COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-0991

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

KHLH, INCORPORATED AND
QUALITY POURED WALLS, INC.,

PLAINTIFFS-RESPONDENTS,

V.

WISCONSIN LAND SURVEYORS, LTD.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Wisconsin Land Surveyors, Ltd., appeals from a judgment in favor of KHLH, Incorporated, a general contractor, and Quality Poured Walls, Inc., a basement contractor, for $20,000 and $10,000, respectively,

entered after a court trial. The surveyor claims that: (1) the contractors cannot maintain a contribution action because of the economic loss doctrine and because the surveyor owed no duty to them; (2) the contractors cannot maintain a contribution action because the mutual claims between the homeowner and the surveyor were dismissed; (3) the contractors did not establish damages; (4) no credible evidence of causal negligence supported the trial court's decision; (5) the contractors cannot maintain a contribution action because the contractors and the surveyor were successive tortfeasors; and (6) there is no indemnification because there is no evidence that the contractors were compelled to pay damages attributable to the surveyor's negligence. We affirm.

I. Background

¶2 Wisconsin Land Surveyors contracted with homeowners to plot some land for the placement of a house in Whitefish Bay. The contract did not provide that the surveyor was to place any excavation stakes. The general contractor, however, asked the surveyor to do so and the surveyor made an error in their placement. The house's foundation, which was poured utilizing the stakes, was improperly located in violation of Whitefish Bay's building code. Ultimately, the homeowners settled with the general contractor and basement contractor. These contractors then sought, and the trial court awarded, indemnification damages from the surveyor. The court found that the surveyor's "act of negligence is clearly a very significant contributing factor in the house ending up cockeyed," and that "the failure to at least inquire as to whether the front setback is okay at 30 feet probably was a violation of their duty in that regard." The court assessed 45 percent causal negligence to Whitefish Bay, 30 percent to the surveyor, 15 percent to the homeowners, and 10 percent to the general contractor.

II. Analysis

¶3 There are three prerequisites to a claim for contribution in negligence cases: (1) both parties must be joint negligent wrongdoers; (2) they must have common liability because of such negligence to the same person; and (3) one such party must have borne an unequal proportion of the common burden. *See* ***Farmers Mut. Auto. Ins. Co. v. Milwaukee Auto. Ins. Co.***, 8 Wis. 2d 512, 515, 99 N.W.2d 746, 748 (1959). This court must accept a trial court's factual findings unless they are clearly erroneous, and must give due regard to the trial court's opportunity to judge the credibility of witnesses. *See* ***State v. Yang***, 201 Wis. 2d 725, 735, 549 N.W.2d 769, 773 (Ct. App. 1996); WIS. STAT. § 805.17(2) (1997-98).[1]

A. Economic Loss Doctrine and Duty.

¶4 The surveyor argues that the economic loss doctrine precludes the contractors from maintaining a contribution action against it, and that its liability, if any, arose out of its contract with the homeowners and not out of a duty to act apart from the promises made in the contract. "The economic loss doctrine is a judicially created doctrine providing that a commercial purchaser of a product cannot recover from a manufacturer, under thc tort theories of negligence or strict liability, damages that are solely 'economic' in nature." ***Daanen & Janssen, Inc. v. Cedarapids, Inc.***, 216 Wis. 2d 395, 400, 573 N.W.2d 842, 844–845 (1998). "[E]conomic loss is damage to a product itself or monetary loss caused by the defective product, which does not cause personal injury or damage to other

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

property." ***Id.***, 216 Wis. 2d at 402, 573 N.W.2d at 845. The Wisconsin Supreme Court has extended the doctrine to parties who are not in privity of contract. *See* ***id.,*** 216 Wis. 2d 395, 400, 573 N.W.2d 842, 844 (1998).

¶5 The surveyor's reliance on the economic loss doctrine is without merit; the loss caused by the surveyor's negligence is not "economic loss" as defined by ***Daanen.*** Rather, this case is strikingly similar to ***A.E. Investment Corp. v. Link Builders, Inc.***, 62 Wis. 2d 479, 482, 214 N.W.2d 764, 765 (1974), where an architect drew faulty plans and was sued by a building tenant with whom he had no contractual relationship. *See* ***id.,*** 62 Wis. 2d at 481–482, 214 N.W.2d at 765. As a result of the flawed plans, "the floor space leased to the plaintiff began to settle, damage was caused to the walls, the floor became uneven, and the premises became untenantable." ***Id.***, 62 Wis. 2d at 482, 214 N.W.2d at 765. The supreme court rejected the architect's claim that he owed no duty to the tenant, holding: "The duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harmed person or the harmed interest is unknown at the time of the act." ***Id.***, 62 Wis. 2d at 483, 214 N.W.2d at 766. Once it is determined that a causally negligent act was committed, a party is liable unless "considerations of public policy require that there be no liability." ***Id.***, 62 Wis. 2d at 484, 214 N.W.2d at 767.

¶6 The parallel between the architect in ***A.E. Investment*** and the surveyor here is clear. Once he placed the stakes, the surveyor had a duty to place them so their placement would not cause foreseeable harm. The trial court's finding that the surveyor could reasonably foresee the harm that could occur if it did not properly place the "in excavation" stakes was not clearly erroneous.

Accordingly, the trial court correctly determined that the surveyor owed a duty of care to the contractors.[2]

B. Mutual Claims Do Not Bar Action Against Surveyor.

¶7 The surveyor also argues that the contractors cannot make a contribution claim because the trial court dismissed the mutual claims between the homeowners and itself. We disagree. As noted, the surveyor had a duty to properly place the stakes regardless of a contractual obligation. Thus, it is irrelevant whether the court dismissed the contract claims between the homeowner and the surveyor.

C. Settlement Payment.

¶8 The surveyor next argues that because the contractors voluntarily chose to settle the case with the homeowners, the contractors are not entitled to contribution from the surveyor. We disagree. "The right of contribution arises from common liability and ripens into a cause of action upon payment by reason of a judgment, *or pursuant to a reasonable settlement made with the injured*." ***State Farm Mut. Auto. Ins. Co. v. Continental Cas. Co.***, 264 Wis. 493, 497, 59 N.W. 425, 427 (1953) (emphasis added). We conclude that the trial court's implicit finding, that the amount of the settlement was reasonable, was not clearly

[2] As permitted by our rules, appellant has submitted to us a decision that was decided after the briefing in this appeal was closed that it believes to be relevant, ***Home Valu, Inc. v. Pep Boys***, 213 F.3d 960 (7th Cir. 2000). ***Home Valu*** stands for the unremarkable proposition that "Wisconsin law bars tort claims which seek only 'economic losses' related to a commercial transaction." ***Id.***, 213 F.3d at 963. As noted in the main body of this opinion, the damages sustained here do not constitute "economic loss" as that concept has been defined by the latest supreme court decision on the subject, ***Daanen & Janssen, Inc. v. Cedarapids, Inc.***, 216 Wis. 2d 395, 402, 573 N.W.2d 842, 845 (1998) ("[E]conomic loss is damage to a product itself or monetary loss caused by the defective product, which does not cause personal injury or damage to other property.").

erroneous. The payments made by the contractors to the homeowner under the settlement agreement were not gratuitous, and thus, do not bar a contribution action.

D. Credible Evidence of Negligence.

¶9 The surveyor also claims that no credible evidence supported the trial court's finding of its causal negligence. As noted, we must accept a trial court's findings of facts unless they are clearly erroneous and give due regard to the trial court's assessment of witness credibility. *See* ***Yang***, 201 Wis. 2d at 735, 549 N.W.2d at 773. The record here reflects that the trial court's decision was supported by credible evidence. After carefully examining the evidence, the trial court rejected the proposition that the basement contractor had improperly used a correctly placed stake or that unauthorized movement of the stake had occurred after the surveyor placed the stakes. Instead, the court found that "the only logical explanation of the skewing [of the home] is the improper placement of the front 'in excavation' stake by [the surveyor]. The trial court found:

> that the evidence establishes to a reasonable certainty by the greater weight of the credible evidence that [the surveyor] was negligent in the placement of the front 'in excavation' stake, which was obviously a substantial factor in causing the home to be constructed in violation of the … building code.

In addition, the trial court stated that it had "struggled with the credibility" of the surveyor's explanation. We conclude that the trial court's finding of negligence on the part of the surveyor was supported by credible evidence and was not clearly erroneous.

E. Successive Tortfeasors.

¶10 The surveyor next argues that the parties were successive, rather than joint, tortfeasors, thus barring a contribution claim. *See* ***General Accident Ins. Co. of America v. Schoendorf & Sorgi***, 202 Wis. 2d 98, 103, 549 N.W.2d 429, 431 (1996) ("[A]n action for contribution cannot lie when the parties are successive tortfeasors."). "To recover on the basis of contribution, nonintentional negligent tort-feasors must have a common liability to a third person at the time of the accident created by their concurring negligence." ***Id.***, 202 Wis. 2d at 104, 549 N.W.2d at 432 (citation omitted). Whether there is sufficient common liability to support a claim for contribution is a question of fact. *See* ***Teacher Retirement Sys. v. Badger XVI Ltd. Partnership***, 205 Wis. 2d 532, 546, 556 N.W.2d 415, 421 (Ct. App. 1996).

¶11 "Successive tortfeasors" are "those whose negligent acts produce discrete, albeit overlapping or otherwise related, injuries." ***Schoendorf***, 202 Wis. 2d at 104, 549 N.W.2d at 432 (citation omitted). The surveyor contends that the parties in this case were successive tortfeasors because "[the surveyor] completed surveying services before any work relative to the placement of the … home was commenced by [either contractor]." The trial court disagreed, however, and determined that the surveyors: "were not successive tort feasors; they were concurrent tort feasors whose negligence combined with that of [the general contractor], the City, and the [homeowners], to cause the misalignment of the home." The trial court also stated: "I agree they have separate identifiable acts of negligence. But those separate acts of negligence coalesced to cause one harm. That harm being the house being constructed in the wrong location." Although the parties may have worked successively on the house, the harm in this case is not

divisible. *See* ***Schoendorf***, 202 Wis. 2d at 106, 549 N.W.2d at 432. Accordingly, the trial court properly determined that the parties were not successive tortfeasors.

F. Indemnification Claim.

¶12 Finally, the surveyor argues that the trial court erroneously granted indemnity to the contractors since the contractors were not compelled, via settlement, to pay for the surveyors' damages. "Unlike contribution where liability is shared, indemnity is a principle that 'shift[s] the loss from one person who has been compelled to pay to another who on the basis of equitable principles should bear the loss.'" ***Brown v. LaChance***, 165 Wis. 2d 52, 64, 477 N.W.2d 296, 302 (Ct. App. 1991) (citation omitted). There is a "'right of indemnity ... where one person is exposed to liability by the wrongful act of another in which he does not join.'" ***Id.*** (citation omitted). Whether an individual has a right to indemnification is a legal issue that we decide *de novo*. *See* ***Kutner v. Moore***, 159 Wis. 2d 120, 125, 464 N.W.2d 18, 20 (Ct. App. 1990).

¶13 The surveyor claims that neither contractor offered any proof that they were compelled to pay damages attributable to the surveyor. There was no dispute, however, that the contractors paid money to the homeowners in a settlement. The trial court reasonably found that, since the contractors paid money pursuant to a settlement with the homeowners and because the contractors' negligence was less than that attributable to the surveyor, the contractors were compelled to pay the damages. Accordingly, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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