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

**June 15, 2010**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2009AP1451** **Cir. Ct. No. 2007CV9798**

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

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**WESTERN LEATHER LOFTS CONDOMINIUM ASSOCIATION, INC., A WISCONSIN NON-STOCK CORPORATION,**

**PLAINTIFF,**

**V.**

**ANDREW G. BUSALACCHI, RAINMAKER ENTERPRISES, INC. AND ANDY BUSALACCHI HEATING AND AIR CONDITIONING CORP.,**

**DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,**

**V.**

**RUNDLE-SPENCE MFG. CO.,**

**DEFENDANT-THIRD-PARTY DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Reversed and cause remanded.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Andrew G. Busalacchi, Rainmaker Enterprises, Inc., and Andy Busalacchi Heating and Air Conditioning Corp. (referred to collectively as "Busalacchi" unless otherwise specifically identified), appeal from a judgment dismissing their third-party claims against Rundle-Spence Mfg. Co.[1] Busalacchi argues that the trial court erroneously dismissed his claims for promissory estoppel, breach of contract, breach of warranty, equitable indemnification and equitable contribution from Rundle-Spence. We agree. Therefore, we reverse the summary judgment dismissing Busalacchi's claims against Rundle-Spence and remand for further proceedings consistent with this opinion.

## BACKGROUND

¶2 Rainmaker Enterprises, Inc., owned by Andrew Busalacchi, was the developer of Western Leather Lofts Condominiums in Milwaukee. Busalacchi initially installed twelve German-manufactured Buderus boilers as part of the radiant heat system for the condominium building. For a variety of reasons, Busalacchi decided to replace the Buderus boilers before he transferred control of the building to the Western Leather Lofts Condominium Association, Inc. ("the Association").

[1] In addition to dismissing Busalacchi's claims against Rundle-Spence, the judgment also dismissed negligence and strict liability claims against Rundle-Spence that were filed by Western Leather Lofts Condominium Association, Inc., the entity that originally sued Busalacchi. However, for reasons discussed *infra*, we conclude that the trial court's ruling with respect to the Association's negligence claim against Rundle-Spence was in error, and we reverse the dismissal of Busalacchi's contribution claim that was based on the erroneous dismissal of the Association's negligence claim.

¶3 Busalacchi discussed his interest in replacing the Buderus boilers with Ed Sharpe,[2] an employee of Rundle-Spence, a boiler distributor. According to Busalacchi, Sharpe suggested French-manufactured Monitor boilers and represented the Monitor boilers as "relatively safe, energy-efficient, technologically advanced, high-quality and durable." However, the Monitor boilers were not "ASME-certified."[3] ASME certification is a safety and quality certification, given by an ASME-accredited organization, that a particular product has been tested by the accredited organization and passed the ASME Boiler and Pressure Vessel Code. The ASME itself, as a group, does not test products for compliance with its code, but other organizations may test a product using the ASME code and then certify that the product meets the code. The fact that a boiler does not have ASME certification does not necessarily mean that the boiler does not meet standards set forth in the ASME Boiler and Pressure Vessel Code; but it does mean that an ASME-accredited organization has not yet made a determination that the boiler meets those code provisions.

¶4 ASME certification is important because § 223-7.3 of the CITY OF MILWAUKEE CODE OF ORDINANCES ("MCO") requires that boilers of the kind at issue here comply with ASME codes and safety provisions, *i.e.*, they must be ASME-certified.[4] Variances from the MCO requirements may be obtained by

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[2] This employee's name is spelled two ways in the record: Sharp and Sharpe. We will use Sharpe in this opinion.

[3] ASME is an acronym for American Society of Mechanical Engineers.

[4] MCO ch. 223, entitled "Boilers," provides in relevant part:

> Other Standards. In any case not covered by reference in s. 223-1, the commissioner may use the ASME codes for boilers, pressure vessels and power piping systems, as amended, as representing standard engineering and safe practice.

(continued)

appeal to the City of Milwaukee Department of Neighborhood Services. *See* MCO ch. 200, subch. 3.

¶5 According to Busalacchi, when he and Sharpe discussed the need for ASME-certified boilers that would comply with the ordinance, Sharpe said that "the ASME certification was on the way, don't worry about it," and promised that Rundle-Spence would "either make sure that the Monitor boilers were soon ASME certified or would obtain variances from the City of Milwaukee ordinances and state safety codes that required ASME certification." Sharpe further indicated that he was certain that the Monitor boilers would be ASME-certified in the near future. According to Busalacchi, Sharpe's representations concerning ASME certification were a "major reason" that he decided to purchase the Monitor boilers from Rundle-Spence and have them installed in the condominium building. At the time Busalacchi considered them, and later when he actually purchased and installed nine[5] Monitor-brand boilers from Rundle-Spence, the boilers had not been ASME-certified. At some point after the Monitor boilers were installed, Busalacchi turned control of the building over to the Association.

¶6 Contrary to Rundle-Spence's representations, ASME certification of the boilers was not forthcoming. In March 2004, a City of Milwaukee inspector issued a Notice of Violation advising that the boilers were not ASME-certified and must be removed. After the Association was notified of the violation, an appeal

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Sec. 223-7.3.a.

[5] For reasons not explained in the record, only nine of the twelve Buderus boilers were replaced at first. The other three Buderus boilers were subsequently replaced with Monitor boilers.

was filed and Busalacchi took the lead in responding to the City's inspection report. At the hearing, representatives of Monitor and of Rundle-Spence spoke in support of Busalacchi, discussed the ASME certification process and stressed the good performance of the Monitor boilers. The Commission decided to grant a three-year variance to allow the ASME certification process to be completed and also granted permits so that the three remaining Buderus boilers could be replaced with Monitor boilers. Rob Spence, a Rundle-Spence representative who appeared at the hearing, asked the Commission, "[I]f there are problems with getting [ASME] certification, we can come back here and ask for a variance again?" The Commission chairperson responded: "Oh, absolutely. The door's not closed three years from now. We would just hear the status of how it's progressing."

¶7 The variance was granted in May 2004. According to Busalacchi, Rundle-Spence did "very little" during the next three years to attempt to obtain ASME certification of the Monitor boilers or another variance.

¶8 In late 2006 or early 2007, the Association decided to remove the Monitor boilers and install ASME-certified boilers. According to the Association, that decision was based on maintenance and performance problems it experienced with the Monitor boilers. The Association did not seek another variance after the City issued an order to the Association's property management company in June 2007 directing that the non-ASME-certified boilers (the Monitor boilers) be removed.

¶9 The Association filed suit against Busalacchi in August 2007, alleging seven causes of action, including: (1) negligence; (2) breach of

warranties; (3) negligently providing or failing to provide statement pursuant to WIS. STAT. § 703.33(2)(cm) (2007-08);[6] (4) negligence per se—breach of safety statute; (5) breach of fiduciary duty; (6) strict liability; and (7) negligent design.[7] The complaint alleged that the Monitor boilers did not comply with the building code and were unsafe. Busalacchi filed three counterclaims against the Association and also filed a third-party complaint against Rundle-Spence.

¶10 Busalacchi's third-party complaint alleged six claims based on Rundle-Spence's failure to procure ASME certification for the Monitor boilers, including: (1) promissory estoppel; (2) breach of contract; (3) breach of express warranty; (4) breach of implied warranty of merchantability; (5) breach of implied warranty of fitness for a particular purpose; and (6) breach of the duty of good faith and fair dealing.

¶11 Subsequently, the Association, for the first time, named Rundle-Spence as a defendant, asserting claims of negligence and strict liability based on allegations that Rundle-Spence's boilers did not comply with the building code and were "inherently dangerous." Busalacchi then amended its third-party complaint against Rundle-Spence, adding a claim for indemnification and/or contribution for liability Busalacchi may have to the Association.

¶12 Discovery ensued. Rundle-Spence moved for summary judgment against both the Association and Busalacchi, seeking dismissal of all claims.

[6] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[7] Later, the Association added another claim solely against Andrew Busalacchi, alleging a breach of the duty of good faith and loyalty.

Neither the Association nor Busalacchi filed a motion for summary judgment and both opposed Rundle-Spence's motion.

¶13 The trial court granted summary judgment dismissing all Association claims against Rundle-Spence and all Busalacchi claims against Rundle-Spence.[8] The trial court concluded that "the economic loss doctrine governs and bars the negligence and strict liability claims as between [the Association] and [Rundle-Spence]." The Association did not appeal.

¶14 As to Busalacchi, the trial court dismissed the breach of contract claims holding that the issue was "not ripe" because there had been no determination that Busalacchi had an obligation to the Association. The trial court dismissed the breach of warranty claims, holding that a specific time for performance should have been included in the contract, and that without such specificity, the warranty was too indefinite to enforce. Busalacchi's claim for contribution was dismissed because the Association's negligence claim against Rundle-Spence had been dismissed and, therefore, there was no joint and several liability to sustain a claim for contribution.

¶15 The trial court dismissed Busalacchi's promissory estoppel claim and claim for indemnification because there was no specific time in which Rundle-Spence was to obtain the ASME certification and, therefore, there was "no issue of indemnification … or promissory estoppel in view of the indefiniteness of the requirement." Busalacchi appeals from the dismissal of its claims against Rundle-Spence.

[8] Because our standard of review is *de novo*, we decline to explain in great detail the trial court's rulings on every claim. Rather, we provide a brief summary of the rulings.

## STANDARD OF REVIEW

¶16 The claims at issue in this case were dismissed on summary judgment. On appeal, we review summary judgments *de novo*, using the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). In evaluating the evidence, we draw all reasonable inferences from the evidence in the light most favorable to the non-moving party. ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980), *abrogated on other grounds by* ***Olstad v. Microsoft Corp.***, 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139.

## DISCUSSION

¶17 Busalacchi argues that its claims against Rundle-Spence should not have been dismissed. We discuss three categories of Busalacchi's claims: (1) promissory estoppel; (2) breach of contract and warranty claims; and (3) contribution and indemnification claims.

### I. Promissory Estoppel.

¶18 In order to prevail on a promissory estoppel claim, a claimant must prove three elements: "(1) Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee? (2) Did the promise induce such action or forbearance? (3) Can injustice be avoided only by enforcement of the promise?" ***Hoffman v. Red Owl Stores, Inc.***, 26 Wis. 2d 683, 698, 133 N.W.2d 267 (1965).

The first two elements present issues of fact which will ordinarily be resolved by a jury; the third element is a policy question to be decided by the court. ***Id.***

¶19 At summary judgment, courts are to infer from facts in the record those inferences most favorable to the party against whom summary judgment is sought. *See* ***Grams***, 97 Wis. 2d at 339. Here, Busalacchi asserts that in purchasing the Monitor boilers, he relied on "Rundle-Spence's promise that it would either independently obtain ASME certification or variances from the City of Milwaukee," and he contends that Sharpe definitively asserted "that the Monitor boilers would soon be ASME certified."

¶20 Clearly, there are facts in the record which tend to support Busalacchi's claim that a promise of performance was made and was not kept—two elements of a valid claim for promissory estoppel. A jury could infer that Sharpe intended Busalacchi to rely on Sharpe's representation, that Busalacchi did reasonably rely on that representation when he purchased several Monitor boilers, that the reliance was substantial because multiple commercial boilers were purchased and installed in the condominium building, and that Sharpe failed to perform as promised. These facts would support the first two elements of promissory estoppel.

¶21 The trial court concluded, however, that because of the "indefiniteness of the requirements" of the promises made to Busalacchi, the claim for promissory estoppel should be dismissed. We disagree. The specifics of the promises made are in dispute and require resolution by a jury.

¶22 Finally, Rundle-Spence urges this court to affirm the dismissal of Busalacchi's promissory estoppel claim based on the third element of promissory estoppel, which requires us to analyze whether "injustice [can] be avoided only by

enforcement of the promise," which is a policy question. *See* ***Hoffman***, 26 Wis. 2d at 698. If a party has proven the first two elements of promissory estoppel, the court can consider *any* equitable or legal remedy which will "prevent injustice." *See* ***id.*** at 701-02. Until the facts in this case are determined by a jury, we deem it premature to consider the policy prong of the ***Hoffman*** test.

¶23 For the foregoing reasons, we conclude that the promissory estoppel claim should not have been dismissed. We reverse the summary judgment dismissing this claim.

**II.** ***Breach of Contract and Breach of Warranty Claims.***

¶24 Busalacchi alleged in his Amended Third-Party Complaint that Rundle-Spence promised "that the Monitor boilers would be ASME certified and that, until such certification was achieved, Rundle-Spence would get a variance from the City of Milwaukee ordinance requiring the boilers be ASME certified." This allegation is the basis for Busalacchi's claims for breach of contract and breach of warranty.

¶25 Rundle-Spence offers several reasons why these claims should not proceed to a jury; the trial court relied on some of those same reasons for its dismissal of the breach of contract and breach of warranty claims. We disagree that summary judgment was proper and, therefore, we reverse.

¶26 First, Rundle-Spence argues that the claims are not ripe. It explains:

> "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" ***Texas v. United States***, 523 U.S. 296, 300 (1998) (quoting ***Thomas v. Union Carbide Agricultural Products Co.***, 473 U.S. 568, 580-81 (1985)).

> In this case, there is no dispute that [the] Busalacchi entities have not suffered the damages which they seek to recover and as such, their claims are not ripe.

If we understand Rundle-Spence's argument correctly, it is asserting that until Busalacchi is found liable to the Association, its breach of contract and breach of warranty claims are not ripe for determination. We disagree.

¶27 The requirement that a controversy be "ripe" for decision is designed to permit courts to decline to resolve hypothetical cases. *See* ***Tammi v. Porsche Cars N. Am., Inc.***, 2009 WI 83, ¶3, 320 Wis. 2d 45, 768 N.W.2d 783 (where resolution of issues "'depends on hypothetical or future facts, [they are] not ripe for adjudication and will not be addressed by this court.'") (citation omitted; bracketing in ***Tammi***). The requirement of ripeness allows courts to refuse to render advisory opinions. *See* ***City of Janesville v. County of Rock***, 107 Wis. 2d 187, 199, 319 N.W.2d 891 (Ct. App. 1982) ("Courts will not render merely advisory opinions."). Our standard of review of whether a controversy is "ripe" is *de novo*. ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶39, 309 Wis. 2d 365, 749 N.W.2d 211. ("[W]e review the circuit court's legal conclusion that [a] cause of action was not ripe, and therefore not justiciable, de novo.")

¶28 Here, the facts are disputed, but they are not hypothetical. The facts creating the controversies involving the Association, Busalacchi and Rundle-Spence have already occurred; the disputes are not based on some possible future (*i.e.*, hypothetical) actions, and resolution of the disputes will not be merely an advisory opinion. At trial, the respective liabilities of the parties will be determined. The controversy was ripe for adjudication.

¶29 Next, Rundle-Spence contends that the warranties "are not actionable because they are indefinite as to time." We are not convinced that

dismissal of these claims on summary judgment was appropriate. The parties have not provided specific arguments concerning the warranties, and it is clear that the facts concerning what was promised are in dispute, as exemplified by Rundle-Spence's references to its "alleged statement regarding ASME certification." Once again, we conclude that there are disputed issues of material fact that require resolution by a jury before interpretation of the alleged warranties is possible.

¶30 Rundle-Spence also argues that it "cannot be held liable in contract under the doctrine of impossibility." (Some capitalization omitted.) Rundle-Spence cites as authority WIS JI—CIVIL 3062, which provides:

> If performance of a contract is possible only if a certain state of facts continues to exist, then a cessation or termination of the state of facts which makes performance impossible will excuse failure to perform. But if performance becomes impossible by reason of contingencies which should have been foreseen by a party, then such party is not excused from the duty to perform.

We disagree that the doctrine of impossibility provides a basis to dismiss Busalacchi's breach of contract claim at the summary judgment stage. Whether Rundle-Spence could have, or should have, sought ASME certification and/or another variance are disputed issues of fact that require resolution by a jury, as is the application of this doctrine under the facts presented.

¶31 For the foregoing reasons, we reverse the dismissal of Busalacchi's breach of warranty and breach of contract claims so that they can be considered by a jury.

## III. Indemnification and contribution.

¶32 Busalacchi's amended third-party complaint added a claim for indemnification and/or contribution. On appeal, Busalacchi has clarified that these

are claims for equitable indemnity and equitable contribution, as opposed to claims based on a contract provision. We conclude that the indemnification and contribution claims should not have been dismissed.

**A. Equitable indemnification.**

¶33 On appeal, Rundle-Spence offers a brief argument concerning Busalacchi's claim for equitable indemnity. It contends:

> A common law indemnification claim ... requires proof [of] an injustice. Specifically, to prevail on a claim for common law indemnification, a plaintiff must prove that the relationship between the parties is such that, either in law or equity, there is an obligation on one party to indemnify the other, such as in a situation where the liability of a party seeking indemnification is based on the wrongful act of another in which the party seeking indemnification did not join. ***Teacher Retirement Sys. of Texas v. Badger XVI Ltd., P'ship***, 205 Wis. 2d 532, 546, 556 N.W.2d 415 (Ct. App. 1996); ***Brown v. LaChance***, 165 Wis. 2d 52, 64, 477 N.W.2d 296 (Ct. App. 1991).

Just as we concluded that numerous disputed issues of material fact concerning the equities in this case precluded dismissal of Busalacchi's promissory estoppel claim, we conclude that Busalacchi's equitable indemnity claim should not have been dismissed on summary judgment. Whether Rundle-Spence made certain promises and failed to fulfill them affects Busalacchi's equitable indemnity claim. Until those facts are determined at trial, it is premature to dismiss this claim.

**B. Equitable contribution**.

¶34 Wisconsin recognizes an equitable right to contribution which is "'independent of the underlying cause of action'" and which "is not dependent on whether the obligation discharged resulted from contract or tort." ***State Farm Mut. Auto. Ins. Co. v. Schara***, 56 Wis. 2d 262, 265-66, 201 N.W.2d 758 (1972)

(citation omitted). ***Schara*** explained: "The cause of action that accrues depends not one whit upon the nature of the origin of liability. It is enough that joint liability from whatever source exist." ***Id.*** at 266.

¶35 Rundle-Spence argues that Busalacchi's contribution claims should be dismissed because Rundle-Spence cannot be a joint tortfeasor, given that the judgment dismissed the Association's negligence claim. We reject Rundle-Spence's argument, for two reasons.

¶36 First, as noted, an equitable right to contribution can exist where the underlying obligation is based on a tort or contract theory. *See* ***id.*** Thus, the summary judgment dismissing the Association's negligence claim against Rundle-Spence does not automatically preclude Busalacchi's potential contribution claim because it still has potential contract claims.

¶37 Second, we conclude that Busalacchi is entitled to dispute the trial court's conclusion that the economic loss doctrine barred the Association's negligence claim, and we reverse the trial court's ruling on that issue.[9] Rundle-Spence argues that because the Association did not appeal the dismissal of its negligence claim, Rundle-Spence "has already been determined finally and conclusively not to have any liability to the Association." However, a person who is aggrieved by a judgment can appeal from it. *See* ***Weina v. Atlantic Mut. Ins. Co.***, 177 Wis. 2d 341, 345-47, 501 N.W.2d 465 (Ct. App. 1993) (per curiam) (joint-tortfeasor that was aggrieved by grant of summary judgment dismissing another tortfeasor was entitled to appeal from judgment because it was aggrieved

[9] Busalacchi has not challenged the dismissal of the Association's strict liability claim against Rundle-Spence and we do not address it.

by judgment, *i.e.*, the "judgment bears directly and injuriously upon" its interests and it is "adversely affected in some appreciable manner"). Indeed, we have recognized that a joint tortfeasor can appeal even if he has not yet filed a contribution claim against another alleged tortfeasor. *See* ***id.*** at 346.

¶38 Here, Busalacchi had already filed a claim for contribution at the time Rundle-Spence moved for summary judgment. When Rundle-Spence sought dismissal of the Association's negligence claim against it based on the economic loss doctrine, Busalacchi argued that the claim should not be dismissed.[10] In doing so, Busalacchi followed the advice our supreme court offered in ***Estate of Rille v. Physicians Ins. Co.***, 2007 WI 36, 300 Wis. 2d 1, 728 N.W.2d 693, where the court held that in order to preserve a contribution claim against a joint tortfeasor, the party "should have appeared and objected on the merits to [the joint tortfeasor's] motion for summary judgment, thereby ensuring that there would be no possibility of inconsistent fact-finding on any issue central to [the claims]." *See* ***id.***, ¶9. Busalacchi is aggrieved by the dismissal of the Association's negligence claim against Rundle-Spence because Rundle-Spence has successfully used that ruling to obtain dismissal of Busalacchi's contribution claim. Because Busalacchi is aggrieved, we will consider his argument that the dismissal was in error.

¶39 The trial court concluded that the economic loss doctrine precluded the Association's negligence claim against Rundle-Spence. "Whether the

[10] In his brief opposing Rundle-Spence's motion for summary judgment, Busalacchi argued: "Rundle-Spence can be liable to [the Association on its] negligence theories because the economic loss doctrine does not apply to bar claims between parties for whom there is no contract for a product."

economic loss doctrine applies to a particular set of facts is a question of law we decide de novo, owing no deference to the trial court's conclusions." ***Trinity Lutheran Church v. Dorschner Excavating, Inc.***, 2006 WI App 22, ¶16, 289 Wis. 2d 252, 710 N.W.2d 680.

¶40 In its motion for summary judgment, Rundle-Spence argued that the costs the Association was seeking—boiler maintenance, an engineering proposal, boiler repairs, a boiler control panel and boiler replacement—were monetary losses caused by the allegedly defective product and did not relate to personal injuries or damage to other property, and that the economic loss doctrine therefore barred the Association's recovery in tort.

¶41 "The economic loss doctrine is a judicially created doctrine providing that a commercial purchaser of a product cannot recover from a manufacturer, under the tort theories of negligence or strict products liability, damages that are solely 'economic' in nature." ***Daanen & Janssen, Inc. v Cedarapids, Inc.***, 216 Wis. 2d 395, 400, 573 N.W.2d 842 (1998). In ***Daanen***, a commercial purchaser bought a replacement part for its quarry machine from a distributor, who had purchased the part from the manufacturer. ***Id.*** at 397-98. ***Daanen*** held that although the commercial purchaser and the manufacturer were not in "privity," the economic loss doctrine nonetheless barred the "remote commercial purchaser from recovering economic losses from [the] manufacturer under tort theories of strict liability and negligence." ***Id.*** at 399.

¶42 Subsequently, this court distinguished ***Daanen*** in a case involving two companies that were both performing work for a church, but which did not have a contractual agreement between them. *See* ***Trinity***, 289 Wis. 2d 252, ¶¶1, 18, 19. ***Trinity*** recognized that in ***Daanen***, the commercial purchaser and the

manufacturer "were in 'vertical privity' with each other through an intermediary distributor." ***Trinity***, 289 Wis. 2d 252, ¶19. In contrast, the two companies who performed work for the church in ***Trinity*** "were 'strangers' to each other who happened to be working side-by-side on a common project, not parties who had had an opportunity to 'allocate economic risk by contract' between them." ***Id.***, ¶18. Therefore, the economic loss doctrine did not preclude one company's contribution claim against the other company. ***Id.***, ¶19.

¶43 ***Trinity*** also considered whether the church's claim against one company was barred by the economic loss doctrine. ***Id.***, ¶¶21-25. The court recognized "that the economic loss doctrine applies to only contracts for products, not to contracts for services." ***Id.***, ¶22. The court explained:

> In order to determine whether a given contract between two parties is one for services or products, a court is to apply the "predominant purpose" test by considering objective and subjective factors such as "the amount charged for services and the amount charged for materials, whether the purpose or 'thrust' of the contract was for goods or for services and the language used in the contract to describe the project." The predominant purpose test is a "totality of the circumstances" test.

***Id.*** (citation omitted).

¶44 Rundle-Spence asserted in its motion for summary judgment that the economic loss doctrine bars the Association's claims. We are not convinced, based on the current state of the record, that the economic loss doctrine applies.

¶45 There are numerous problems with the potential application of the economic loss doctrine in this case. First, we question whether the Association is a "commercial purchaser" of a product where the boilers were affixed to property the Association acquired after the boilers were installed. Second, it is undisputed

that Rundle-Spence is not a manufacturer, but is instead a distributor. Whether and how that affects the ***Daanen*** analysis was not an issue that Rundle-Spence addressed at the trial court or on appeal. Third, Rundle-Spence asserted in its trial court reply brief that "the Association's relationship to both the Busalacchi defendants and Rundle-Spence is vertical rather than horizontal and accordingly, ***Trinity Lutheran*** is wholly inapplicable." This issue was not thoroughly briefed by the parties, and we are not convinced that we can so quickly determine whether a condominium association that acquires a building with installed boilers stands in vertical privity with the distributor that sold the boilers to the original building owner, where the association never negotiated with the distributor and the details of the transfer of the property to the association have not been brought to this court's attention.

¶46 Finally, even if one or more contracts between Rundle-Spence and Busalacchi (none of which we have located in the record) can be said to bind the Association, whether the "predominant purpose" of the contracts was to provide goods or services—which affects whether the economic loss doctrine might apply—is not clear based on the record, where there are allegations that Rundle-Spence allegedly promised to obtain ASME certification and/or seek a variance.

¶47 In short, we are not prepared, based on the current state of the record, to conclude that the economic loss doctrine bars the Association's negligence claim against Rundle-Spence. There are disputed issues of fact concerning each parties' actions and contracts, and the parties have not thoroughly addressed the myriad issues that the facts of this case present concerning application of the economic loss doctrine. For these reasons, we reverse the determination that the economic loss doctrine bars the Association's negligence

claim against Rundle-Spence and the related dismissal of Busalacchi's claim for contribution against Rundle-Spence.[11]

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

Not recommended for publication in the official reports.

[11] Whether the Association can potentially benefit from our reversal of the trial court's ruling on its negligence claim against Busalacchi is not an issue that has been considered by the trial court or briefed on appeal and, therefore, we decline to address it.