

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BENJAMIN H. GANNETT and)
BOOMER ENTERPRISES, LLC,)

Plaintiffs,)

v.)

Civil No. 03-CV-228-B-W

MALCOLM L. PETTEGROW and)
MALCOLM L. PETTEGROW, INC.,)

Defendants)

**RECOMMENDED DECISION
ON MOTION FOR SUMMARY JUDGMENT AND
ORDERS ON MOTION TO AMEND SECOND AMENDED COMPLAINT
AND MOTION TO AMEND SCHEDULING ORDER**

This dispute arises from the construction and sale of the sixty-five foot, four million dollar yacht/fishing boat, M/Y Boomer. Benjamin Gannett, the boat's purchaser, and Boomer Enterprises, LLC, its current owner, have filed suit against Malcolm Pettegrow and his corporation, Malcolm L. Pettegrow, Inc., which contracted to build the boat, alleging breach of contract, negligence, and violation of Maine's Unfair Trade Practices Act. The plaintiffs maintain that they have suffered in excess of \$350,000.00 in damages by virtue of repairs and lost earnings caused by the defective construction of the vessel. The defendants have brought a counterclaim for \$100,000.00 that they claim is due and owing under the contract. The defendants moved for summary judgment against all of the claims set forth in the second amended complaint. (Docket No. 22.) In addition to filing papers in opposition to the motion for summary judgment, the plaintiffs also filed a motion to amend the second amended complaint to add an allegation of fraudulent and/or negligent misrepresentation. (Docket No.

26.) After receiving the defendants' response to their motion to amend, the plaintiffs then filed a motion to amend the scheduling order, seeking to reopen discovery to allow the defendants to conduct further discovery on the new allegations pertaining to fraudulent misrepresentation. (Docket No. 40.) I now **DENY** the motion to amend the second amended complaint and the motion to amend the scheduling order to reopen discovery. I also recommend that the court grant summary judgment against all claims except for the breach of contract claim.

Statement of Facts

Malcolm L. Pettegrow, Inc. (Pettegrow, Inc.), built a spec boat in the early 1990s (hereinafter referred to as "Boomer I"), which was eventually sold and delivered to the plaintiff, Benjamin Gannett. (Statement of Material Facts, Docket No. 23, ¶ 1.) After he took possession of Boomer I, Gannett decided that he would like to own a larger sport fishing boat, so he had conversations with Malcom Pettegrow about building a bigger, better Boomer (hereinafter "Boomer II"). (Opposing Statement of Additional Material Facts, Docket No. 27, ¶¶ 37-38.) After a course of discussions, many in informal circumstances (Gannett and Pettegrow had become fast friends), Gannett and Pettegrow agreed that Pettegrow would build a Boomer II for Gannett. (Id., ¶¶ 39-40, 42, 44-46.) During a deposition conducted in association with this litigation, Gannett was asked what he remembered about his conversations with Pettegrow from the time he conceived of building Boomer II until the date the boat building agreement was signed, and Gannett responded that they laid out what was needed for rooms in the new boat and what they hoped to do with the new boat, which resulted in the size of the new boat, but Gannett could not specifically remember the substance of the conversations or when they occurred. (Id., ¶ 38; Reply Statement of Material Facts, Docket No. 37, ¶ 38.)

When it came time to get drawings for the concept of Boomer II, Pettegrow received instruction from Gannett about the kinds of rooms he wished the boat to have ("state rooms and . . . salon and . . . that kind of stuff"), but otherwise relied on Pettegrow to draw up the plans. (Docket No. 27, ¶ 41; Docket No. 37, ¶ 41.) Pettegrow assured Gannett that he was capable of building the Boomer II. (Docket No. 27, ¶ 43.) The informality of the relationship between Gannett and Pettegrow is perhaps best evidenced by the fact that Pettegrow and Gannett both assert that they had not intended to execute a written contract for the construction of the multi-million dollar Boomer II, but did so only at the bank's behest. (Id., ¶ 48.)

On October 30, 1995, Benjamin H. Gannett entered into a boat building agreement with Pettegrow, Inc., for the sale of a "custom 65' yacht/fisherman."¹ (Docket No. 23, ¶ 2.) The written agreement for the construction of the vessel came from the defendants. (Docket No. 27, ¶ 49.) Malcolm Pettegrow signed the contract on behalf of Malcolm L. Pettegrow, Inc., in his capacity as the corporation's president. (Docket No. 23, ¶ 3.) Malcolm Pettegrow is not identified in the agreement as a contracting party and his name does not otherwise appear on the agreement. (Id., ¶ 4.) The agreement describes the "general scope of work" as follows: "The contractor [Pettegrow, Inc.] shall furnish labor and materials and perform all the work within and on the vessel as set forth in the Specifications labeled Exhibit A . . ." (Docket No. 27, ¶ 51.) Exhibit A was supposed to be a comprehensive set of specifications for building the Boomer II, but Exhibit A was never actually attached to the contract. The only set of written specifications that were ever produced pertained to a boat that was never built, because Gannett changed his mind about the boat he wanted to have built and no new specifications were ever attached as Exhibit A. (Id., ¶¶ 50, 52.) One consequence of this development was that no detailed drawings

¹ The agreement can be found on the electronic docket at entry 23, electronic attachment 3 (at the end of the Affidavit of Malcolm Pettegrow).

or specifications were ever developed for the construction of the Boomer II's hull in the area of the chine. (Id., ¶ 53.)

At his deposition, Gannett testified that he entered into the boat building agreement because he believed Pettegrow would be individually involved in virtually all aspects of the project and would be present whenever anyone worked on it. (Docket No. 23, ¶ 23; Docket No. 27, ¶ 54.) Also, Pettegrow had represented to Gannett that he had the expertise to know whether things would work or would not work. (Docket No. 23, ¶ 29; Docket No. 27, ¶ 55.) However, there was no discussion in which Gannett told Pettegrow that he expected Pettegrow to be present a certain amount of time. (Docket No. 23, ¶ 22.) Gannett's expectation that Pettegrow would oversee all aspects of Boomer II's construction arose from his experience with respect to Pettegrow's involvement in building Boomer I. (Id., ¶ 24.) Gannett does not have any reason to believe that Pettegrow was not present for virtually all of the construction of Boomer II and has no basis for saying whether Pettegrow was less involved with the building of Boomer II than he was in building Boomer I. (Id., ¶¶ 25, 27.)

Gannett took possession of Boomer II in February 1999. (Docket No. 23, ¶ 5.) By that time, Gannett had paid over four million dollars to have it built. (Docket No. 27, ¶ 78.) The plaintiffs allege that from its maiden voyage, Boomer II suffered from significant vibration problems due to improper alignment between the engine and various drive components. (Docket No. 23, ¶¶ 7, 10.) The plaintiffs further allege that on October 11, 2002, Boomer II suffered damage arising from hidden structural defects in the vessel, specifically cracking in the hull along its chine caused by inadequate construction. (Id., ¶ 8.) It is undisputed that on that day, while traveling at 26 knots through two- to four-foot seas, the high water bilge alarms went off, indicating that water was collecting in the vessel. (Docket No. 27, ¶¶ 71-73.) The captain and a

crewmember went below and discovered a substantial amount of water in a bedroom chamber. (Id., ¶ 74.) They "ripped apart" enough of the inside of the vessel to expose the leak and stuffed rags into it to stop the leaking. (Id., ¶¶ 75-76.) After the Coast Guard arrived and supplied a pump and other assistance, the captain returned Boomer II to shore and had it hauled out of the water. (Id., ¶ 76.) Roughly \$3,500 of personal property owned by the captain and crewmember was destroyed by the water. These losses were paid for by Atlantic Mutual Insurance Company. (Id., ¶ 77.)

Michael Kaufman, a naval architect who inspected the vessel after this incident, discussed his inspection with Pettegrow. (Id., ¶ 66.) Kaufman indicated to Pettegrow that there were some open spaces in the area of the chine with newspaper in it. (Id., ¶ 67.) Pettegrow has photographs of the void that were sent to him by Kaufman. (Id., ¶ 68.) Although Pettegrow can attest to the way in which Boomer II's chine was constructed, he does not believe he is qualified to give an opinion on its construction. (Id., ¶¶ 56, 70; Docket No. 37, ¶¶ 56, 70.) Furthermore, Pettegrow admits that he does not have the expertise to render an opinion as to whether or not putting rudders in the offset position would cause hull vibrations, but asserts that he was aware that the Navy and the Coast Guard place rudders in an offset position. (Docket No. 27, ¶ 57; Docket No. 37, ¶ 57.)

Benjamin H. Gannett filed the initial complaint in this matter on December 31, 2003. (Id., ¶ 6; see also Docket No. 1.) The second amended complaint, filed May 5, 2004, added Boomer Enterprises, LLC, as a party plaintiff. (Docket No. 12.) In the second amended complaint the plaintiffs allege that the chine was constructed in a manner that reflects a "gross breach of good workmanlike standards." (Id., ¶ 9.) The second amended complaint recites a plea for "repair damages and loss of use of the vessel" in excess of \$350,000. (Id., ¶11). It does

not set forth any counts or map out the elements of any precise causes of action. Rather, its sets forth a contract claim and a negligence claim in the following manner:

11. As a result of the breach of contract by Defendant Pettegrow, Inc., Plaintiffs have suffered repair damages and loss of use of the vessel, resulting in damages which exceed \$350,000.

12. As a result of the negligent actions of Pettegrow, individually, in failing to hire, supervise, inspect, and consult to verify that Defendant Pettegrow, Inc. was performing and providing its contract that all work, labor and materials in a good and workmanlike manner, Plaintiffs suffered significant damages, including repair costs and loss of earnings which exceed \$350,000.

(Docket No. 12, ¶¶ 11-12.) In the summary judgment papers the plaintiffs indicate that they are asserting a claim against Malcolm L. Pettegrow, Inc., for breach of contract and warranties

(Docket No. 23, ¶14; Docket No. 27, ¶ 14) and that their claim against Malcolm L. Pettegrow, individually, is for "negligence in failing to perform his duties as represented." (Docket No. 23, ¶ 17; Docket No. 27, ¶ 17.) The only allegation regarding the Unfair Trade Practices Act in the plaintiffs' second amended complaint is the statement that notice of the vibration problems was given to both defendants pursuant to 5 M.R.S.A. § 213. (Docket No. 23, ¶ 30; Docket No. 27, ¶ 30.) The plaintiffs did not identify the Unfair Trade Practices Act as a claim being asserted against Pettegrow, individually, in their answers to interrogatories. (Docket No. 23, ¶ 31).²

Motion to Amend

On November 19, 2004, the plaintiffs moved to amend their complaint. (Docket No. 26.)

The proposed third amended complaint identifies Atlantic Mutual Insurance Company as a party

² Plaintiffs have denied or, in their words, "modified" these last two assertions by stating, in essence, that their complaint read in its entirety supports an Unfair Trade Practices Act claim against both Pettegrow and Matthew Pettegrow, Inc.

plaintiff³ and adds several new allegations designed to support negligent and fraudulent misrepresentation claims. (Docket No. 26, Ex. 1.) Pursuant to Fed. R. Civ. P. 15(a), leave to amend a complaint should be freely given. Forman v. Davis, 371 U.S. 178, 182 (1962) (“In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be ‘freely given’”). However, there are certain instances when amendment need not be allowed, such as when there has been undue delay or where the amendment would be futile. Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 59 (1st Cir. 1990) (“Where an amendment would be futile or would serve no legitimate purpose, the district court should not needlessly prolong matters.”); Quaker State Oil Ref. Corp. v. Garrity Oil Co., Inc., 884 F.2d 1510, 1517 (1st Cir. 1989) (“[P]arties seeking the benefit of . . . Rule 15(a)’s liberality have an obligation to exercise due diligence; unseemly delay, in combination with other factors, may warrant a denial of a suggested amendment.”)

The original complaint in this case was filed on December 31, 2003. Shortly thereafter, on January 9, 2004, Gannett submitted his first amended complaint as of right. Following the defendants' submission of their answer, a motion to file a second amended complaint to add Boomer Enterprises, LLC, and two motions to amend the court's scheduling order, the court set the discovery deadline at October 15, 2004, and the deadline for dispositive motions at November 1, 2004. The deadline to amend the pleadings, originally set at April 30, 2004, was never modified. The plaintiffs motion to submit their second amended complaint was filed only shortly before the deadline, on April 19, 2004. (Docket No. 10.) On October 21, 2004, the

³ The court previously denied a motion to substitute Atlantic Mutual for Benjamin Gannett, but granted a motion to join Atlantic Mutual as a real party in interest. (Docket No. 21.)

defendants filed their motion for summary judgment. (Docket No. 22.) The plaintiffs sought and obtained an extension for their response to that motion and filed their response on November 19, 2004, simultaneously submitting their motion to amend the second amended complaint. According to plaintiffs' counsel, the claim for fraudulent misrepresentation is based upon statements made by Malcolm Pettegrow during his second deposition, which was taken in August 2004.

As to the claim of negligent representation against Malcolm Pettegrow, there is no need to amend the complaint. Plaintiffs' existing claim against Pettegrow is "for negligence in failing to perform his duties as represented by him to Gannett that he would inspect and supervise the design and construction of Gannett's Boomer II, ensuring the quality of work during design and construction." (Docket No. 23, ¶ 17; Docket No. 27, ¶ 17.) The defendants concede that the complaint as currently constituted includes a claim that Pettegrow negligently represented that he would supervise the construction and ensure the quality of the work. (Obj. to Mot. to Amend Complaint, Docket No. 35 at 1-2.) Implicit within that representation, Pettegrow represented that he possessed the requisite skills and knowledge to perform the task at hand. Whatever the merits, the defendants appear willing to concede that this claim already exists in the second amended complaint.

The proposed amendment adding a claim for fraudulent misrepresentation is a separate kettle of fish. Gannett claims the amendment is based upon newly discovered evidence from the depositions, but the motion to amend was not filed until three months after the last deposition was taken, and not until after the filing of the defendants' motion for summary judgment. There is obvious prejudice to the defendants by the addition of a new claim, because the defendants had no opportunity to address "fraudulent misrepresentation" in their motion for summary judgment.

Although the summary judgment pleadings speak to the issues surrounding misrepresentation, it is in the context of the claim of negligent misrepresentation against Malcolm Pettegrow. As plaintiffs' counsel implicitly acknowledges in his motion to amend the scheduling order, filed December 22, 2004, (Docket No. 40), were this court to allow the untimely motion to amend to add the fraudulent misrepresentation count the court would necessarily have to reopen discovery and further allow a second round of dispositive motions to be filed. Nothing about the facts underlying this motion to amend justify that sort of delay in this case. The motion to amend the second amended complaint and the motion to amend the scheduling order are both **DENIED**.

Motion for Summary Judgment

A movant is entitled to summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). I view the record in the light most favorable to the non-movants and I indulge all reasonable inferences in their favor. See Savard v. Rhode Island, 338 F.3d 23, 25-26 (1st Cir. 2003).

A. Statute of Limitation

It is undisputed that Gannett took possession of Boomer II in February 1999 and that the vibration problems with the boat became apparent on her maiden voyage to the Bahamas in March of 1999. The complaint was not filed until December of 2003, more than four years, but less than six years later. Title 11 M.R.S.A. § 2-725 provides that an action for breach of contract

for the sale of goods must be commenced within four years after the cause of action accrues and provides that a cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. Id., § 2-725(1) & (2). As for breach of warranties, § 2-725 provides that breach occurs "when tender of delivery is made, except that where a warranty explicitly extends to future performance . . . and discovery of the breach must await the time of such performance." Id., § 2-725(2).

According to the defendants, the boat building agreement is subject to the Uniform Commercial Code and the plaintiffs' contract and warranty claims are barred by the Code's four-year statute of limitation. (Docket No. 22 at 12-13.) According to the plaintiffs, the contract claims are not subject to the UCC's limitation period but to Maine's general, six-year statute of limitation. (Obj. to Mot. for Summ. J., Docket No. 29, at 11, citing 14 M.R.S.A. § 752) Neither party adequately briefs the issue of whether the boat building agreement was predominantly a contract for goods or predominantly a contract for services. See Smith v. Urethane Installations, Inc., 492 A.2d 1266, 1268-69 (Me. 1985). Because the defendants hold the laboring oar on this affirmative defense, see Northeast Harbor Golf Club, Inc. v. Harris, 1999 ME 38, ¶ 15, 725 A.2d 1018, 1023, and because they fail to articulate why the parties' boat building agreement is predominantly a contract for the sale of a good rather than a service, and because my inclination under the circumstances of this case is to conclude that the contract predominantly concerns the provision of custom boat building services,⁴ I conclude that the claim should be subjected to the general, six-year limitation period set forth in 14 M.R.S.A. § 752. Accordingly, I recommend that the court deny the motion for summary judgment with respect to the plaintiffs' contract claim.

⁴ In addition to the boat building agreement itself, the documents appended to the end of Benjamin Gannett's deposition transcript also support this conclusion. (Docket No. 23, Elec. Attach. 2.)

B. Economic Loss Doctrine

Maine applies the economic loss doctrine, which generally bars tort recovery for a product's damage to itself. Oceanside at Pine Point Condo. Owners Ass'n v. Peachtree Doors, 659 A.2d 267, 270 (Me. 1995). As explained in Oceanside, the rationale "is that damage to a product itself 'means simply that the product has not met the customer's expectations, or, in other words, that the customer has received insufficient product value. The maintenance of product value and quality is precisely the purpose of express and implied warranties.'" Id. (quoting E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 872 (1986)). Despite its origin in products liability law, courts have expanded the economic loss doctrine to bar tort claims associated with service contracts as well as contracts for the sale of goods. See Me. Rubber Int'l v. Env'tl. Mgmt. Group, Inc., 298 F. Supp. 2d 133, 137 (D. Me. 2004) (collecting cases). The rule does not generally extend to tort claims that seek recovery for damage to property other than the defective product itself. Oceanside, 659 A.2d at 270. Courts are divided over whether the doctrine permits recovery for economic losses resulting from negligent misrepresentation on the part of contracting parties or their agents. See Cummings v. HPG Int'l, Inc., 244 F.3d 16, 24 (1st Cir. 2001).

The defendants argue that the economic loss doctrine should be applied in this case to bar the negligent misrepresentation claim against Pettegrow. (Docket No. 22 at 3.) The plaintiffs⁵ argue that the court should not apply the doctrine based on four exceptions. The first exception raised by the plaintiffs is the "other property" exception. They argue that the doctrine ought not apply because the failure of the vessel's hull caused \$3500 worth of damage to the captain and

⁵ Although I say "the plaintiffs," the record does not support a finding that Boomer Enterprises, LLC, was party to any of the pre-contract communications between Gannett and Pettegrow. Due to the rather nebulous state of the pleadings, I have simply proceeded on the assumption that there is an identity of interest between Gannett and Boomer Enterprises.

crewmember's personal property.⁶ (Docket No. 29 at 5-6.) The problem with this argument is that the plaintiffs' pleadings and summary judgment papers fail to establish that the plaintiffs hold any *claim* that would entitle them to recover for this loss of crew property. Precedents permitting tort claims to go forward for loss to "other property" reflect that the other property is the *plaintiff's* other property. See, e.g., Rodman Indus. V. G&S Mill, 145 F.3d 940, 945 (7th Cir. 1998) (observing that the "other property" exception "allows for tort suits when the allegedly defective product damages other property owned by the purchaser"); Saratoga Fishing Co. v. J. M. Martinac & Co., 520 U.S. 875 (1997) (permitting tort claim to go forward for defective manufacture of a ship but only to the extent the plaintiff's other property – certain extra fishing equipment – was lost). The only "other property" that the plaintiffs have pointed to is property they did not own and they have failed to articulate how it is that they have a claim for its loss.⁷ Furthermore, courts generally recognize "that 'minimal damage to 'other property' will not take a case outside the economic loss doctrine.'" Delmarva Power & Light v. Meter-Theater Inc., 218 F. Supp. 2d 564, 570 (D. Del. 2002) (quoting Rich Prods. Corp. v. Kemutec, Inc., 66 F. Supp. 2d 937, 971 (E. D. Wis. 1999) and collecting cases). See also Lewinter v. Genmar Industries, Inc., 26 Cal. App. 4th 1214, 1222-23 (Cal. App. 1994) ("[I]t would appear that the damaged items of personal property which were not part of the yacht's original inventory can only be classified as *de minimis*. It has been held that where the 'other property damage' appears to be *de minimis*, the essence of the claim is only for economic loss.").

⁶ The defendants object to the quality of this evidence in their reply memorandum (Docket No. 38 at 1-2), but they admitted the factual statements when replying to the plaintiffs' statement of additional material facts.

⁷ Atlantic Mutual may have covered the captain and crewmember's loss, but Atlantic Mutual's "claim" is simply by way of subrogation to Boomer Enterprises' claim which as articulated in the complaint does not include the captain and crewmember's loss. In the Defendants' Motion to Substitute (Docket No. 17) the record suggests that Atlantic Mutual's only claim by way of subrogation is for damages to the hull. Ex. A, Requests for Admissions, ¶ 2.

The second exception raised by the plaintiffs is the "unreasonably dangerous" exception, which some courts have applied in situations where an item's malfunction created an unreasonable risk of personal injury or death, even though no such injury occurred. Thus, the plaintiffs argue that the nature of Boomer II's hull defect created an inordinately dangerous risk of personal injury or death by drowning, offering evidence that the captain and crewmember went through a harrowing ordeal before managing to return Boomer II to shore. (Docket No. 29 at 6.) The Restatement authors indicate that the "unreasonably dangerous" exception is generally disfavored, which leads me to conclude that the Law Court would not likely adopt it. Restatement (Third) of Torts: Products Liability § 21, cmt. d. (1997).

The third exception raised by the plaintiffs could perhaps be called the "misrepresentation exception." (Id. at 6-10.) The plaintiffs argue that Pettegrow's pre-contract assurances regarding his knowledge and expertise in boat building and his assurances that he could build a bigger, better Boomer were extra-contractual conduct capable of supporting an independent tort action. (Id.) I address this claim in more detail below.

The fourth exception concerns tort claims based on fiduciary duties or special relationships that arise from some contractual undertakings, including some professional service contracts. (Id. at 8.) In my view, the contract in this case cannot reasonably be characterized as a contract for the provision of the kind of professional services that would give rise to fiduciary obligations or the kind of special relationship that requires the imposition of a heightened duty of care. See Me. Rubber Int'l v. Env'tl Mgmt. Group, Inc., 298 F. Supp. 2d 133 (D. Me. 2004).

As for the misrepresentation exception advanced by the plaintiffs, they articulate the claim thusly:

[P]rior to even entering into the construction contract for the BOOMER II, Defendant Pettegrow made false representations regarding his qualifications on

which Mr. Gannett relied and in fact induced him into entering into the contract with Malcolm L. Pettegrow, Inc. Had it not been for Defendant Pettegrow's deceptive representations regarding his expertise and participation in the construction of his sport fishing vessel, Mr. Gannett would never have entered into the contract with Malcolm L. Pettegrow, Inc.

(Docket No. 29 at 8.) In Maine Rubber, this court concluded that the economic loss doctrine applied to a negligent misrepresentation claim relating to a contract for services. Maine Rubber hired Environmental Management Group (EMG) to perform an environmental site assessment in relation to a real estate purchase. 298 F. Supp. 2d at 134. EMG issued a report indicating that the real estate passed its environmental assessment. Id. Maine Rubber later sued EMG for negligent misrepresentation when it incurred economic losses due to environmental problems with the site that EMG had failed to discover. Id. at 134-35. The obvious distinction between this case and Maine Rubber is that the misrepresentations alleged in Maine Rubber were the statements contained in EMG's environmental report, the very representations or opinions that the parties contracted for EMG to provide. In contrast, this case presents representations by an agent of the contracting party prior to the execution of the contract. There is a split of authority on whether this circumstance warrants an exception to the economic loss doctrine. See Apollo Group v. Avnet, Inc., 58 F.3d 477, 480 n.3 (9th Cir. 1995) (observing the lack of consensus but applying the doctrine in a similar circumstance). In my view, the better reasoned precedents indicate that this distinction is not crucial. These courts look to the nature of the damages alleged and to whether the alleged misrepresentation is merely a form of inducement to enter a contract and whether the inducing representation is essentially indistinguishable from the expectations and requirements that the parties place in the contract. See id. ("Apollo seeks to recover purely 'benefit of the bargain' and consequential losses. Such foreseeable risks could have been . . . allocated by the parties in their contractual agreement."); Duquesne Light Co. v.

Westinghouse Elec. Corp., 66 F.3d 604, 620 (3d Cir. 1995) (collecting cases and observing that "[a] party who engages in contractual negotiations with another has the ability to protect itself in the contractual language against the other party's innocent, though wrong representations."); Hotels of Key Largo v. RHI Hotels, 694 So. 2d 74, 77-78 (Fla. Dist. Ct. App. 1997) ("Misrepresentations relating to the breaching party's performance of a contract do not give rise to an independent cause of action in tort, because such misrepresentations are interwoven and indistinct from the heart of the contractual agreement."); see also Marvin Lumber v. Cedar Co. v. PPG Indus., 223 F.3d 873, 893-97 (8th Cir. 2000) (Lay, J., dissenting) (dissenting from the court's opinion affirming the district court's application of the economic loss doctrine to a fraudulent inducement claim, but providing an extensive discussion of the kind of misrepresentation claims that are generally barred by the economic loss doctrine and collecting cases); Rich Prods., 66 F. Sup. 2d at 977 (discussing a "limitation on the fraud-in-the-inducement exception to the economic loss doctrine . . . [that] allows plaintiffs to plead tort claims stemming from misrepresentations which induce them to enter into a contract, so long as the representations . . . do not concern the quality or characteristics of the subject matter of the contract or otherwise relate to the offending party's expected performance of the contract"); cf. Bailey Farms v. NOR-AM Chem. Co., 27 F.3d 188, 191-92 (6th Cir. 1994) (applying doctrine to bar negligent misrepresentation claim based on post-contract misrepresentation about product usage because such communications were "incidental to the sale"). In this case, Pettegrow's misrepresentations relate entirely to Pettegrow's prospective performance of boat building services for Gannett pursuant to Gannett's contract with Pettegrow, Inc. The services were provided pursuant to a legally enforceable agreement and the plaintiffs have sued because they maintain that they did not receive the benefit of the bargain. As in Oceanside and Maine Rubber,

"the critical issue here . . . is value and quality of what was purchased," and I see no reason not to limit the plaintiffs to their contractual remedies against Pettegrow, Inc. Me. Rubber, 298 F. Supp. 2d at 138. Although this case may have been different had Gannett never entered into a written contract with Pettegrow, Inc., the fact is that he did and that his only injury is that he failed to obtain the full benefit of his bargain. I recommend that summary judgment be entered against the plaintiffs' tort claims.⁸

C. Unfair Trade Practices Act

In paragraph 10 of the second amended complaint the plaintiffs allege:

Plaintiffs notified Defendants Pettegrow and Pettegrow, Inc., not only of the vibration problems, but the structural and design problems of the chine area. Such notification was accomplished pursuant to 5 M.R.S.A. §213 of the Unfair Trade Practices Act.

(Docket No. 12, ¶ 10.) Concerned that this allegation might pass as a claim for relief pursuant to Maine's Unfair Trade Practices Act, the defendants have moved for summary judgment against it on the ground that the plaintiffs have not alleged sufficient facts or produced sufficient evidence to support the claim. (Docket No. 22 at 13-14.) In opposition to the motion, the plaintiffs indicate that they are asserting a claim under the UTPA that is premised on a misrepresentation theory and the fact that the construction of Boomer II "was so far beyond the realm of any reasonable industry standard that not only would it be considered deceptive and unfair, but be could [sic] inferred as an intentional and total reckless disregard for the safety of Mr. Gannett and his crew." (Docket No. 29 at 12.) The plaintiffs do not bother themselves to brief the legal basis for the claim, failing to cite or quote the statutory language, any binding precedent

⁸ But for the fact that the tort claim would run against Pettegrow individually, and therefore expose him to personal liability, the discussion of the economic loss rule would be largely academic because Maine law limits recovery in misrepresentation cases to the value of the plaintiff's lost bargain. See Jourdain v. Dineen, 527 A.2d 1304, 1307 (Me. 1987); see also Veilleux v. NBC, 206 F.3d 92, 125 (1st Cir. 2000) ("Under Maine law, the proper measure of damages for a misrepresentation claim is plaintiff's lost bargain.").

construing Maine's UTPA, or any persuasive authority discussing claims made pursuant to similar statutes in other jurisdictions. This poses a problem for the plaintiffs because the UTPA does not define what "unfair or deceptive acts or practices" are. See 5 M.R.S.A. § 207. Furthermore, the record reflects that Boomer Enterprises currently holds title to Boomer II and that the plaintiffs' damages include lost earnings. The UTPA affords private remedies only to persons who acquire property primarily for personal, family or household purposes. Id., § 213(1). Nothing in the record indicates whether the Boomer II is primarily used for Gannett's personal use or for Boomer Enterprises' commercial purposes. I recommend that the court enter summary judgment against the claim because of the plaintiffs' failure to adequately brief it.

Conclusion

For the foregoing reasons, I **RECOMMEND** that the court **GRANT** the defendants' motion for summary judgment, **IN PART**, and enter judgment against the plaintiffs' tort and UTPA claims. Based on the presentations made by the parties, the only claim that survives summary judgment is a claim against Pettegrow, Inc., for breach of the boat building agreement and the warranties associated with it.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated January 28, 2005

GANNET v. PETTEGROW et al
Assigned to: JUDGE JOHN A. WOODCOCK, JR
Cause: 28:1332 Diversity-Contract Dispute

Date Filed: 12/31/2003
Jury Demand: None
Nature of Suit: 120 Contract: Marine
Jurisdiction: Federal Question

Plaintiff

BENJAMIN H GANNET

represented by **MICHAEL X. SAVASUK**
LAW OFFICE OF MICHAEL X.
SAVASUK
MARINE TRADE CENTER
300 COMMERCIAL STREET
P.O. BOX 267
PORTLAND, ME 04112-0267
(207)773-0788
Email: mxslaw@maine.rr.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

BOOMER ENTERPRISES LLC

represented by **MICHAEL X. SAVASUK**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

**ATLANTIC MUTUAL
INSURANCE COMPANY**

represented by **MICHAEL X. SAVASUK**
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

MALCOLM L PETTEGROW

represented by **DAVID C. KING**
RUDMAN & WINCHELL
84 HARLOW STREET
P.O. BOX 1401
BANGOR, ME 04401

(207) 947-4501
Email: dking@rudman-winchell.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

DEBRA ANNE REECE
RUDMAN & WINCHELL
84 HARLOW STREET
P.O. BOX 1401
BANGOR, ME 04401
(207) 947-4501
Email: dreece@rudman-winchell.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

MALCOLM L PETTEGROW INC

represented by **DAVID C. KING**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

DEBRA ANNE REECE
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Counter Claimant

MALCOLM L PETTEGROW INC

represented by **DEBRA ANNE REECE**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

DAVID C. KING
(See above for address)
ATTORNEY TO BE NOTICED

Counter Claimant

MALCOLM L PETTEGROW

represented by **DEBRA ANNE REECE**
(See above for address)

*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

DAVID C. KING
(See above for address)
ATTORNEY TO BE NOTICED

V.

Counter Defendant

BENJAMIN H GANNET

represented by **MICHAEL X. SAVASUK**
(See above for address)
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Counter Claimant

MALCOLM L PETTEGROW INC

Counter Claimant

MALCOLM L PETTEGROW

V.

Counter Defendant

BOOMER ENTERPRISES LLC

represented by **MICHAEL X. SAVASUK**
(See above for address)
ATTORNEY TO BE NOTICED

Counter Defendant

BENJAMIN H GANNET