COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP211 **Cir. Ct. No. 2005CV321**

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

LANA C. KOMOROWSKI AND ROBERT KOMOROWSKI,

PLAINTIFFS-APPELLANTS,

V.

JEFF JANSSEN BUILDERS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Lana and Robert Komorowski appeal a summary judgment granted to Jeff Janssen Builders, Inc. They argue the court erred in holding the economic loss doctrine barred their claim, and that it erred in granting summary judgment because a material issue of fact exists. We conclude the

economic loss doctrine bars the Komorowskis' claim, and any disputed facts underlying that claim therefore are not material. Accordingly, we affirm the judgment.

BACKGROUND

¶2 The following facts are taken from the Komorowskis' affidavits opposing summary judgment.[1] On April 22, 1996, Lana and her ex-husband entered into a home construction contract with Janssen Builders.[2] Janssen Builders finished the house in August 1996.

¶3 In spring 2002, the Komorowskis discovered a water problem in their basement. They contacted Jeff Janssen, the owner of Janssen Builders. Janssen adjusted the cover on the sump pump and told the Komorowskis that faulty landscaping was causing water to run toward the house and through the wall.

¶4 In spring 2004, water ran through the basement wall again. The Komorowskis removed the drywall from the wall and discovered water damage to the framing and insulation, as well as mold in the wall. They contacted Janssen, who insisted the water problem was due to the faulty landscaping. However, a second contractor discovered the drain tile was too low along some walls and had not been installed along the wall where most of the water problems had occurred.

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[1] For purposes of summary judgment, we assume the facts in the affidavits opposing summary judgment are true. *See* ***Severude v. American Family Mut. Ins. Co.***, 2002 WI App 33, ¶2, 250 Wis. 2d 655, 639 N.W.2d 772.

[2] Lana received title to the house when she and her ex-husband divorced, then transferred a joint tenancy to Robert shortly after their marriage in July 2003.

¶5 On February 17, 2005, the Komorowskis filed suit against Janssen Builders, alleging negligent design and installation of the sump and drain tile system. They alleged only negligence, and claimed damages only for the cost of repairing the damage to their house and replacing the sump pump and drain system.

¶6 Janssen Builders moved for summary judgment, arguing the economic loss doctrine barred the Komorowskis' claim. The circuit court agreed and granted summary judgment on January 5, 2006.

STANDARD OF REVIEW

¶7 Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[3] We review a grant of summary judgment independently, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten,*** 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶8 This case also involves application of the economic loss doctrine. Whether the economic loss doctrine applies to a set of facts is a question of law, as is the predominant purpose of a contract under the economic loss doctrine. ***Linden v. Cascade Stone Co.***, 2005 WI 113, ¶5, 283 Wis. 2d 606, 699 N.W.2d 189. We review questions of law without deference to the circuit court but benefiting from its analysis. ***Id.***

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

DISCUSSION

¶9 The economic loss doctrine is a judicially created doctrine that seeks to preserve the distinction between contract and tort. ***Insurance Co. of N. Am. v. Cease Elec. Inc.,*** 2004 WI 139, ¶15, 276 Wis. 2d 361, 688 N.W.2d 462. The economic loss doctrine bars tort actions when a party sustains a purely economic loss due to a defect in the subject matter of a contract. ***Bay Breeze Condo. Ass'n v. Norco Windows, Inc.***, 2002 WI App 205, ¶9, 257 Wis. 2d 511, 651 N.W.2d 738. An economic loss is one caused by a product's failure to perform as expected, including damage to the product itself or monetary losses caused by the product. ***Linden***, 283 Wis. 2d 606, ¶6.

¶10 Here, the Komorowskis concede that their house was the subject of a contract and that their losses are purely economic. They argue, however, that the economic loss doctrine does not apply because the contract here was for services, not for goods. We disagree.

¶11 This issue is controlled by ***Linden***. ***Linden*** involved a new home construction contract. ***Id.***, ¶2. The Lindens sued the general contractor and various subcontractors for negligence, alleging that faulty roofing and stucco application had allowed water damage to the house. ***Id.***, ¶3. The court held the general contract was one for goods, not services, and the Lindens' claims were therefore barred by the economic loss doctrine. ***Id.***, ¶25.

¶12 Whether a contract is for goods or services depends on the predominant purpose of the contract. ***Id.***, ¶8. To determine the predominant purpose of the contract, courts examine the totality of the circumstances, including the language of the contract, the nature of the supplier's business, the value of the materials, the circumstances of the parties, and the primary objective the parties

hoped to achieve by entering into the contract. ***Id.***, ¶21. In ***Linden***, the comparative value of the goods and services and the language of the contract were inconclusive. ***Id.***, ¶¶23-24. The court based its holding on two facts: (1) the "primary reason the Lindens entered into the contract was to have a house custom built for them"; and (2) the payment due was a fixed sum, not a rate that could change based on the cost of labor or materials. ***Id.***, ¶25.

¶13 We see no difference between this case and ***Linden***. Like the Lindens, the Komorowskis bargained for an entire house as a single package, and paid a fixed sum for it. The Komorowskis do not argue that the comparative value of goods and services in this case is different from that in ***Linden***, or that the language of the contract here shows that the contract was one for services.

¶14 The Komorowskis argue ***Linden*** is distinguishable because the water damage they sustained was due to negligently performed services—the installation of the sump pump and drain tile—not negligent design of any product. However, the Lindens also alleged negligently performed services: negligent application of stucco and negligent roofing. ***Id.***, ¶3. In addition, ***Linden*** makes clear that whether the economic loss doctrine applies depends on the predominant purpose of the general contract, not the nature of the alleged negligence. ***Id.***, ¶¶8, 17.

¶15 The Komorowskis also argue ***Linden*** was wrongly decided. They argue ***Linden*** "represents a step too far in the evolution of the economic loss doctrine" and that it turns the proverbial "sea of tort" into a desert. However, whether the supreme court was right or wrong in ***Linden*** is not for us to decide. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). The Komorowskis must address these arguments to the supreme court.

¶16 Finally, the Komorowskis argue the circuit court erred in granting summary judgment because of material facts in dispute with regard to their negligence claim. A material fact is one that entitles the nonmoving party to a trial. ***Butler v. Advanced Drainage Sys., Inc.***, 2006 WI 102, ¶18, 717 N.W.2d 760. Because the economic loss doctrine bars the Komorowskis' negligence claim, they are not entitled to a trial on that claim regardless of the merit it would otherwise have. Therefore, facts relating to the merits of that claim are not material.[4]

By the Court.—Judgment affirmed.

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

[4] The parties also dispute which statute of limitations governs the Komorowskis' claim. Because that claim is barred by the economic loss doctrine, we need not decide what statute of limitations governs it. *See* ***Patrick Fur Farm, Inc. v. United Vaccines, Inc.***, 2005 WI App 190, ¶9 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (court of appeals decides cases on the narrowest possible grounds).