COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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Appeal No. 2004AP683 **Cir. Ct. No. 2002CV3530**

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

MIDLAND BUILDERS, INC.,

PLAINTIFF-APPELLANT,

V.

SEMLING-MENKE CO.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed.*

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 LUNDSTEN, J. Midland Builders, Inc., a developer and builder of residential homes, appeals a circuit court judgment dismissing its claims for negligence, strict responsibility misrepresentation, breach of an implied warranty, and contribution against Semling-Menke Co. ("Semco"), a manufacturer of

windows used in Midland homes. Midland argues that the circuit court erred in granting summary judgment in favor of Semco after determining (1) that Midland's claims for negligence and strict responsibility misrepresentation were barred by the economic loss doctrine, (2) that Midland could not pursue contribution against Semco because Midland was not the real party in interest, and (3) that Midland's breach-of-warranty claim was time-barred. We conclude that the circuit court properly granted summary judgment in favor of Semco and affirm the circuit court's judgment.

Background

¶2 Midland constructs residential homes.[1] Semco designs and manufactures windows for residential homes. Until approximately 1996, Midland purchased Semco windows through a building supply company, UBC, for installation in hundreds of homes.

¶3 In November 2001, Midland was contacted by a homeowner who discovered rotting and deterioration below the Semco windows that had been installed in her home. Midland learned of a number of other homeowners who were experiencing the same problem. Midland also learned that some homeowners had contacted attorneys, and some homeowners had threatened to contact attorneys, if Midland did not solve the problem. Midland investigated and determined that a design flaw in the Semco windows caused some water to flow into the house structure, eventually causing rot and deterioration below the windows.

[1] We take our background facts from the circuit court's written decision and Midland's pleadings and affidavits. Our resolution of this case does not involve disputed material facts.

¶4 At no cost to the homeowners, Midland made modifications to stop water from penetrating the homes and repaired damage found below the windows. Midland incurred costs of over $750,000 to inspect homes and repair the problems. Semco and UBC refused Midland's request to contribute to the repair costs.

¶5 On November 11, 2002, Midland sued Semco and UBC to recover its costs and other damages.[2] Midland alleged claims for negligence, strict responsibility misrepresentation, breach of implied warranty, and contribution against Semco. Midland alleged that its damages included the losses it incurred to repair the damaged homes, losses it incurred to satisfy claims of homeowners with failed Semco windows, and lost profits resulting from the failure of the Semco windows.

¶6 Semco moved for summary judgment. The circuit court granted Semco's motion and dismissed Midland's negligence and strict-responsibility-misrepresentation claims as barred by the economic loss doctrine. The circuit court also dismissed Midland's contribution claim because Midland was not the real party in interest, and dismissed Midland's breach-of-warranty claim as time-barred. Midland appeals.

Discussion

¶7 We perform summary judgment analysis *de novo*, applying the same method employed by circuit courts. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). That method is well established and need

[2] UBC was dismissed from the suit after reaching settlement with Midland.

not be repeated in its entirety. *See*, *e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. It is sufficient to say here that summary judgment is appropriate when there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. *See* ***id.***, ¶24. We conclude that there is no genuine issue as to any material fact here and that Semco is entitled to judgment as a matter of law.

I. Midland's Tort Claims for Negligence and Strict Responsibility Misrepresentation

¶8 Whether the circuit court properly granted summary judgment on Midland's claims for negligence and strict responsibility misrepresentation turns on this question: May Midland seek damages from Semco through claims for negligence and strict responsibility misrepresentation for expenses Midland incurred to repair damaged homes, losses Midland incurred to satisfy homeowners' claims, and Midland's lost profits? We conclude that the economic loss doctrine bars Midland's claims.

A. Economic Loss Doctrine: Basic Principles

¶9 The economic loss doctrine, broadly stated, is a judicially created doctrine providing that certain purchasers of products cannot, via certain tort theories, recover from the product manufacturer damages that are solely "economic" in nature. *See* ***Daanen & Janssen, Inc. v. Cedarapids, Inc***., 216 Wis. 2d 395, 400, 573 N.W.2d 842 (1998); *see also* ***Van Lare v. Vogt, Inc.***, 2004 WI 110, ¶18, 274 Wis. 2d 631, 683 N.W.2d 46; ***Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.***, 148 Wis. 2d 910, 921, 437 N.W.2d 213 (1989).

¶10 "Economic" loss is generally defined as damages resulting from inadequate value because a product is inferior and does not work for the general

purpose for which it was manufactured and sold. ***Daanen***, 216 Wis. 2d at 400-01. The economic loss doctrine does not bar recovery under tort theories for personal injury or for damage to "other property." ***Id.*** at 402. "Other property," generally defined, means "property other than the product itself." ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 248, 593 N.W.2d 445 (1999); *see also* ***Bay Breeze Condo. Ass'n v. Norco Windows, Inc.***, 2002 WI App 205, ¶13, 257 Wis. 2d 511, 651 N.W.2d 738. At the same time, "[d]amage by a defective component of an integrated system to either the system as a whole or other system components is not damage to 'other property' which precludes the application of the economic loss doctrine." ***Wausau Tile***, 226 Wis. 2d at 249.

B. ***Wausau Tile*** *Controls Midland's Tort Claims and Precludes the Damages Midland Seeks on Those Claims*

¶11 In ***Wausau Tile***, the supreme court applied the economic loss doctrine, and its "other property" exception, to bar tort claims for the same types of damages that Midland seeks here. In that case, a manufacturer, Wausau Tile, made "pavers." Pavers are concrete paving blocks made of cement, aggregate, water, and other materials. ***Id.*** at 241. A substantial number of the pavers that Wausau Tile made with cement supplied by Medusa were defective. These defective pavers led to demands and lawsuits against Wausau Tile. ***Id.*** at 242.

¶12 Wausau Tile sued Medusa, alleging torts and other claims. Wausau Tile alleged that the pavers failed, in part, because the cement provided by Medusa was defective. ***Id.*** Wausau Tile sought three categories of damages: (1) the costs of repairing and replacing failed pavers; (2) the costs of satisfying third parties' claims that the defective pavers either caused personal injury or damaged property adjoining the pavers, such as curbs and walls; and (3) lost profits and business. ***Id.***

at 242-43, 248. The supreme court concluded that Wausau Tile had alleged only economic loss and could not proceed with its tort claims. ***Id.*** at 257, 265.

¶13 The categories of damages at issue in ***Wausau Tile*** are the same as those that Midland seeks here: the costs of repairing its own product, the costs of satisfying third-party demands or claims resulting from the failed product, and lost profits.[3]

¶14 The court in ***Wausau Tile*** began by addressing Wausau Tile's claims for negligence and strict liability, and then individually addressed each category of damages sought under those claims. In analyzing Wausau Tile's costs in repairing and replacing the pavers, the court noted that it was undisputed that the pavers were "integrated systems comprised of several component materials." ***Id.*** at 251. The cement, in turn, was an "integral component" of the pavers, and the court thus rejected Wausau Tile's contention that the pavers constituted "other property." ***Id.*** at 251-52. Accordingly, the court also concluded:

> [T]he crux of Wausau Tile's claim for repair and replacement costs is that the pavers were damaged because one or more of their ingredients was of insufficient quality and did not work for Wausau Tile's intended purpose. This is the essence of a claim for economic loss.

Id. at 252-53.

[3] In its complaint, Midland does not limit itself to these three categories of damages, but these are the only damages that Midland has alleged with any specificity. As demonstrated in ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 245-57, 593 N.W.2d 445 (1999), the applicability of the economic loss doctrine will often turn on the precise nature of the damages sought. When courts analyze the applicability of the economic loss doctrine, they cannot imagine and address every hypothetical category of damages that a plaintiff might ultimately seek under a catchall damages allegation or a prayer for relief. Accordingly, we address only the categories of damages that Midland specifically pled. This is consistent with the approach used by the supreme court in ***Wausau Tile***.

¶15 Likewise, the crux of Midland's claim for repair costs here is that the homes were damaged because an ingredient, Semco windows, was of insufficient quality and did not work for Midland's intended purpose. Accordingly, these costs are the "essence of a claim for economic loss," and ***Wausau Tile*** precludes Midland from seeking to recover such losses through its negligence and strict-responsibility-misrepresentation claims.[4]

¶16 The court in ***Wausau Tile*** next addressed Wausau Tile's damages relating to third parties' claims for damage to property adjoining the pavers and for personal injury. ***Id.*** at 253. Wausau Tile conceded, much as Midland does here, that this item of damages was an "attempt to recoup the commercial costs of settling the claims of third parties which resulted from the product defect." ***Id.*** As

[4] Our decision in ***Selzer v. Brunsell Bros.***, 2002 WI App 232, 257 Wis. 2d 809, 652 N.W.2d 806, supports our decision here. In ***Selzer***, an individual homeowner purchased and took delivery of windows from a window manufacturer for installation in his home. ***Id.***, ¶¶1, 3, 5. After some of the window frames developed wood rot, which spread to the siding below a number of the windows, the homeowner brought an action, including tort claims, against the window manufacturer. ***Id.***, ¶¶6, 8. We held that the homeowner could not recover in tort for the cost to repair or replace the rotting windows because his damages were economic losses. ***Id.***, ¶34. We determined that the "other property" exception did not apply, relying, in part, on the "integrated system" rule. ***Id.***, ¶¶35, 39. We said:

> We cannot discern a meaningful analytical difference between a window in a house, a gear in a printing press, a generator connected to a turbine, or a drive system in a helicopter. In each of these examples, the window, the gear, the generator, and the drive system are integral parts of a greater whole; none of the integral parts serve an independent purpose. Thus, just as the damage to the printing press, the turbine, and the helicopter caused by their integral parts constituted damage to the products themselves, so too did the damage to Selzer's home caused by the windows constitute damage to the product itself, and not damage to "other property" for purposes of the economic loss doctrine.

Id., ¶39.

to these damages, the court said: "[E]ven if Wausau Tile's claims were sufficient to allege personal injury and/or property damage, it would not be permitted to litigate those claims because it would not be a real party in interest …." ***Id.***

¶17 As the court in ***Wausau Tile*** explained, a real party in interest is "'one who has a right to control and receive the fruits of the litigation.'" ***Id.*** at 253 (quoting ***Mortgage Assocs. v. Monona Shores, Inc.***, 47 Wis. 2d 171, 179, 177 N.W.2d 340 (1970)).

> The basic test is whether the plaintiff's suit will prevent the defendant from being harassed by other claimants for the same demand, whether it will preclude the defendant from asserting any fair defense, offset, or counterclaim, and whether the defendant will be fully protected when the judgment in behalf of the plaintiff is discharged.

Wausau Tile, 226 Wis. 2d at 254. Applying this test, the court in ***Wausau Tile*** said:

> Wausau Tile would not be a real party in interest in regard to any claims of personal injury or property damage. All property allegedly damaged is owned by third parties not joined in this suit. Similarly, third parties, not Wausau Tile, sustained any personal injury which may have occurred. Wausau Tile is arguably one of the parties responsible for harm caused by the defective pavers. As such, it is clear that Wausau Tile has no right to control the litigation or receive the fruits of any claims of harm to person or property. Further, because injured third parties may bring their own claims against Medusa, recovery for personal injury or property damage by Wausau Tile would not save Medusa from further harassment for the same harm.

Id. at 254-55 (footnote omitted). The ***Wausau Tile*** court noted that Wausau Tile "voluntarily incurred the costs it did when it chose to take on the responsibility of remediating the damage to the pavers and other property of third parties" and

"could have declined to repair the pavers or pay for the property damage and left the affected third parties to their remedies." ***Id.*** at 255 n.13.

¶18 Again, we see no meaningful difference between Midland's claim for damages for costs in settling claims or anticipated claims of homeowners and Wausau Tile's alleged damages for its costs in settling claims or anticipated claims of third parties. *See* ***id.*** at 253. The only difference is that some of the third parties in ***Wausau Tile*** may not have been customers of Wausau Tile, whereas all of the homeowners here were customers of Midland. This is a factual difference, but Midland does not provide any reason why this is a difference that matters.

¶19 Midland nonetheless argues that ***Wausau Tile*** is distinguishable. More specifically, Midland argues:

> The Supreme Court [in ***Wausau Tile***] did not directly address the application of the "integrated system" rule when the plaintiff purchases the product separately, incorporates it into another product and sells it. Instead, the Court concluded that the plaintiff's argument failed "in light of the fact we determine elsewhere in this opinion that Wausau Tile is not the real party in interest as to the tort claims it asserts." ***Wausau Tile***, 226 Wis. 2d at 252 n.10. That distinction cannot be made here because the facts show that Midland is the real party in interest.

But Midland misreads ***Wausau Tile*** and quotes it out of context.

¶20 First, Midland is wrong that the court in ***Wausau Tile*** did not directly address the application of the integrated system rule when a plaintiff purchases a product separately, incorporates it into another product, and sells it. ***Wausau Tile*** addressed the application of the integrated system rule to the following facts. The plaintiff (Wausau Tile) purchased a product separately (cement), incorporated the cement into another product (pavers), and sold the pavers. *See* ***id.*** at 241-42, 251-52. Both Midland and Wausau Tile obtained

component products (windows and cement) from manufacturers (Semco and Medusa), integrated those component products into final products (houses and pavers), and sold them.

¶21 Second, the language that Midland quotes from ***Wausau Tile***, found in a footnote toward the end of the court's discussion of damages for repair and replacement of pavers, refers to the court's discussion of damages for third-party personal injury or property damage claims. The language must be read in that context. The court, in referencing its later discussion, was elaborating on its rejection of Wausau Tile's argument that the pavers themselves (analogous to the homes here) constituted "other property" for purposes of the economic loss doctrine:

> Wausau Tile argues that the … "integrated system" rule … may only be applied when a purchaser buys an entire integrated system which later turns out to have a defective component. Wausau Tile contends that the rule does not apply in this case because Wausau Tile bought only the component (the cement), not the integrated system (the pavers).
>
> In a similar vein, Wausau Tile argues that it is in the position of the "initial user" in ***Saratoga Fishing*** [a United States Supreme Court case discussing the "initial user" as the one who first purchases an integrated system]….
>
> Both of these arguments fail in light of the fact we determine elsewhere in this opinion that Wausau Tile is not the real party in interest as to the tort claims it asserts…. The complete packages purchased by the "initial users" in this case were the pavers manufactured by Wausau Tile, which contained cement as one of their components. If the proper parties were to bring the tort claims Wausau Tile is attempting to assert, the damage to the pavers would be damage to the "product itself" even under Wausau Tile's formulation of the [integrated system] rule.

Id. at 252 n.10 (citations omitted).

¶22 While the ***Wausau Tile*** footnote is not a model of clarity, when read with the rest of the court's opinion it is apparent that the court was recognizing two concepts, neither of which help Midland: (1) a final product that is an integrated system does not necessarily gain "other property" status for purposes of the economic loss doctrine simply because the product is sold to someone else, and (2) to the extent an integrated system produced and sold by a manufacturer has become someone else's property, the manufacturer ordinarily will lack standing to initiate an action in tort against one of its component suppliers for damage to the system or to property other than the system, in part because the manufacturer no longer owns the damaged system.

¶23 Contrary to Midland's argument, the sum total of what the ***Wausau Tile*** court had to say about real parties in interest and the "other property" exception demonstrates that Midland is similarly situated to Wausau Tile. We realize that at least some of the third parties in ***Wausau Tile*** may have been more remote from any direct relationship with Wausau Tile than the homeowners are from Midland. However, the court in ***Wausau Tile*** did not distinguish between third parties who were direct customers of Wausau Tile and third parties who were not. We repeat, Midland has not explained why this is a difference that matters.[5]

¶24 Midland advances additional arguments as to why it is a real party in interest. We reject these arguments.

[5] Midland also argues that ***Northridge Co. v. W.R. Grace & Co.***, 162 Wis. 2d 918, 471 N.W.2d 179 (1991), provides more apt guidance than ***Wausau Tile***. Midland's reliance on ***Northridge***, however, lacks merit because ***Northridge*** applies a narrow exception to the economic loss doctrine that cannot be stretched to include the facts here. *See* ***Wausau Tile***, 226 Wis. 2d at 264-65 (holding that "***Northridge*** does not create a broad 'public safety exception' to the economic loss doctrine," and suggesting that the ***Northridge*** exception is limited to asbestos or other material that is inherently dangerous to human health and safety).

¶25 Midland argues that it had a legal duty to mitigate damages, which was triggered when homeowners threatened Midland with lawsuits. However, Midland provides no direct authority for this proposition, relying instead on general sources for the rule that an injured party has a duty to mitigate damages. These sources, however, do not address whether Midland had a legal duty to repair, at the time that it made repairs, such that it became a real party in interest for claims that otherwise belonged to the homeowners. Wausau Tile would have had the same "duty," to the extent such a duty can be said to exist. Like Wausau Tile, Midland could have declined to repair the homes or pay for other damages and "left the affected third parties to their remedies." *See* ***Wausau Tile***, 226 Wis. 2d at 255 n.13. It may have been in Midland's best interest to make repairs, just as it may have been in Wausau Tile's interest to replace and repair, but it does not follow that either company was legally bound to make the repairs that it did.

¶26 Midland also argues that the costs it incurred in response to the threat of litigation were not "voluntary," citing ***Kennedy-Ingalls Corp. v. Meissner***, 5 Wis. 2d 100, 106-07, 92 N.W.2d 247 (1958). But Midland does not explain why its actions were any less voluntary than those by the plaintiff in ***Wausau Tile***. To the extent that ***Kennedy-Ingalls*** and ***Wausau Tile*** could be read as conflicting with each other, we follow ***Wausau Tile***, which is a more recent supreme court case. *See* ***Bruns Volkswagen, Inc. v. DILHR***, 110 Wis. 2d 319, 324, 328 N.W.2d 886 (Ct. App. 1982).

¶27 Midland also argues that, under the test articulated in ***Wausau Tile***, Midland is the real party in interest because, in Midland's words, it "completely took care of SEMCO's future liability" by making repairs and backing up the

repairs with a fully transferable five-year warranty.[6] According to Midland, these repairs ensured that homeowners were made whole and there is no risk that Semco will face any viable homeowner claims. We disagree.

¶28 Midland does not adequately explain why the homeowners can have no viable claims against Semco. Midland seemingly assumes that all affected homeowners are satisfied that Midland's repairs made them whole. But, as Semco points out, what if some homeowners are concerned that Midland's modifications are insufficient and subsequently seek replacement windows from Semco? What if a homeowner discovers that water infiltration caused by Semco windows leaked into a basement and damaged valuable stored property? Suppose a contractor hired directly by a homeowner to repair damage caused by a Semco window injured himself while repairing damage, but has yet to come forward with a claim. Finally, suppose a homeowner is simply unconvinced that the defective Semco windows will not fail again and cause damage in the future. Why could such homeowners not successfully sue Semco? We agree with Semco that it does not take much imagination to think of scenarios in which Semco might be subject to claims, despite Midland's repairs and warranty. Midland does not dispel such scenarios[7]

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[6] Midland moves this court to supplement the record with a sample copy of a limited five-year warranty it provided to homeowners. In support of its motion, Midland asserts that the copy of the warranty was inadvertently omitted from one of the affidavits it filed in the circuit court. We deny Midland's motion. We note that consideration of this warranty would not change our decision because the warranty is insufficient to tip the balance in Midland's favor on the real-party-in-interest test as set forth in ***Wausau Tile***.

[7] Midland also argues that Semco had the burden to prove, as an affirmative defense, that Midland is not the real party in interest and that, to meet this burden, Semco needed to present undisputed evidence that homeowners will bring claims against Semco. We doubt this is a viable legal argument in light of the logic of ***Wausau Tile***, but we decline to address it. We agree with Semco that this argument, contained in Midland's supplemental brief, is a new argument that (continued)

¶29 The question is *not* whether Midland's actions substantially protected Semco from homeowner lawsuits. Midland itself does not argue that substantial protection is sufficient. Rather, the question is whether Midland completely assumed all future liability Semco might have. So far as we can tell, this could have been accomplished by an assignment of rights—Midland could have offered to repair the damage if the homeowners assigned to Midland any rights they might have with regard to Semco. Midland did not obtain such assignments and has not demonstrated that it has otherwise assumed all future liability Semco might have.

¶30 In sum, ***Wausau Tile*** precludes Midland's request for damages for costs in making repairs and settling claims or anticipated claims of homeowners. ***Wausau Tile*** also plainly precludes Midland's damages for lost profits. *See* ***Wausau Tile***, 226 Wis. 2d at 257.[8]

C. Midland's Reliance on ***Bay Breeze*** *Is Misplaced*

¶31 We briefly discuss one additional economic loss doctrine case that Midland relies on, ***Bay Breeze Condominium Ass'n***, 257 Wis. 2d 511, to explain

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does not comport with our order for supplemental briefing, which directed Midland to provide reasons why Semco is "'fully protected' within the meaning of ***Wausau Tile*** or other case law."

[8] Midland also argues that ***Marshfield Clinic v. Doege***, 269 Wis. 519, 69 N.W.2d 558 (1955), is the case "most applicable" to Midland's circumstances. ***Marshfield Clinic***, even though a real-party-in-interest case, is not on point. That case involved a breach of a noncompete contract and depended largely on the language of the contract along with corporate law principles. *See* ***id.*** at 520-21, 522-26. Specifically, the court in ***Marshfield Clinic*** held that individual Clinic doctors, who were shareholder-employees of the Clinic, were not real parties in interest in a suit against a former shareholder-employee who breached the noncompete contract. ***Id.*** at 520-21, 527. The contract language indicated that the rights to the penalties for breach were held by the corporation, not its individual shareholder-employees. ***Id.*** at 522, 524-25. ***Marshfield Clinic*** is of no assistance to our analysis here.

why this case does not cast doubt on our conclusion that ***Wausau Tile*** requires dismissal of Midland's tort claims.

¶32 In ***Bay Breeze***, a condominium association sued a window manufacturer, alleging that negligently designed windows in condominium units resulted in water damage to the units. ***Id.***, ¶1.[9] The association maintained that the damage to areas surrounding the windows fell under the "other property" exception to the economic loss doctrine. ***Id.*** We concluded that the damage caused to portions of the units adjoining the defective windows did not fall within the "other property" exception to the economic loss doctrine. ***Id.***, ¶2. Viewing the windows as a component of the condominium homes, we explained: "[T]he economic loss doctrine applies to building construction defects when … the defective product is a component part of an integrated structure or finished product." ***Id.***, ¶26. Nonetheless, Midland points to what it believes is helpful language in ***Bay Breeze***.

¶33 In ***Bay Breeze***, we quoted with approval the following language from a Florida case:

> "Generally, house buyers have little or no interest in how or where the individual components of a house are obtained. They are content to let the builder produce the finished product, i.e., a house. These [Florida] homeowners bought finished products—dwellings—not the individual components of those dwellings. They bargained for the finished products, not their various components. The concrete became an integral part of the finished product and, thus, did not injure 'other' property."

[9] Although the manufacturer in ***Bay Breeze*** raised a standing argument in the circuit court, the standing issue was not before us on appeal. ***Bay Breeze Condo. Ass'n v. Norco Windows, Inc.***, 2002 WI App 205, ¶6 n.2, 257 Wis. 2d 511, 651 N.W.2d 738.

Id., ¶25 (quoting ***Casa Clara Condo. Ass'n v. Charley Toppino & Sons***, 620 So. 2d 1244, 1247 (Fla. 1993)). The ***Casa Clara*** court reasoned that, when applying the "other property" exception, "one must look to the product purchased by the plaintiff, not the product sold by the defendant." ***Casa Clara***, 620 So. 2d at 1247; *see also* ***Bay Breeze***, 257 Wis. 2d 511, ¶25.

¶34 Applying that reasoning here, Midland points out that, unlike a homeowner, Midland purchased only windows and those windows damaged "other property," the Midland-built homes. Thus, according to Midland, the "other property" exception applies. However, when we examine the ***Casa Clara*** court's reasoning in context, it is apparent that the court was simply responding to the plaintiffs' ill-conceived argument that they purchased house components, not homes. *See* ***Casa Clara***, 620 So. 2d at 1247. Neither ***Bay Breeze*** nor ***Casa Clara*** addresses how the "other property" exception works when the plaintiff is the seller, not a buyer, of an integrated system. That is the situation here, as it was in ***Wausau Tile***. Accordingly, we follow ***Wausau Tile***.[10]

[10] The supreme court had at least four economic loss cases on its docket this term: ***Kaloti Enters., Inc. v. Kellogg Sales Co.***, 2005 WI 111, No. 2003AP1225; ***Grams v. Milk Prods., Inc.***, 2005 WI 112, No. 2003AP801; ***Linden v. Cascade Stone Co.***, 2005 WI 113, No. 2004AP4; and ***Insurance Co. of N. Am. v. Cease Elec., Inc.***, 2004 WI 139, 276 Wis. 2d 361, 688 N.W.2d 462. Opinions in the most recent three of these cases, ***Kaloti***, ***Grams***, and ***Linden***, have just been issued and we have reviewed them to determine whether our discussion and application of the economic loss doctrine are consistent with these opinions. We conclude that they are. In particular, ***Wausau Tile***, the case on which we place primary reliance, is unaffected by the just-issued opinions. We note the following language from Chief Justice Abrahamson's dissent:

> [The majority] reaffirms this court's endorsement and use of the "integrated system" concept when evaluating whether a claimed loss is damage to "other property." This proposition is not controversial; the court unanimously adopted this concept. In ***Wausau Tile, Inc. v. County Concrete Corp.***, we said that "[d]amage by a defective component of an integrated system to either the system as a whole or other system components is not

(continued)

D. Under Existing Law, There Is No Exception to the Economic Loss Doctrine for Strict Responsibility Misrepresentation in a Commercial Setting

¶35 Midland makes an additional argument that, regardless of ***Wausau Tile***, the economic loss doctrine should not apply to its strict-responsibility-misrepresentation claim. Although no such claim was at issue in ***Wausau Tile***, we have previously applied the economic loss doctrine to claims of strict responsibility misrepresentation. *See* ***Selzer v. Brunsell Bros.***, 2002 WI App 232, ¶¶31-33, 257 Wis. 2d 809, 652 N.W.2d 806.

¶36 Nothing in ***Wausau Tile*** suggests that we should make an exception for Midland's strict-responsibility-misrepresentation claim here, and Midland does not explain why its strict-responsibility-misrepresentation claim should be treated differently than the same type of claim in ***Selzer***. Rather, Midland's argument focuses on the policy of free negotiation underlying the economic loss doctrine and on an attempt to analogize strict responsibility misrepresentation to a "fraud in the inducement" exception to the economic loss doctrine. In light of ***Selzer***, Midland must address this argument to the supreme court. That court recently determined that the economic loss doctrine applied to a strict-responsibility-misrepresentation claim arising from a commercial real estate transaction. ***Van Lare***, 274 Wis. 2d 631, ¶2. Although the court in ***Van Lare*** repeatedly stated its holding narrowly, *see* ***id.***, ¶¶2, 41-42, the court also said that "[u]nder existing

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> damage to 'other property' which precludes the application of the economic loss doctrine."

Grams, 2005 WI 112, ¶61 (Abrahamson, C.J., dissenting) (footnotes omitted).

law, there is no exception to the economic loss doctrine for strict liability misrepresentation in a purely commercial setting." ***Id.***, ¶28.[11]

E. Midland's Joinder Argument

¶37 According to Midland, if we hold that Midland is not a real party in interest, then the proper remedy is to join the homeowners, not dismiss Midland's lawsuit. Midland, however, neither attempted to join the homeowners nor raised this joinder argument in the circuit court. Indeed, Midland does not dispute Semco's assertion that Midland has waived the argument. Rather, Midland says that this court "may consider [Midland's] argument, and should, because joinder is the proper remedy." We consider the matter no further because Midland provides no reason to deviate from our normal practice of requiring that issues first be raised before the circuit court. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) ("The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal.").

II. Midland's Contribution Claim

¶38 Along with its tort claims for negligence and strict responsibility misrepresentation, Midland also alleged a cause of action for contribution against Semco. The circuit court dismissed Midland's contribution claim based on the court's determination that Midland was not the real party in interest.

¶39 The elements of contribution can be generally stated as follows: (1) the parties must be joint wrongdoers; (2) the parties must have common

[11] In ***Grams***, 2005 WI 112, ¶¶9, 55 & n.12, the supreme court once again applied the economic loss doctrine to affirm dismissal of a strict-responsibility-misrepresentation claim.

liability because of such wrongdoing to the same person; and (3) one such party must have borne an unequal proportion of the common burden. *See* ***Giese v. Montgomery Ward, Inc.***, 111 Wis. 2d 392, 404, 331 N.W.2d 585 (1983). Setting aside the question of whether Midland could maintain a contribution claim against Semco in light of the operation of the economic loss doctrine and real-party-in-interest principles, we determine that Midland has failed to properly plead a contribution claim.

¶40 Midland's complaint fails to allege facts showing that it might be negligent or otherwise legally liable for any of the damage caused by the defective Semco windows.[12] Midland is to be commended for standing behind the homes it sold. But the question here is whether it has alleged in its complaint that it was obligated to do so. The answer is no and, thus, Midland has failed to plead either the first or second elements required to state a claim for contribution.

¶41 Midland relies on ***Rusch v. Korth***, 2 Wis. 2d 321, 328, 86 N.W.2d 464 (1957), and argues that under ***Korth*** a plaintiff is not required to establish its own wrongdoing in order to bring a contribution claim and something is "radically wrong" with a rule that would require otherwise. But ***Korth*** was overruled on this very point in ***Farmers Mutual Automobile Insurance Co. v. Milwaukee Automobile Insurance Co.***, 8 Wis. 2d 512, 99 N.W.2d 746 (1959). In ***Farmers Mutual***, the court had this to say about ***Korth***: "As a contribution case it stands as

[12] Midland argues, without citation to any particular paragraph in its complaint, that it pled joint liability. We disagree. Midland alleges in the contribution section of its complaint that: "As a result of the damages, and based upon the claims of the homeowners against Midland, Midland elected to provide a remedy to the homeowners for the damages." Even given liberal pleading principles, Midland's allegation does not make the grade.

an anomaly in the law." ***Farmers Mutual***, 8 Wis. 2d at 517. The court explained as follows:

> The ***Korth*** *Case* might better have been put on the general equitable principles governing subrogation as was inferred in the subsequent case of ***Kennedy-Ingalls Corp. v. Meissner*** (1958), 5 Wis. (2d) 100, 92 N.W.(2d) 247. In the more-recent decision in ***Bauman v. Gilbertson*** (1959), 7 Wis. (2d) 467, 96 N.W.(2d) 854, we commented on the ***Korth*** *Case* as follows (p. 470):
>
> "The appellants urge that common liability is no longer required as an essential element of contribution under ***Rusch v. Korth*** (1957), 2 Wis. (2d) 321, 86 N.W.(2d) 464. We do not agree. The latter case in reality should not be classed as a contribution case but rather as one grounded on the principle of subrogation. ***Kennedy-Ingalls Corp. v. Meissner*** (1958), 5 Wis. (2d) 100, 106, 92 N.W.(2d) 247."
>
> We did not intend the ***Korth*** *Case* to change the traditional law of contribution in this state so as to make it unnecessary for the party seeking contribution to allege and prove his negligence, the negligence of the defendant, and common liability resulting from such joint negligence. The language therein used extending the doctrine of contribution to cases when no common liability exists at the time of the accident cannot be approved.
>
> After a careful review of the cases and the implications put on the language of the ***Korth*** *Case*, this court is of the opinion that, to recover on the basis of contribution, nonintentional negligent tort-feasors must have a common liability to a third person at the time of the accident created by their concurring negligence. Language to the contrary in the ***Korth*** *Case* is overruled. Situations like those of the ***Korth*** *Case* may give rise to a claim for subrogation in equity but on principle cannot be based on the equitable principles governing contribution. It follows, therefore, that when one of two or more joint tort-feasors pays more than his proper proportionate share (comparative negligence not being applied to contribution cases, ***Wedel v. Klein*** (1938), 229 Wis. 419, 282 N.W. 606) and brings suit for contribution against the other tort-feasor, he must plead and prove among the other necessary allegations his own negligence, the negligence of the other tort-feasors, and their common liability. This rule places the burden of proof on the one asserting contribution.

Id. at 518-19.

¶42 In sum, Midland has failed to allege a claim for contribution against Semco because Midland has not pled any theory under which Midland itself might be liable to the homeowners.

III. Midland's Breach-of-Warranty Claim

¶43 The circuit court determined that Midland's breach-of-warranty claim was time-barred. Midland stopped purchasing Semco windows sometime in 1996 and filed its lawsuit on November 11, 2002. Midland's arguments focus on the applicability of two statutes of limitation, WIS. STAT. §§ 402.725 and 893.89 (2003-04).[13] For the reasons that follow, we determine that Midland's breach-of-warranty claim does not turn on any genuine issue of material fact and that the circuit court correctly concluded that the breach-of-warranty claim is time-barred.

¶44 The interpretation and application of a statute to undisputed facts are questions of law for our *de novo* review. ***Tannler v. DHSS***, 211 Wis. 2d 179, 183, 564 N.W.2d 735 (1997). Midland's arguments also require that we interpret Semco's written warranty. The interpretation of warranty language is also a question of law that we review *de novo*. ***Dieter v. Chrysler Corp.***, 2000 WI 45, ¶15, 234 Wis. 2d 670, 610 N.W.2d 832.

[13] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted. We refer to the most recent version of the statutes since the parties have not asserted that the language in this version of the statutes is different than the version that applies to Midland's claims.

A. Wis. Stat. § 402.725

1. The Future Performance Exception

¶45 Midland's primary warranty argument, stated broadly, is that its breach-of-warranty claim is timely under the "future performance" exception set forth in WIS. STAT. § 402.725. That statute provides:

> **(1)** An action for breach of any contract for sale must be commenced within 6 years after the cause of action has accrued….
>
> **(2)** A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Thus, the normal rule is that a breach-of-warranty action must be commenced within six years after "tender of delivery" of the product warranted. *See* ***Selzer***, 257 Wis. 2d 809, ¶16. However, if the warranty "explicitly extends to future performance of the goods," the action accrues when the buyer discovered or should have discovered the breach. WIS. STAT. § 402.725(2); *see also* ***Selzer***, 257 Wis. 2d 809, ¶16.

¶46 Our decision in ***Selzer*** controls the resolution of Midland's future performance argument. The plaintiff in ***Selzer*** brought both an express and an implied warranty claim against a window manufacturer. ***Selzer***, 257 Wis. 2d 809, ¶¶1, 3, 8. The window manufacturer sold its windows with a one-year warranty on its millwork. ***Id.***, ¶4. At the same time, however, the manufacturer advertised in its catalogue that "all exterior wood [on the windows] is deep-treated to permanently protect against rot and decay." ***Id.***, ¶¶3, 23. Since no Wisconsin case

had yet determined the scope of the future performance exception in WIS. STAT. § 402.725, a Uniform Commercial Code provision, in ***Selzer*** we turned to Uniform Commercial Code case law from other jurisdictions. *See* ***Selzer***, 257 Wis. 2d 809, ¶18. We gleaned the following rules:

> "The courts have applied a stringent standard in determining whether a warranty explicitly extends to future performance." Specifically, for such a warranty to exist, "'there must be specific reference to a future time in the warranty.'" The requirement of a "specific reference to a future time" is satisfied when a warranty guarantees a product for a particular number of years, or for a less precise, but still determinable period of time.
>
> The use of a "stringent standard" in applying U.C.C. § 2-725(2) comports with the subsection's plain language. While all warranties in a general sense apply to the future performance of goods, the future performance exception applies only where the warranty "*explicitly* extends to future performance." "Explicitly" is synonymous with clearly, definitely, precisely, and unmistakably, and has been defined as "fully and clearly expressed or demonstrated; leaving nothing merely implied; unequivocal." Thus, any ambiguity in warranty language should be interpreted against the existence of a future performance warranty.

Id., ¶¶19-20 (citations omitted). We then cited to cases from other jurisdictions concluding that warranty words such as "many years" and "permanent" were too vague to comply with the requirement that the time period be determinable. ***Id.***, ¶22. In light of these rules and cases, we concluded that the window manufacturer's statement in its catalogue—that the windows were "deep-treated to permanently protect against rot and decay"—did not "explicitly" extend to future performance and, therefore, the plaintiff's express warranty claim was time-barred. ***Id.***, ¶23.

¶47 We then turned to the ***Selzer*** plaintiff's *implied* warranty claim, and explained:

> Similarly, the "future performance" exception is not available [with respect to the plaintiff's] implied warranty claim. "*Implied warranties cannot, by their very nature, explicitly extend to future performance*." "Stated differently, the statute of limitations will *always start to run against claims based on implied warranty from the time when delivery of the goods is tendered*."

Id., ¶24 (citations omitted; emphasis added).

¶48 Midland has pled a breach of *implied* warranty, not express warranty, against Semco. ***Selzer*** would seem to put this claim to rest by saying, in plain language, that "'[i]mplied warranties cannot, *by their very nature*, explicitly extend to future performance'" and that "'the statute of limitations will *always* start to run against claims based on implied warranty from the time when delivery of the goods is tendered.'" ***Id.*** (citations omitted; emphasis added). Thus, we could stop here, but Midland makes an argument that we did not expressly consider in ***Selzer***.

¶49 Midland argues that Semco provided an express future performance warranty for a specified period of time because (1) Semco's written warranties stated that any "implied warranty of merchantability" was limited to the duration of the express warranties, and (2) the express warranties were for one and ten years. In Midland's view, this amounts to a statement by Semco that it is *expressly* providing an implied warranty of merchantability for one to ten years.[14]

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[14] The applicable Semco warranties stated:

> Any implied warranty of merchantability shall be limited in time to the duration of the express warranty provided herein for the product warranted.

And, separate warranty language provided an express one-year warranty on "millwork" and an express ten-year warranty on "insulating glass."

Moreover, Midland asserts, the time period for this express "implied" warranty is ten years because of ambiguity as to whether the one-year or ten-year express warranty applies to extend the duration of the implied warranty.

¶50 The significance of Midland's argument, if valid, is that the six-year limitations period in WIS. STAT. § 402.725 did not begin to run until the breach was or should have been discovered during the ten-year express warranty period. *See* § 402.725(2). Thus, according to Midland, it had ten years to discover the failure, and another six years after discovery to file suit.

¶51 Midland's argument is unpersuasive. Even apart from our statement in ***Selzer*** that implied warranties cannot, by their very nature, explicitly extend to future performance, ***Selzer***, 257 Wis. 2d 809, ¶24, the warranty route Midland asks us to travel is far from clear. As we explained in ***Selzer***, a future performance warranty must be clear, definite, precise, and unmistakable. *See* ***id.***, ¶20. It can hardly be said that the warranty statements Midland relies on, when read together, unambiguously provide an express "implied" warranty of merchantability for ten years' duration.

¶52 It is not apparent why we should look to the ten-year insulated glass warranty rather than the one-year millwork warranty. Again, the only explanation Midland offers is that it is ambiguous whether the language that the implied warranty "shall be limited in time to the duration of the express warranty" refers to the one-year or the ten-year express warranty. But ambiguity works against Midland in this context. Although an ambiguous warranty disclaimer or other ambiguous warranty language is normally construed against the drafter, *see* ***Dieter***, 234 Wis. 2d 670, ¶15, a more specific rule applies here, namely, that

ambiguity in warranty language should be interpreted against the existence of a future performance warranty. *See* ***Selzer***, 257 Wis. 2d 809, ¶20.

¶53 Midland relies heavily on ***Richardson v. Clayton & Lambert Manufacturing Co.***, 634 F. Supp. 1480 (N.D. Miss. 1986). But ***Richardson*** is an unsatisfying read to say the least. The court in ***Richardson*** layers a similar "implied" warranty limitation on an express ten-year warranty. ***Id.*** at 1486-87. The ***Richardson*** court, like Midland, fails to explain adequately why warranty language like that here creates an implied warranty that explicitly extends to future performance. Other cases reach the opposite result from ***Richardson***. *See* ***Stoltzner v. American Motors Jeep Corp.***, 469 N.E.2d 443, 444-45 (Ill. App. Ct. 1984); ***Nationwide Ins. Co. v. General Motors Corp.***, 625 A.2d 1172, 1178 (Pa. 1993).

¶54 Finally, Midland asserts that ***Selzer*** must be read with ***City of Stoughton v. Thomasson Lumber Co.***, 2004 WI App 6, 269 Wis. 2d 339, 675 N.W.2d 487 (Ct. App. 2003), a case which, according to Midland, holds that implied warranties can, and often do, extend to the future. We disagree with Midland's characterization of ***Thomasson***. That case is of no assistance to Midland. In ***Thomasson***, we reaffirmed our statement in ***Selzer*** that implied warranties cannot, by their very nature, explicitly extend to future performance. ***Thomasson***, 269 Wis. 2d 339, ¶12. We simply recognized, as we had in ***Selzer***, that "'[w]hile all warranties in a general sense apply to the future performance of goods, the future performance exception … applies only where the warranty "*explicitly* extends to future performance."'" ***Thomasson***, 269 Wis. 2d 339, ¶13 (quoting ***Selzer***, 257 Wis. 2d 809, ¶20).

¶55 Accordingly, we reject Midland's assertion that Semco's written warranty creates an implied warranty of merchantability that explicitly extends to future performance within the meaning of WIS. STAT. § 402.725.

2. Midland's Claim for Damages Related to Homes Constructed Within the Six-Year Period Before Midland Filed Suit

¶56 Midland argues that it suffered $53,585 in losses related to homes constructed within the six-year period before Midland filed its complaint. Midland reasons that its claims relating to this amount should have survived summary judgment under the six-year statute of limitation found in WIS. STAT. § 402.725, regardless of the applicability of the future performance exception in § 402.725(2). But Midland's argument is insufficiently developed to merit much of our attention.

¶57 Midland asserts that it is undisputed that it "has suffered damages in the amount of at least $53,585 for losses to homes constructed within the last six years." However, under WIS. STAT. § 402.725, it does not matter when the homes were constructed. What matters under the statute is when "tender of delivery is made." WIS. STAT. § 402.725(2). Midland argues that the triggering event under the statute was "completion of the sale" of the windows, which, according to Midland, need not coincide with the windows' delivery date. But Midland's arguments fail to demonstrate that the circuit court erred. Is Midland referring to the sale of the Semco windows to Midland or to UBC? When did these sales take place? How do we know whether there is a factual dispute as to when the relevant purchases were made?

¶58 Midland argues in its reply brief that Semco does not dispute Midland's assertion that it constructed the homes—homes that Midland later spent

$53,585 repairing—within six years of the time Midland filed suit. This is true. But it is not apparent why Semco should bother. Even under Midland's theory, the time of construction is *not* the event triggering the statute of limitations. We conclude that Midland's argument is insufficient to show that summary judgment regarding this amount was in error.

B. The Ten-Year Limitation Period in WIS. STAT. § 893.89

¶59 Midland argues that its breach-of-warranty claim falls within WIS. STAT. § 893.89, which allows for a ten-year limitation period on certain actions for injury resulting from improvements to real property. The circuit court erred, Midland argues, in determining that § 893.89 does not apply.

¶60 WISCONSIN STAT. § 893.89 reads, in part:

> **(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. This subsection does not affect the rights of any person injured as the result of any defect in any material used in an improvement to real property to commence an action for damages against the manufacturer or producer of the material.
>
> ….
>
> **(4)** This section does not apply to any of the following:

> ….
>
> (b) A person who expressly warrants or guarantees the improvement to real property, for the period of that warranty or guarantee.

¶61 Midland, however, does not develop any argument dealing with what we view as a threshold procedural question: Why should the ten-year period of limitation in WIS. STAT. § 893.89 apply to salvage a breach-of-warranty cause of action that is otherwise time-barred by WIS. STAT. § 402.725? As we read Midland's arguments, Midland is not arguing that § 402.725 does *not* apply; rather, Midland is arguing that both statutes apply. Midland seems to assume that the longer of the two limitation periods necessarily controls if both statutes apply. The truth of this assumption is not apparent, and we decline to address the matter further in the absence of developed argument.[15]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[15] Midland also argues that, as a matter of good policy, its breach-of-warranty claim should not be barred if, as we have now concluded, the economic loss doctrine bars its tort claims. Midland asserts that any other result completely denies Midland a remedy and allows a manufacturer to place a defective product on the market simply because the defect does not manifest itself right away. Thus, Midland argues, "[t]his Court should adopt the rule that the limitations period for a breach starts to run when there is some manifestation of the breach, whether the party to the contract knows of the manifestation." This argument, if adopted, would be a substantial change in warranty law and would effectively override cases such as ***Selzer***. Given the magnitude of such a change, we think this argument is better directed to the supreme court.