their claims against True Value Company for strict responsibility misrepresentation, negligent misrepresentation, and negligence.¹ For the reasons set forth in the following paragraphs, we affirm the circuit court in part and reverse in part.

BACKGROUND

¶2 This case concerns events surrounding the purchase of a True Value franchise hardware store, which was owned and operated by C&M in Green Bay, Wisconsin. C&M entered into a “Retail Member Agreement,” wherein C&M purchased a True Value franchise from True Value. C&M operated its True Value franchise from July 2004 until December 2005, when the store was closed for financial reasons.

¶3 C&M brought suit against True Value in October 2006, alleging among other claims, strict responsibility misrepresentation, negligent misrepresentation, and negligence.² In its two misrepresentation claims C&M alleged that True Value, through its agent Patricia Neumann, made certain representations to induce C&M to become a True Value franchisee; that those

¹ C&M’s notice of appeal states that C&M appeals a judgment entered April 21, 2011. The circuit court entered its *decision* on True Value’s motion for summary judgment on April 21, and subsequently entered an *order* dismissing C&M’s claims against True Value on May 5, 2011, which incorporated its April 21 decision. We construe C&M’s appeal as being from the May 5 order.

² C&M originally asserted ten claims against True Value. However, through various events not relevant to this appeal, all of C&M’s claims against True Value were dismissed except their claims for strict responsibility misrepresentation, negligent misrepresentation and negligence.

representations were false; and that C&M relied upon those representations, along with the specific allegations necessary to show strict responsibility and negligent misrepresentation, respectively. The basis of C&M's negligence claim is discussed in the section on the dismissal of that claim, below.

¶4 The circuit court granted True Value's summary judgment motion, dismissing all remaining claims. The court determined that the misrepresentation claims could not succeed based upon the following exculpatory provision in the Retail Member Agreement:

[True Value] has not represented to [C&M] that a "minimum," "guaranteed," or "certain" income can be expected or realized. Success depends, in part, on [C&M] devoting dedicated personal efforts to the business and exercising good business judgment in dealings with customers, suppliers, and employees. [C&M] also acknowledges that neither [True Value] nor any of its employees or agents has represented that [C&M] can expect to attain any specific sales, profits, or earnings. If [True Value] has provided estimates to [C&M], such estimates are for informational purposes only and do not represent any guarantee of performance by [True Value] to [C&M]. [TRUE VALUE] MAKES NO REPRESENTATIONS OR WARRANTIES EITHER EXPRESS OR IMPLIED REGARDING THE PERFORMANCE OF [C&M'S] BUSINESS.

The court determined that this provision put C&M on notice that anything that may have been said about how the business was to perform could not create representations or warranties about how the business would perform.

¶5 The circuit court also dismissed C&M's negligence claim. The court stated that in Wisconsin, to prove negligence based upon the performance of a contract, a plaintiff must show that there is an independent duty to perform the contract. The court determined that C&M had not offered any evidence that there

was an independent duty to perform the contract that was breached. An order dismissing C&M's claims was subsequently entered by the court. C&M appeals.

DISCUSSION

¶6 C&M challenges the circuit court's dismissal of its misrepresentation claims and negligence claim on summary judgment.

¶7 We review a circuit court's grant of summary judgment de novo, applying the same standards that the circuit court applied. *Deminsky v. Arlington Plastics Mach.*, 2003 WI 15, ¶15, 259 Wis. 2d 587, 657 N.W.2d 411. We will not repeat the methodology in detail, except to note that summary judgment is appropriate where no material facts remain in dispute and a court can determine that one party is entitled to judgment as a matter of law. *Id.* We review issues of law de novo, without deference to the circuit court. *Id.* Interpretation of a contract is an issue of law, which we review de novo. *Id.*

A. *Strict Responsibility and Negligence Misrepresentation Claims*

¶8 C&M contends that the circuit court erred in determining that its misrepresentation claims could not succeed in light of the exculpatory contract provision in the Retail Member Agreement, quoted above in ¶4. C&M argues that the exculpatory contract provisions are contrary to public policy, and are thus void and unenforceable. We agree.

¶9 The Retail Member Agreement included two exculpatory contract provisions. The first we quote above in ¶4. The second exculpatory contract provision is located on the agreement's final page of text and is what is commonly referred to as an integration clause. It provides:

This Agreement, and any other agreement which [C&M] signs with [True Value], is the entire and complete Agreement between [C&M] and [True Value] and there are no prior agreements, representations, promises, or commitments, oral or written, which are not specifically contained in this Agreement or any other agreement which [C&M] signs with [True Value]. The current form of the Company Member Agreement shall govern all past and present relations, actions or claims arising between [True Value] and [C&M].

¶10 An exculpatory contract provision seeks to release a party from liability from his or her negligence or other wrongful act. *Merten v. Nathan*, 108 Wis. 2d 205, 210, 321 N.W.2d 173 (1982). Exculpatory contract provisions are not favored by the law, but they are not automatically void and unenforceable. *Yauger v. Skiing Enters., Inc.*, 206 Wis. 2d 76, 81, 557 N.W.2d 60 (1996). “[A] court closely examines whether such agreements violate public policy and construes them strictly against the party seeking to rely on them.” *Id.*

¶11 In *Grube v. Daun*, 173 Wis. 2d 30, 60, 496 N.W.2d 106 (Ct. App. 1992), we explained that our analysis of exculpatory contract provisions is based on “careful balancing of the principles of contract and tort law.” Thus, while contract principles generally support the enforcement of these provisions, tort law principles of just compensation for harm caused by the “unreasonable conduct of another” and the prevention of future harm militate against enforcement. *Id.*

¶12 Wisconsin courts have examined various factors in ruling on the validity of particular exculpatory contracts in a number of cases. There is no need to review all of this case law here because we conclude that the exculpatory contract provisions in this case are void because the provisions: (1) failed to clearly, unambiguously, and unmistakably explain to C&M that they were accepting the risk of True Value’s negligence; and (2) the form, looked at in its entirety, failed to alert the signer to the nature and significance of the document

being signed. *See Yauger*, 206 Wis. 2d at 81-84 (declining to reiterate the basic principles of exculpatory contracts because they had recently been “thoroughly reviewed” and holding an exculpatory contract void because it failed to explain that signer was accepting the risk of negligence and failed to alert the signer as to the significance of the document).

¶13 In *Yauger*, the Wisconsin Supreme Court invalidated a liability waiver that a ski hill operator asserted shielded it from liability in the death of an eleven-year-old girl because the document: (1) failed to clearly, unambiguously, and unmistakably explain to the signer that he or she was accepting the risk of the ski hill’s negligence; and (2) the form looked at in its entirety failed to alert the signer to the nature and significance of the document being signed. *Id.* at 84.

1. Exculpatory contract provisions must be specific as to the tort being disclaimed

¶14 In *Yauger*, the supreme court concluded that an exculpatory contract provision was void because the provision failed to specify the specific tort the provision sought to disclaim. The exculpatory provision at issue in *Yauger* was included in an application for a ski pass and provided as follows:

In support of this application for membership, I agree that:

1. There are certain inherent risks in skiing and that we agree to hold Hidden Valley Ski Area/Skiing Enterprises Inc. harmless on account of any injury incurred by me or my Family member on the Hidden Valley Ski Area premises.

Id. at 79. The supreme court held that this exculpatory language was void because it failed to “clearly, unambiguously and unmistakably” inform Yauger that he was relieving the ski hill of all liability for its negligence. *Id.* at 84. The court stated that “nowhere in the form does the word ‘negligence’ appear,” and concluded that the phrase “inherent risks in skiing” was ambiguous. *Id.* at 84-85. The court then

applied the “well established principle that exculpatory contracts are construed strictly against the party seeking to rely on them” and held that the waiver was void as against public policy “because it failed to clearly, unambiguously, and unmistakably inform Michael Yauger of the rights he was waiving.” *Id.* at 86.

¶15 The two exculpatory contract provisions in the Retail Member Agreement are similarly uninformative. In Wisconsin, exculpatory contract provisions may not be used to escape liability for misrepresentation unless the disclaimer is specific as to the tort the disclaimer wishes to disclaim. *Grube*, 173 Wis. 2d at 59-60. Neither of the exculpatory contract provisions at issue here gave any indication that True Value was requiring C&M to waive their right to tort claims in general, nor misrepresentation in particular.

¶16 The first provision, which we have quoted above in ¶4, provides, after explaining that True Value has not represented that C&M will realize a “‘minimum,’ ‘guaranteed,’ or ‘certain’ income”:

Success depends, in part, on [C&M] devoting dedicated personal efforts to the business and exercising good business judgment in dealings with customers, suppliers, and employees.

The provision then disavows “guarantee of performance by [True Value]” and asserts that True Value makes “NO REPRESENTATIONS OR WARRANTIES EITHER EXPRESS OR IMPLIED REGARDING THE PERFORMANCE OF [C&M’S] BUSINESS.”

¶17 Nothing in the language of this provision gives any notice or explanation to C&M that it is a waiver of True Value’s liability for misrepresentation. To the contrary, the provision concerns warranty, a contract matter, and not tort liability at all. As in *Yauger*, the “[s]uccess depends”

language of the provision at issue here is vague and ambiguous. Strictly construing this language against True Value, as we must, we conclude that this clause does not validly waive True Value's liability for misrepresentation.

¶18 The second provision, which we have quoted above in ¶9, is likewise invalid. It too fails to explain that it operates as a waiver of tort liability. Like the first provision, the first sentence of this second provision makes no mention of misrepresentation or tort liability:

This Agreement, and any other agreement which [C&M] signs with [True Value], is the entire and complete Agreement between [C&M] and [True Value] and there are no prior agreements, representations, promises or commitments, oral or written, which are not specifically contained in this Agreement or any other agreement which [C&M] signs with [True Value].

This is a typical integration clause, providing that all discussions prior to entering into the written agreement are negotiations and the written agreement is the result of those negotiations and thus expresses everything that the parties agreed to. According to this provision, by entering into the Retail Member Agreement, C&M agrees that the contract means only what it says and that all prior negotiations are irrelevant. This is very similar in effect to an "as is" clause in a purchase agreement for real or personal property. *See, e.g., Grube*, 173 Wis. 2d at 47.

¶19 The first sentence of the second provision makes no mention of disclaiming liability let alone specifying any specific tort. However, the second and final sentence provides: "The current form of the Company Member Agreement shall govern all past and present relations, actions or claims arising between [True Value] and [C&M]." In stating that the Retail Member Agreement "shall govern all ... claims," the provision not only fails to specify any specific tort or torts as being disclaimed, it also fails to make clear that it disclaims tort claims

at all. As with the first provision here, the second provision does not put C&M on notice that the provision required them to waive True Value's liability for misrepresentation. *See Yauger*, 206 Wis. 2d at 84-85.

¶20 True Value relies upon our holding in *Peterson v. Cornerstone Prop. Dev., LLC*, 2006 WI App 132, ¶37, 294 Wis. 2d 800, 720 N.W.2d 716. True Value claims that in *Peterson*, we found similar integration provisions sufficient to waive liability for misrepresentation. Its reliance is misplaced. *Peterson* involved a contract for the purchase of a condominium, which the plaintiff claimed was not in the condition represented by the seller. *Id.*, ¶9. In *Peterson*, we gave particular emphasis to the fact that in one of the integration clauses, the buyer specifically agreed that “she has not relied on any representations made by the Seller,” and the fact that the plaintiff failed to specify which particular representations made by the seller were relied upon by the buyer. *Id.*, ¶¶37, 39 (emphasis omitted). In the present case, however, the integration clause signed by C&M did not disclaim reliance upon True Value's representations. Unlike the plaintiff in *Peterson*, C&M did not disclaim liability for misrepresentation and was quite specific as to which representation formed the basis of its claims and thus the case is distinguished.

2. Exculpatory contract provisions must be sufficiently conspicuous to give notice to the signer of their nature and significance

¶21 A separate problem with True Value's argument is that the provisions at issue were not sufficiently conspicuous. In *Yauger*, the supreme court also concluded that the exculpatory contract provision at issue was unenforceable because the provision failed to give the signer adequate notice of the waiver's nature and significance. *Yauger*, 206 Wis. 2d at 84-88. In its analysis of the conspicuousness of the waiver at issue in *Yauger*, the supreme

court noted that the form had multiple purposes, being the application for a seasonal ski pass, as well as the waiver itself, and that the paragraph containing the waiver was but one paragraph in a form containing five separate paragraphs. *Id.* at 87. According to the supreme court, the waiver did not stand out from the rest of the form in any manner and did not require a separate signature. *Id.*

¶22 As in *Yauger*, the two exculpatory contract provisions in the Retail Member Agreement were not sufficiently conspicuous to provide C&M with adequate notice of the provisions' nature and significance. Both provisions are contained in a six-page contract that contains thirty-five separate numbered provisions, the principle purpose of which is to establish a franchise relationship between C&M and True Value. The title of the contract document, "Retail Member Agreement with Truserv Corporation[:] A Cooperative of Independent Retailers," gives no indication of the existence of the exculpatory contract provisions within.

¶23 Within the contract, the provisions do not stand out. They are not placed together, nor are they placed in a particularly conspicuous location. The first provision is on page four and the second provision is on page six. Neither of the provisions is on either the first or last page of the agreement, nor surrounded by an attention-grabbing box, nor emphasized by a heading. Both provisions are in the same relatively small typeface as the balance of the contract terms and, although the last sentence in the first provision is in capital letters, it is neither a title nor a warning to C&M.

¶24 In short, nothing about the placement or presentation of the two exculpatory contract provisions at issue here would draw attention to them. They are simply two provisions among thirty-five paragraphs of often opaque legalese.

They are not sufficiently conspicuous to give notice to the signer of their nature and significance.

¶25 The provisions before us, therefore, fail in both of the same respects as the form before the supreme court in *Yauger*. Accordingly, we conclude that the provisions are void and unenforceable as against public policy, and we reverse the circuit court's order of summary judgment with respect to C&M's misrepresentation claims.

B. Negligence

¶26 C&M contends the circuit court erred in entering summary judgment in favor of True Value on its negligence claim. The court concluded that C&M had not established that True Value had a duty independent of the Retail Member Agreement toward C&M that True Value violated. The circuit court determined that such a showing was necessary because, according to *Autumn Grove Joint Venture v. Rachlin*, 138 Wis. 2d 273, 281 n.6, 405 N.W.2d 759 (Ct. App. 1987), "Wisconsin has not recognized a cause of action for tortious breach of contract."

¶27 C&M argues that an independent duty of care is based upon allegations of false representations made by a representative of True Value, Patricia Neumann, during their negotiations, which she knew or should have known were false, in order to induce C&M to purchase the True Value franchise, and that True Value had a duty not to provide misinformation. However, C&M only alleged in their complaint that their negligence claim involves "the provision of goods, services, and advice regarding inventory, competition, marketing, store operations, and advertising, among others (the 'Services and Advice')." Any ambiguity about what particular "Services and Advice" this refers to is clarified by the claim's cross-reference to ¶¶26 and 27 of the complaint, which read:

26. Throughout July[] 2004 through December[] 2005, C&M informed Neumann that it would rely on Neumann's advice for advertising, inventory purchases, and pricing information and, in fact, did so. Neumann responded that C&M should trust her and True Value's advice, adhere to that advice and that by doing so, would "make it work."

27. The advice Neumann provided included, but is not limited to, what inventory to buy and when, at what prices to buy the inventory, when to advertise, how to advertise, when to have sales and what to discount, how to set up the store and how to operate the store.

Because the Retail Member Agreement was signed by C&M in May 2004, the allegations of the complaint regarding negligence between July 2004 and December 2005 clearly concern operations during the period that the contract was in effect and not representations made prior to entering into the contract intended to induce C&M to enter into the contract.

¶28 The record before us does not contain an amended complaint. Nor has C&M asserted that the complaint was amended to conform to the evidence, as provided in WIS. STAT. § 802.09(2) (2011-12).³ Therefore, even under the liberal notice pleading standards, the only allegations and reasonable inferences before the circuit court at the time of summary judgment did not include the argument now advanced on appeal.

³ WISCONSIN STAT. § 802.09(2) (2011-12) reads:

AMENDMENTS TO CONFORM TO THE EVIDENCE. If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the

(continued)

CONCLUSION

¶29 For the reasons discussed above, we reverse that portion of the circuit court's order dismissing C&M's misrepresentation claims and affirm that portion of the circuit court's order dismissing C&M's negligence claim and remand for further proceedings.

By the Court.—Order affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.

pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

