**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**March 30, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2004AP1379** **Cir. Ct. No. 2003CV1781**

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

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**ROTO ZIP TOOL CORPORATION,**

**PLAINTIFF-APPELLANT,**

**V.**

**DESIGN CONCEPTS, INC.,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Dane County: ROBERT DE CHAMBEAU, Judge. *Reversed and cause remanded.*

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 DYKMAN, J. Roto Zip Tool Corp. appeals from a summary judgment granted to Design Concepts, Inc., dismissing Roto Zip's claims of

breach of contract, breach of warranty and negligence against Design Concepts.[1] The circuit court determined Roto Zip could not recover damages on its contract and negligence claims against Design Concepts because the parties' contract required that Roto Zip test Design Concepts' prototypes before putting them into production and Roto Zip failed to conduct these tests.

¶2 Roto Zip contends that the circuit court erred in granting Design Concepts' summary judgment motion because the requirement to test was not incorporated into the final pre-production phase of the agreement. It further contends that even if the testing provision was a part of the contract, summary judgment was inappropriate because disputed issues of material fact exist. Design Concepts asserts alternate grounds for summary judgment, including that an indemnity clause was also a part of the parties' agreement and precludes recovery, and that the negligence claim is barred by the economic loss doctrine.

¶3 We conclude that: (1) the contracts are ambiguous as to whether Roto Zip was responsible for testing the prototypes in the final phase of the contract; (2) disputed issues of material fact exist as to whether Roto Zip fulfilled a purported duty to test and as to whether an alleged breach of this duty was sufficiently material to excuse Design Concepts' alleged breach of contract; (3) the economic loss doctrine does not bar Roto Zip's negligence claim because the parties' contract was predominantly for services and not goods, and service contracts are not subject to the economic loss doctrine; (4) the complaint states a claim in negligence because Design Concepts had a duty of care independent from

[1] On appeal, Roto Zip does not contest the circuit court's dismissal of its breach of warranty claim.

the contract to exercise the standard of care exercised by members of its profession; and (5) disputed issues of material fact preclude summary judgment on the negligence claim. For these reasons, we conclude the trial court erred in granting Design Concepts' motion for summary judgment on Roto Zip's breach of contract and negligence claims. We therefore reverse and remand for further proceedings.

## BACKGROUND

¶4 The following facts are taken from the parties' affidavits, pleadings and other supporting materials. Roto Zip is a power tool manufacturer founded in 1976 by Robert and Becky Kopras in Black Earth, Wisconsin. Roto Zip's first product was a modified router tool originally developed for cutting drywall. The tool was a commercial success, and Roto Zip developed new models for use outside of the drywall industry, including the SpiraCut, which was later sold as the SCS-01 spiral saw. Roto Zip's power tools are now sold in national chain retail stores and in international markets. In 2002, Roto Zip reported worldwide sales of $1.7 billion. In 2003, the company was acquired by Robert Bosch Tool Corporation of Mt. Prospect, Illinois.

¶5 Design Concepts is a Wisconsin company founded in 1967. Design Concepts contracts with businesses for product design and development. The company develops design blueprints and, at the client's request, three-dimensional prototypes of these designs. Design Concepts employs a staff of about forty-five full-time employees.

¶6 Beginning in 1998, Roto Zip entered into a series of contracts with Design Concepts to create designs and prototypes for a new generation of Roto Zip's hand-held power tools. Among these was a project that came to be known

as "SpiraCut II," a redesign of Roto Zip's SCS-01 and cordless SCS-02 spiral saws that incorporated new features such as multiple speed controls, an easily detachable handle and lights on the front of the tools. Roto Zip also contracted with Scientific Molding Corporation (SMC) to review and implement Design Concepts' designs and manufacture and assemble the component parts for Roto Zip's power tools.

¶7 Design Concepts submitted a proposal for the SpiraCut II project designated as proposal 6185, which envisioned three phases to the project. Phase 1 included development of the concept and delivery of detailed illustrations of the new product. Phase 2 was geared toward the production and delivery of a working prototype. The first two phases of the project included cost and time estimates. The proposal described phase 3 as follows:

> **PHASE 3—Product Implementation (Optional)**
>
> 1. **Product Launch Program**—Should you request additional services following Phase 2, a development and/or production launch program can be proposed. Such a program will insure a smooth transition, through tooling and into production.
>
> 2. **Multiple Prototypes**—Following the construction of the initial prototype and subsequent refinements to the design, we will fabricate additional prototypes as requested. Prototype tooling will be designed, built, and evaluated. Multiple prototypes will be constructed to facilitate market and field testing.
>
> 3. **Generate & Develop Manufacturing Plans**—As necessary, we will consult with you to explore manufacturing and assembly alternatives, including the following: tooling coordination, manufacturing sources, schedules, capabilities, and sequence of events.
>
> 4. **Manufacturing Documentation**—As requested, we can generate packaging design and graphics, exploded views, assembly drawings, and/or a detailed bill of materials.

> **5. Deliverables & Cost**—Because of the wide variety of efforts and outcomes required for product implementation, Phase 3 will be estimated at the conclusion of Phase 2. The schedule and cost for Phase 3 are not included in this proposal.

¶8 The proposal included attachments and indicated that acceptance would be understood to include the terms of these attachments.[2] Attachment I, entitled "Proposal Terms," stated that Roto Zip was "solely responsible" for testing Design Concepts' prototypes and designs. It also indemnified Design Concepts "against any loss or expense or claim" arising from its designs and services, and provided that it "shall not be liable, whether in contract or in tort, for any special, indirect, incidental, or consequential damages, including but not limited to lost profits, that may arise from [Design Concepts'] performance or failure to perform under this contract."[3] Each of Design Concepts' eight project

[2] Proposal 6185 provided in pertinent part: "Please refer to the enclosed Attachments for additional, detailed information. Your acceptance of our proposal and issuance of a purchase order shall be understood to include these terms." Proposal 6185A, discussed *infra* ¶9, contained identical language.

[3] Attachment I provided in part:

> **Testing & Approvals**—The client is solely responsible for testing the prototypes and designs provided by [Design Concepts], and for producing pre-production units from production tooling. Every design necessarily involves individualized professional judgments, the results of which cannot be guaranteed. As a result, the pre-production units should be tested by the client to verify that the designs are reliable, and that they meet performance standards. The client is responsible for obtaining UL, CSA, FCC, and any other similar approvals.

(continued)

proposals to Roto Zip included indemnity and product-testing language that was either identical or substantially similar to the verbiage above.

¶9 During phase 2 of the project, Design Concepts sent Roto Zip a revised proposal numbered 6185A. The proposal was dated January 18, 1999, and contained increased cost and time estimates for phase 2. Under the revised phase 2 proposal, Design Concepts offered to "construct one working prototype of each model" which it would "review … for functionality, and forward ... to [Roto Zip] for further testing and development by [Roto Zip's] personnel." The section outlining phase 1 of the project was omitted from the revised proposal, but phase 3 remained as it had appeared in the original proposal. The revised proposal included the same attachments that were appended to the original proposal.

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> **Indemnity & Hold Harmless**—The client agrees to indemnify and hold [Design Concepts] harmless against any loss or expense or claim arising from or in connection with the designs, services, and incidental goods furnished by [Design Concepts] to the client. [Design Concepts] shall not be liable, whether in contract or in tort, for any special, indirect, incidental, or consequential damages, including but not limited to lost profits, that may arise from [Design Concept]'s performance or failure to perform under this contract. This contract is solely for the benefit of the parties hereto and shall not be construed to create rights in any third party.
>
> **Applicable Law**—This proposal for the delivery of services shall be governed by the laws of the State of Wisconsin. [Design Concept]'s receipt of your initial purchase order constitutes your agreement to all the terms of this proposal, including those stated in any and all numbered attachments. The terms of this proposal shall supersede any other communication, including purchase and confirmation orders. This agreement constitutes the entire agreement of the parties and can only be modified by written change order signed by both parties.

¶10 As phase 2 neared completion, Design Concepts indicated in a June 4, 1999 letter its desire to provide Roto Zip with additional services, at least some of which had been described in phase 3 of proposals 6185 and 6185A. The letter began: "The purpose of this letter is to propose a more formal arrangement for our continuing support of your SpirAcut II program, beyond the design services we have performed so far." It did not refer to either prototype testing or the attachments that had been appended to proposals 6185 and 6185A. The full text of the letter is set forth in the discussion section. Roto Zip states that the purchase order dated June 10 it sent to Design Concepts constituted a written acceptance of the phase 3 proposal. The purchase order does not include any additional terms relevant to the parties' agreement.

¶11 As a result of the SpiraCut II project, two new tools, the Revolution and the Rebel, based on the SCS-01 and SCS-02, respectively, were designed and manufactured. Robert Kopras of Roto Zip avers that his company has experienced numerous quality problems and defects with the Revolution and the Rebel. These problems, he avers, resulted from Design Concepts' substandard designs. Specifically, Kopras avers that the new models had defective handles that would separate from the housing; problems with the shaft lock, a button that releases the tool bit; defective control panels, which prevented the units from turning on or running properly; and problems with the air diverter and the circle cutter, an attachment tool. Kopras avers that the product return rate for the Revolution and Rebel was fifty to sixty percent in 2001, fourteen to sixteen percent in 2002 and nine to eleven percent in the first two months of 2003. Kopras contrasts these return rates with those of the SCS-01 and SCS-02, which he avers have been in the range of four percent per year. Kopras avers that the high number of product defects cost Roto Zip millions of dollars in returns alone, and caused the company

substantial damage to its reputation for reliability and quality. Additional statements and exhibits from the parties' summary judgment submissions will be set forth as necessary in the discussion section.

¶12 Roto Zip sued Design Concepts and SMC, alleging breach of contract against both companies, and negligence against Design Concepts only. Roto Zip settled its claims against SMC. Design Concepts moved for summary judgment, asserting that the economic loss doctrine barred the negligence claim; the breach of warranty claim would not lie because such claims apply to contracts for goods and not services; and the contract's terms barred recovery on the contract claim because Roto Zip failed to fulfill its contractual duty to test Design Concepts' prototypes set forth in the attachments to proposals 6185 and 6185A, and, furthermore, these attachments contained enforceable indemnification and hold harmless provisions.

¶13 The circuit court granted Design Concepts' motion for summary judgment. The court determined that the testing provisions contained in attachment I to proposals 6185 and 6185A precluded Roto Zip from recovering on its breach of contract and negligence claims. The court concluded that phase 3 of the contract fully incorporated attachment I in its terms. It then determined that under the unambiguous terms of the agreement, Roto Zip did not bargain for merchantable designs, only prototypes for which Roto Zip bore the full responsibility to test. As a result, the court concluded that, as a matter of law, Roto Zip's damages were the product of its own negligence and contract infringement for failure to test adequately Design Concepts' prototypes. Because the court concluded that the testing provisions barred Roto Zip's claims, the court did not reach the questions of whether Roto Zip's contract and negligence claims were barred by the indemnity and hold harmless provisions of attachment I, or

whether its negligence claim was barred by the economic loss doctrine. Roto Zip appeals.

## DISCUSSION

¶14 We review a motion for summary judgment applying the same methodology as the circuit court. ***Grams v. Milk Products, Inc.***, 2005 WI 112, ¶12, 283 Wis. 2d 511, 699 N.W.2d 167. This methodology bears repeating here:

> If the complaint states a claim and the pleadings show the existence of factual issues, the court examines the moving party's … affidavits or other proof to determine whether the moving party has made a *prima facie* case for summary judgment under sec. 802.08(2). To make a *prima facie* case for summary judgment, a moving defendant must show a defense which would defeat the plaintiff. If the moving party has made a *prima facie* case for summary judgment, the court must examine the affidavits and other proof of the opposing party ... to determine whether there exists disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to a trial.

***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). Summary judgment is appropriate when "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 a judgment as a matter of law." WIS. STAT. § 802.08(2) (2003-2004).[4]

[4] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

## *I. Breach of Contract Claim*

### *A. Interpretation of the Contract*

¶15 Our analysis begins with the question of whether Design Concepts has made a prima facie case for summary judgment on Roto Zip's breach of contract claim. Design Concepts' defense to this claim is that Roto Zip cannot recover under the unambiguous terms of the contract because attachment I to proposals 6185 and 6185A requires that Roto Zip test Design Concepts' pre-production prototypes, which it asserts Roto Zip failed to do. Design Concepts also contends that the indemnity provisions of attachment I preclude recovery on Roto Zip's contract and negligence claims. Design Concepts further asserts that certain allegations from Roto Zip's complaint are evidentiary admissions under WIS. STAT. § 908.01(4)(b) that should preclude Roto Zip's claims against Design Concepts. Specifically, Design Concepts argues that Roto Zip's allegation against SMC that it breached its contractual duty to test the prototypes, causing Roto Zip to sustain damages in excess of $10 million, is an admission that Roto Zip's damages were caused by SMC's failure to adequately test and not by Design Concepts' allegedly substandard design.

¶16 We examine first the terms of the agreement between Roto Zip and Design Concepts. The interpretation of an unambiguous contract is a question of law that is often decided on summary judgment. *See, e.g.*, ***Jones v. Sears and Roebuck Co.***, 80 Wis. 2d 321, 327, 259 N.W.2d 70 (1977). Whether the terms of a written contract are ambiguous is also a question of law that we review de novo. ***Wisconsin Label Corp. v. Northbrook Property & Cas. Ins. Co.***, 2000 WI 26, ¶24, 233 Wis. 2d 314, 607 N.W.2d 276. "A contract provision which is reasonably and fairly susceptible to more than one construction is ambiguous."

***Jones v. Jenkins***, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979). If the terms of a written contract are ambiguous, interpretation of the contract is a question for a fact finder. ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.,*** 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996).

¶17 Roto Zip does not dispute that proposals 6185 and 6185A by their plain language incorporate all attachments, and that the testing provision of attachment I plainly allocates responsibility for testing prototypes and designs to Roto Zip. At issue is the relationship of the June 4 letter to proposals 6185 and 6185A and whether the terms of attachment I were in force during phase 3 of the project. The June 4 letter states:

> Dear [Roto Zip President Robert Kopras],
>
> The purpose of this letter is to propose a more formal arrangement for our continuing support of your **SpirAcut II** program, beyond the design development services that we have performed so far. We are at a stage where our involvement in the program is winding down as defined in our original proposal #6185A … and you need to quickly ramp up toward production. I recognize that Rotozip presently does not have the available resources to coordinate that transition effectively. I wish to offer the services of Design Concepts, Inc. to fill that role at your discretion.
>
> I suggest a Phase 3 to our current proposal where we will act as project coordinator representing your interests while interfacing with your intended production suppliers. We have already begun functioning in this capacity by placing orders for multiple[] sets of prototype parts for SMC, Johnson Electric, and for preliminary UL review. I expect that there will be considerable more requests for direction, support, and assistance by your vendors as we get closer [to] production.
>
> Assuming that you wish to have us act as your project coordinator, I would like to request some form of purchase order to be issued by Rotozip to cover these efforts. This may be in the form of a blanket order or for a set dollar amount that you select. Design Concepts, Inc. would bill

> on a time and material basis, at your direction, for whatever duration you deem appropriate. Ideally, your purchasing and production personnel will become actively involved with us and eventually take full control of this program.
>
> Please review this option and share your thoughts with me at your earliest convenience. I have a great deal of personal and professional pride in seeing this new product make a smooth transition into production and hope that you will feel that it is appropriate that we remain involved to help make that happen.
>
> Sincerely,
> DESIGN CONCEPTS, INC.
>
> Dan Bullis
> Vice President-Operations

¶18 Design Concepts contends that proposals 6185 and 6185A set forth the terms and conditions applicable to phase 3. It asserts that the June 4 letter did not create a new agreement for phase 3, but rather elaborated on the terms of the prior proposals. It notes that the letter refers to phase 3 within the context of "our current proposal," a phrase the trial court relied on in concluding that the June 4 letter was part of an integrated contract. Finally, Design Concepts contends that because attachment I to the proposals unambiguously allocates responsibility for testing Design Concepts' prototypes to Roto Zip, a lack of adequate testing by Roto Zip "destroys the causal link between alleged design deficiencies and Roto Zip's damages," entitling Design Concepts to summary judgment.

¶19 Roto Zip contends that the attachments to proposals 6185 and 6185A were not a part of Design Concepts' phase 3 proposal, noting that the June 4 letter does not refer to the proposals, the attachments or testing. Rather, it asserts that the letter was not an extension of the earlier contract, but a separate proposal by Design Concepts to provide project coordinator services. Roto Zip argues that, at

a minimum, whether the June 4 letter incorporated the attachments to the earlier proposals is ambiguous, and summary judgment is therefore inappropriate.

¶20 We conclude that each of these interpretations of the June 4 letter is reasonable. The contract is therefore ambiguous as to whether the parties intended to incorporate attachment I and its testing and indemnity provisions into phase 3 of the project. The June 4 letter's opening phrase, "[t]he purpose of this letter is to propose a more formal arrangement," supports a reasonable inference that the letter offers new terms for phase 3 that are subject to further negotiation. Moreover, the letter states that Design Concepts is "at a stage where [its] involvement in the program is winding down as defined in [its] original proposal #6185A," suggesting that proposal 6185A defines the first two phases of the agreement, and an additional contract is necessary to continue Design Concepts' involvement in the program. Shortly thereafter, the letter "offer[s] the services of Design Concepts, Inc." for the next stage of the project; the use of the phrase "offer the services of" further supports a view that the June 4 letter is a proposal separate from 6185A and 6185. Finally, the June 4 letter does not refer to the attachments or testing. One could reasonably conclude from this that if Design Concepts had intended to incorporate the attachments of the prior contracts into a letter offering its services for phase 3, it would have explicitly done so.[5]

[5] Roto Zip notes that several of Design Concepts' invoices to Roto Zip for phase 3 services request payment for "testing," which, it contends, indicates that Design Concepts was responsible for testing in phase 3. Roto Zip also points to averments of Roto Zip President Robert Kopras that Design Concepts was responsible for phase 3 testing. As material beyond the four corners of the contract, neither the invoices nor Kopras' averments is relevant to our determination that the text of the contract is ambiguous. Both are simply pieces of evidence that may favor Roto Zip's interpretation of the contract at trial.

¶21 However, we agree with Design Concepts that the reference in the June 4 letter to phase 3 as a part of "our current proposal" reasonably suggests that the letter incorporates the prior proposals. It is true that neither proposal 6185 nor 6185A committed Roto Zip to executing phase 3. Each of those proposals stated: "Should you request additional services following Phase 2, a development and/or production launch program can be proposed." But phase 3, as set forth in these proposals, projects that its details will be fleshed out at a later date (*e.g.*, "Phase 3 will be estimated at the conclusion of Phase 2"). Consequently, these provisions may be read to anticipate additional discussions that elaborate upon but do not supercede the original proposals. Design Concepts' view is thus reasonable as well.

¶22 Because the intent of the parties cannot be determined conclusively on the language of the contract, a trial is necessary to resolve this question. Thus, Design Concepts' defense that the terms of the agreement defeat Roto Zip's contract claim does not constitute a prima facie case for summary judgment. The trial court therefore erred in granting Design Concepts' motion for summary judgment on these grounds.

*B. Other Disputed Issues of Material Fact*

¶23 Roto Zip also contends that other issues of material fact preclude summary judgment. We have already determined that the trial court erred in granting summary judgment on the breach of contract claim, a conclusion that would normally end our analysis. However, we believe that other issues of material fact preclude summary judgment in this case, and we address these factual disputes to assist the trial court in subsequent proceedings.

¶24 Roto Zip asserts that, regardless of whether it was responsible for testing prototypes for merchantability under the contract, summary judgment was inappropriate because disputed issues of material fact exist as to (1) whether Roto Zip actually breached a duty to test; and (2) whether this alleged breach was sufficiently material to excuse Design Concepts' alleged breach of its contractual obligations. We agree on both counts.

¶25 First, Roto Zip's summary judgment submissions place in dispute the question of whether the prototypes were tested "by the client to verify that the designs are reliable, and that they meet performance standards." The Kopras affidavit avers the following: "I, personally, along with my son and others at Roto Zip, tested and evaluated the prototypes by running them, working with them and evaluating their functionality and usefulness. These tests did not reveal the defects that ultimately surfaced once the products went to market." Additionally, Roto Zip's submissions include invoices that show Design Concepts billed Roto Zip for prototype testing in phase 3 of the agreement.

¶26 For summary judgment purposes, Design Concepts does not refute Roto Zip's showing that it did not breach the purported duty to test. Rather, Design Concepts appears to contend that Roto Zip should be foreclosed from asserting that it did not breach the duty to test because Roto Zip's complaint admits that failure to test, not substandard design, caused its alleged damages. Design Concepts contends that Roto Zip's claim against a second defendant, SMC, that SMC's "manufactur[e of] defective power tools and parts" and "fail[ure] to adequately inspect same" caused Roto Zip damages "in an amount in excess of $10,000" (the same amount in damages alleged against Design Concepts) should be treated as a judicial admission that SMC's failure to adequately test caused Roto Zip's damages. *See* ***Kraemer Bros., Inc. v. U.S. Fire***

***Ins. Co.***, 89 Wis. 2d 555, 569, 278 N.W.2d 857 (1979) ("Admissions are the words of the party opponent offered as evidence against him. Admissions come in as substantive evidence of the facts admitted."). We disagree with Design Concepts.

¶27 Roto Zip's claim against SMC merely set forth an alternate view of liability in the complaint. It is well established that parties may plead in the alternative. *See*, *e.g.*, ***Doyle v. Engelke***, 219 Wis. 2d 277, 291 n.5, 580 N.W.2d 245 (1998). Under WIS. STAT. § 802.02(5)(b), a claimant or counter-claimant "may set forth 2 or more statements of a claim … alternatively … either in one claim … or in separate claims." A statement expressing an alternate theory of the case is not an admission. *See* ***Kraemer Bros.***, 89 Wis. 2d at 571 (concluding that an allegation of negligence in a complaint against a third party was not an admission that the defendant was not negligent). Because Roto Zip has presented evidence that it tested the prototypes and paid Design Concepts to conduct testing, a disputed issue of material fact exists as to whether Roto Zip breached a purported duty to test. [6]

[6] Design Concepts' summary judgment materials also include a copy of a counterclaim to a complaint filed against Roto Zip in a separate proceeding by a former Chief Operating Officer of Roto Zip, Jawad G. Nunes. In its reply brief before the trial court, Design Concepts contended that this counterclaim includes an admission that failure to adequately test the prototypes was the cause of Roto Zip's economic damages. Though Design Concepts does not refer to this submission in its appellate brief, we nonetheless address it. Roto Zip's counterclaim alleges that Nunes "became aware of information regarding a potential design defect and safety hazard relating to a quick releasing cad lock on a saw handle manufactured by Roto Zip" which he "made a decision not to further investigate." Like Roto Zip's allegations against SMC, this pleading is not an admission but a legitimate attempt to plead in the alternative. WISCONSIN STAT. § 802.02(5)(b) states that "[a] party may … state as many separate claims or defenses as the party has regardless of consistency."

¶28 Second, we agree with Roto Zip that even if it breached a contractual duty to test, whether this breach was sufficiently material to excuse Design Concepts' alleged breach of its contractual duties is a question of fact that cannot be resolved on the parties' submissions. *See* ***Entzminger v. Ford Motor Co.***, 47 Wis. 2d 751, 755, 177 N.W.2d 899 (1970) (materiality of a breach of contract is a factual question).[7] At oral argument, counsel for Roto Zip conceded that if it materially breached a duty to test, it would not be able to recover the damages it seeks in its complaint—"excess product returns and damage to its goodwill and reputation in an amount in excess of $10,000,000." Counsel asserted that it would still be entitled to recover the payments it made to Design Concepts for the project. However, Roto Zip's complaint does not seek recovery of these damages. Under WIS. STAT. § 802.09(1), Roto Zip may request leave of the court to amend its complaint to include these damages on remand. Though permission to amend the pleadings is addressed to the trial court's discretion, § 802.09(1) provides that

[7] Design Concepts' defense at summary judgment has been that Roto Zip's breach excused Design Concepts' alleged breach and not that it did not breach the contract. For this reason, we have not focused on whether Roto Zip's submissions reasonably support its claim of breach of contract. We conclude they do. Kopras' affidavit avers that return rates in the first three years of production for the models designed by Design Concepts, the Rebel and Revolution, were many times greater than those of Roto Zip's earlier models. Additionally, an affidavit of Al Uzumcu, a mechanical engineer with experience in the power tool industry who worked with Roto Zip, avers that he was personally aware that the Rebel and Revolution had multiple defects and that his professional opinion was that these defects "were a direct result of defects in [Design Concepts'] designs and [its] failure to comply with standards of reasonable care in the power tool design engineering industry."

"leave [to amend a pleading] shall be freely given at any stage of the action when justice so requires."[8]

*C. The Indemnity Provision*

¶29 Finally, we address whether the indemnity and hold harmless provisions of attachment I would preclude Roto Zip's contract and negligence claims against Design Concepts should a fact finder determine that attachment I was a part of the contract during phase 3.

¶30 "It is a settled rule in this state that indemnity agreements are to be broadly construed where they deal with the negligence of the indemnitor, but strictly construed where the indemnitee seeks to be indemnified for his own negligence." ***Deminsky v. Arlington Plastics Machinery***, 2001 WI App 287, ¶21, 249 Wis. 2d 441, 638 N.W.2d 331, *aff'd as modified*, 2003 WI 15, 259 Wis. 2d 587, 657 N.W.2d 411. "[T]he obligation to indemnify an indemnitee for its own negligence must be clearly and unequivocally expressed in the agreement. General language will not suffice." ***Spivey v. Great Atlantic & Pacific Tea Co.***, 79 Wis. 2d 58, 63, 255 N.W.2d 469 (1977). Because the indemnification

[8] We believe that the record before us reveals another potential issue of fact: whether adequate testing would have revealed flaws in the pre-production designs. None of the summary judgment materials appear to address this issue directly. However, the question of whether alleged design flaws would have been discovered by adequate testing may be relevant to a fact finder's determination of materiality of breach in contract and causation in negligence. For example, if a fact finder determined that accepted methods of testing pre-production designs would not have detected certain alleged design flaws, and that it was Roto Zip's responsibility to conduct these tests, Roto Zip's breach might be significantly less material than if all of the alleged design flaws would have been easily detectible. Conversely, if adequate testing would not have detected certain alleged design flaws, and it was Design Concepts responsibility to test the prototypes, Design Concepts' liability might be mitigated by the possibility that the alleged design flaws were of a type that could not have been discovered by a designer exercising reasonable professional care.

provision of attachment I does not unequivocally express an intent to indemnify Design Concepts for its own negligent acts, we conclude the provision does not indemnify Design Concepts for such acts.

¶31 The relevant provisions of the indemnity provision state:

> The client agrees to indemnify and hold [Design Concepts] harmless against any loss or expense or claim arising from or in connection with the designs, services, and incidental goods furnished by [Design Concepts] to the client. [Design Concepts] shall not be liable, whether in contract or in tort, for any special, indirect, incidental, or consequential damages, including but not limited to lost profits, that may arise from [Design Concepts'] performance or failure to perform under this contract.

This language does not refer to negligence and, therefore, it resembles the language of indemnity provisions that have been found not to indemnify a party for its negligent acts. *See, e.g.,* ***Spivey***, 79 Wis. 2d at 62 ("[W]e hereby agree to indemnify and save you harmless from any loss or liability arising in any manner out of the presence of our representatives on any part of the premises."); ***Mustas v. Inland Const., Inc.***, 19 Wis. 2d 194, 206-207, 120 N.W.2d 95 (1963) ("[Y]ou agree to indemnify … the owner … from all loss and damage to person or property and all claims, suits or demands arising from damages or injuries to you … connected with your operations on this job."). Likewise, the indemnity provision in this case lacks the more specific language Wisconsin courts have found necessary in other indemnity clauses to disclaim liability for an indemnitee's own negligence. *See, e.g.*, ***Deminsky***, 249 Wis. 2d 441, ¶21 ("Purchaser shall indemnify and hold harmless Seller ... from and against any and all losses, expenses, demands, and claims made against Seller ... *whether caused by the sole negligence of Seller*."); ***Dykstra v. Arthur G. McKee & Co.***, 100 Wis. 2d 120, 124, 301 N.W.2d 201 (1981) ("You shall … indemnify … any loss,

damage, or expense … [which] results from … the performance of this subcontract, (including any such injury, death, or damage *caused in part by our negligence*) ….) (emphasis added).

¶32 Design Concepts contends that because of the experimental nature of the design prototype that was contracted for in this case, Design Concepts should not be liable for its own negligence. Design Concepts asserts that courts from other jurisdictions have considered the prototypical or experimental nature of a product when deciding not to impose liability on the designer of the product, citing ***Golden Reward Mining Co. v. Jervis B. Webb Co.***, 772 F. Supp. 1188, 1124-25 (D.S.D. 1991), ***Logan Equip. Corp. v. Simon Aerials, Inc.***, 736 F. Supp. 1188, 1196 (D. Mass. 1990), and ***American Elec. Power Co. v. Westinghouse Elec. Corp.***, 418 F. Supp. 435, 458 (S.D.N.Y. 1976). We acknowledge there are good policy reasons for not imposing liability on designers who are involved in the development of useful and innovative new products. However, public policy cannot defeat the language of the indemnity provision in this particular contract, which fails to expressly disclaim liability for Design Concepts' own negligent acts.

### *II. Negligence Claim*

¶33 We turn now to whether summary judgment was properly granted on the negligence claim. Here, we must determine: (1) whether the negligence claim is barred by the economic loss doctrine, as Design Concepts contends; and, if the economic loss doctrine does not bar recovery, (2) whether Roto Zip has stated a claim in negligence and (3) whether disputed issues of fact exist to preclude summary judgment.

*A. Economic Loss Doctrine*

¶34 The economic loss doctrine is a judicial rule first adopted in Wisconsin in ***Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.***, 148 Wis. 2d 910, 921, 437 N.W.2d 213 (1989). Among the economic loss doctrine's purposes is to preserve the distinction between tort and contract. ***Daanen v. Janseen, Inc. v. Cedarapids, Inc.***, 216 Wis. 2d 395, 403-04, 573 N.W.2d 842 (1998). In general, tort law offers a broader array of damages than contract law. ***Grams***, 283 Wis. 2d 511, ¶14. "The economic loss doctrine precludes parties under certain circumstances from eschewing the more limited contract remedies and seeking tort remedies." ***Insurance Co. of North America v. Cease Electric, Inc.***, 2004 WI 139, ¶24, 276 Wis. 2d 361, 688 N.W.2d 462. "'Economic loss' for purposes of the doctrine is defined as the loss in a product's value which occurs because the product is inferior in quality and does not work for the general purposes for which it was manufactured and sold. It includes both direct economic loss and consequential loss." ***Id.***, ¶23 (citations omitted). The application of the economic loss doctrine to a set of facts presents a question of law that we review independently. ***Kaloti Enterprises, Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶10, 283 Wis. 2d 555, 699 N.W.2d 205.

¶35 In ***Cease Electric***, the supreme court held that the economic loss doctrine does not apply to contracts for services. ***Id.***, ¶2. The ***Cease Electric*** court explained that the economic loss doctrine is well suited for contracts for goods and products because built-in warranty provisions of the Uniform Commercial Code (UCC) already provide adequate protection against damages caused by defective products. ***Id.***, ¶35. It noted that the UCC does not apply to contracts for services, however. ***Id.*** The ***Cease Electric*** court stated that, unlike contract law,

> [t]ort law provides an incentive generally to guard against negligent conduct in the provision of services. If tort law is avoided, the ability to deter certain activity is impaired because contract remedies and warranties may be easily disclaimed. Tort principles address more than merely a private interest between two commercial companies; they also address society's interest in minimizing harm by deterring negligent conduct.

***Id.***, ¶41. Additionally, the court observed that extending the economic loss doctrine to service contracts could implicate actions against professionals, including engineers, citing ***Milwaukee Partners v. Collins Engineers, Inc.***, 169 Wis. 2d 355, 362-63, 485 N.W.2d 274 (Ct. App. 1992), which traditionally lie both in tort and contract. ***Id.***, ¶49.

¶36 The supreme court recently addressed the applicability of the economic loss doctrine to cases involving contracts for both goods and services in ***Linden v. Cascade Stone***, 2005 WI 113, ¶8, 283 Wis. 2d 606, 699 N.W.2d 189. ***Linden*** held that the applicability of the economic loss doctrine depended upon whether the contract's "predominant purpose" was to provide either goods or services. ***Id.*** The predominant purpose test, set forth in ***Bonebrake v. Cox***, 499 F.2d 951, 960 (8th Cir. 1974), looks to the totality of the circumstances, including relevant objective and subjective factors. In ***Linden***, a case involving a construction contract for a home, a majority of the court concluded that the contract's predominant purpose was the sale of a product, the home. ***Linden***, 283 Wis. 2d 606, ¶32.

¶37 At oral argument, counsel for Design Concepts contended that ***Cease Electric*** did not preclude application of the economic loss doctrine because the agreements between Design Concepts and Roto Zip were primarily for goods and

not services.[9] Counsel cited ***Prent Corp. v. Martek Holdings, Inc.***, 2000 WI App 194, 238 Wis. 2d 777, 618 N.W.2d 201, which applied the economic loss doctrine to bar a claim of negligent misrepresentation brought by the buyer of a customized software system. Counsel asserted that if a contract for the programming and installation of software is a contract for goods under Wisconsin law, then a contract to design a more tangible set of items, a line of power tools, must also be a contract for goods. We disagree.

¶38 Following ***Linden***, we conclude the economic loss doctrine is inapplicable here because the predominant purpose of the contract was to provide a service. Roto Zip contracted with Design Concepts to receive its professional engineering and design expertise in the redesign of Roto Zip's existing power tool line. The primary materials Design Concepts provided to Roto Zip were those used in the construction of several two- and three-dimensional models. These materials represented a small fraction of the cost of the contract. The phase 3 invoices appended to Robert Kopras' affidavit show that Design Concepts billed Roto Zip by the hour for the labor of individual employees, clear evidence that Roto Zip paid for Design Concepts' professional services, not materials. In this case, the "thrust" of the agreement between Roto Zip and Design Concepts was for "the rendition of a service, with goods incidentally involved." ***Bonebrake***, 499 F.2d at 960.

¶39 To the extent that ***Prent*** suggests a different outcome, we note that it was decided before ***Cease Electric*** and ***Linden***, both of which compel our result.

[9] The parties did not address the impact of the predominant purpose test adopted in ***Linden v. Cascade Stone***, 2005 WI 113, 283 Wis. 2d 606, 699 N.W.2d 189, because oral argument was held before ***Linden*** was released.

Additionally, ***Prent***'s analysis of whether the contract was for a product and not a service was cursory and made only for the purpose of distinguishing a prior case, ***Douglas-Hansen Co., Inc., v. BF Goodrich Co.***, 229 Wis. 2d 132, 598 N.W.2d 262 (Ct. App. 1999).[10] *See* ***Prent***, 238 Wis. 2d 777, ¶24. ***Prent*** stated sufficient alternate grounds on which to distinguish ***Douglas-Hansen. Id.***

*B. Existence of Common Law Duty Independent of Contractual Duties*

¶40 A common law negligence claim requires proof of four elements: duty, breach, causation and damages. ***Thomas ex rel. Gramling v. Mallett***, 2005 WI 129, ¶101, 285 Wis. 2d 236, 701 N.W.2d 523. "In Wisconsin, everyone owes a duty to all others to refrain from any act that will cause foreseeable harm to others." ***Hoida, Inc. v. M & I Midstate Bank***, 2004 WI App 191, ¶11, 276 Wis. 2d 705, 713, 688 N.W.2d 691. However, not every actionable claim in contract gives rise to a tort. ***Landwehr v. Citizens Trust Co.***, 110 Wis. 2d 716, 723, 329 N.W.2d 411 (1983). While a contract establishes the "state of things" that "furnishes the occasion for the tort …[,] there must be a duty existing

[10] Our review of the briefs in ***Prent*** shows that the economic loss doctrine was applied sua sponte. Here is the entire discussion in ***Prent Corp.*** about whether the contract was for goods or services:

> We note that Douglas-Hanson was not a buyer of a product, as Prent and GOEX are. Instead, Douglas-Hanson contracted to provide a service. No Wisconsin appellate case has addressed whether the economic loss doctrine applies to service contracts. And, because it was not an issue in contention, we did not address that question in our decision in ***Douglas-Hanson*** either.

***Prent Corp. v. Martek Holdings, Inc.***, 2000 WI App 194, ¶24, 238 Wis. 2d 777, 618 N.W.2d 201.

independently of the performance of the contract for a cause of action in tort to exist." ***Id.*** "We ignore the existence of the contract when determining whether the alleged conduct is actionable in tort." ***Anderson v. Regents of University of California***, 203 Wis. 2d 469, 485, 554 N.W.2d 509 (Ct. App. 1996).

¶41 Design Concepts appears to contend that Roto Zip's negligence claim must fail because Design Concepts did not have a duty to Roto Zip beyond its contractual duties.[11] Citing ***Milwaukee Partners***, *supra*, and ***A.E. Investment Corp. v. Link Builders, Inc.***, 62 Wis. 2d 479, 214 N.W.2d 764 (1974), Design Concepts asserts that only professionals who are licensed by the state have a duty of care that exists independent of a contract. It argues that because none of its employees is licensed by the state, it does not have a duty to Roto Zip independent of its contractual obligations. We disagree.

¶42 Neither ***Milwaukee Partners*** nor ***A.E. Investment*** holds that whether the profession is licensed by the state determines whether a duty independent of contractual duties exists. Moreover, Design Concepts' argument is inconsistent with the Wisconsin approach to the concept of duty. The supreme

[11] Design Concepts asserted that a duty did not exist independent of the contract in the context of its argument that the economic loss doctrine should apply. Its point there was that because its designers are not members of a regulated profession, the company did not have a duty to meet a professional standard of care independent of its bargained for duties; hence, they argued that application of the economic loss doctrine in this case would not extend the doctrine to contracts for professional services. (The parties submitted appellate briefs before the release of ***Insurance Co. of North America v. Cease Electric, Inc.***, 2004 WI 139, 276 Wis. 2d 361, 688 N.W.2d 462, which, as explained earlier, established that all service contracts, professional or otherwise, are exempt from the economic loss doctrine.) Design Concepts' argument that it did not have a duty to Roto Zip independent of the contract also attacks a necessary element of Roto Zip's negligence claim, even if the argument was not made for this purpose. We therefore address it here.

court summarized this view of duty in the context of a medical malpractice claim in ***Nowatske v. Osterloh***, 198 Wis. 2d 419, 432-33, 543 N.W.2d 265 (1996):

> [P]hysicians, like all others in this state, are bound by a duty to exercise due care. Every person in Wisconsin must conform to the standard of a reasonable person under like circumstances; so too, then, "the duty of a physician or surgeon is to exercise ordinary care …." "[T]he basic standard—ordinary care—does not change when the defendant is a physician. The only thing that changes is the makeup of the group to which the defendant's conduct is compared.
>
> .... Generally a determination of negligence involves comparing an alleged tortfeasor's standard of care with "the degree of care which the great mass of mankind exercis6es under the same or similar circumstances." WIS JI-CIVIL 1005. When a claim arises out of highly specialized conduct requiring professional training, however, the alleged tortfeasor's conduct is compared with the conduct of others who are similarly situated and who have had similar professional training.

(Citations omitted.) Under this well-established standard of duty, Design Concepts' affidavits and other supporting materials fail to show that it is entitled to summary judgment on the question of duty. Design Concepts fails to show that Roto Zip's claim does not "arise out of highly specialized conduct requiring professional training," and thus, that it is subject only to the more general standard of care to which everyone is subject. We therefore conclude that Design Concepts' affidavits fail to show that it does not have an independent duty to Roto Zip and therefore it is not entitled to summary judgment on the negligence claim on this basis.

### *C. Existence of Disputed Issues of Material Fact*

¶43 We turn next to the question of whether Roto Zip's submissions place material facts in dispute. For summary judgment purposes, Design Concepts

has not contested the elements of breach or damages. Design Concepts has contended that Roto Zip cannot prove the element of causation because Roto Zip's failure to test the prototypes breaks the causal link between the alleged breach by Design Concepts and Roto Zip's damages. We disagree and conclude that the question of causation cannot be resolved on the summary judgment submissions.

¶44 In Wisconsin, the element of causation turns on "whether the defendant's negligence was a substantial factor in producing the injury." ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis. 2d 462, 475, 529 N.W.2d 594 (1995) (citations omitted). Here, causation, like duty, may ultimately be tied to the parties' intent regarding testing in phase 3 of the contract and other issues in dispute, including whether Roto Zip adequately tested the prototypes and whether testing would have revealed the alleged design flaws. A fact finder's answers to these issues may impact its determination of whether Design Concepts' allegedly negligent design work was a cause of Roto Zip's damages.[12] Regardless, because the parties' submissions show that disputed issues of fact exist as to the negligence claim, summary judgment is inappropriate.

## CONCLUSION

¶45 In sum, we conclude the circuit court erred in granting Design Concepts' motion for summary judgment on Roto Zip's breach of contract claim

[12] Defendants routinely plead comparative negligence in cases such as this where the claimant's damages may have been caused at least in part by its own negligence. *See* WIS. STAT. § 802.02(3) (providing that comparative negligence must be pled to be relied upon as a defense). However, we observe that Design Concepts has not pled contributory negligence. Under WIS. STAT. § 802.09(1), Design Concepts may petition the court to amend its answer. Though permission to amend the pleadings is addressed to the trial court's discretion, § 802.09(1) provides that "leave [to amend a pleading] shall be freely given at any stage of the action when justice so requires."

because the contract is ambiguous as to whether Roto Zip had a contractual duty to test Design Concepts' prototypes in the final pre-production phase of the contract. We conclude that the economic loss doctrine does not bar Roto Zip's cause of action for negligence against Design Concepts, and that Roto Zip's negligence claim survives because Design Concepts failed to show that it did not have a duty to Roto Zip independent of its contractual duties. Finally, we conclude summary judgment was improperly granted on the negligence and breach of contract claims because the parties' submissions raise disputed issues of material fact. We therefore reverse and remand for further proceedings.

*By the Court*.—Judgment reversed and cause remanded.

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