COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1730

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

VICTOR SALBASHIAN,

PLAINTIFF-APPELLANT,

V.

DAVID C. MATZKE AND CAROL MATZKE,

DEFENDANTS,

OPPORTUNITY HOMES, INC.,

DEFENDANT-THIRD-PARTY
PLAINTIFF-RESPONDENT,

WAUSAU HOMES, INC.,

DEFENDANT-RESPONDENT,

HERITAGE MUTUAL INSURANCE CO.,

DEFENDANT,

V.

ASSURANCE COMPANY OF AMERICA,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Victor Salbashian appeals from the trial court's decision granting summary judgment, thereby dismissing his claims for negligent construction against Opportunity Homes, Inc. (OHI) and Wausau Homes, Inc. (Wausau). On appeal, Salbashian argues that the trial court erred by applying the economic loss doctrine to this action. He contends that the foreseeability exception to the doctrine should be applied, as the risk of harm from OHI and Wausau's conduct was reasonably foreseeable. Salbashian also argues that OHI and Wausau were performing a service by constructing the house in question, and the doctrine does not apply to negligent services. Finally, Salbashian contends that, as a matter of public policy, the doctrine should not apply to home builder negligence. We disagree with Salbashian's arguments and find that the economic loss doctrine does apply in this case; thus, we affirm the trial court's grant of summary judgment.

I. BACKGROUND

¶2 In May of 1994, Salbashian purchased a house from its original owners, David and Carol Matzke, who had lived there since its construction in late 1981. Prior to its construction, the Matzkes and OHI entered into a contract for construction of the house, and OHI, in turn, purchased prefabricated home construction supplies from Wausau for use in building the home. OHI and Wausau had no further contact with the Matzkes, nor any contact with Salbashian prior to this case.

¶3 According to Salbashian's complaints, shortly after he purchased and took possession of the house, he discovered excessive amounts of humidity in it, causing condensation on the inside windows and paneling. He obtained a home inspection and learned that the house had been constructed without proper insulation or a vapor barrier, in violation of the local building code. The absence of the insulation and vapor barrier was found to be the cause of the house's interior moisture accumulation. Accordingly, this defect lowered the home's value by $32,500.

¶4 Salbashian commenced his suit against the Matzkes on August 8, 1996, alleging breach of contract and misrepresentation, and seeking rescission of the contract and/or restitution. On August 11, 1997, Salbashian amended the complaint, adding a claim of negligent construction against OHI and Wausau. OHI brought a summary judgment motion, joined by Wausau, arguing that WIS. STAT. § 893.98, the statute of repose, barred Salbashian's claim. The trial court agreed and granted summary judgment, dismissing Salbashian's claims against OHI and Wausau.

¶5 Salbashian subsequently appealed the trial court's decision. This court reversed and remanded the case to the trial court, reinstating OHI and Wausau as defendants. ***Salbashian v. Matzke et al.***, No. 98-2051, unpublished slip op. (Wis. Ct. App. April 20, 1999). Once again, OHI and Wausau filed summary judgment motions, this time arguing Salbashian's claims were barred by the economic loss doctrine. The trial court again granted summary judgment, dismissing OHI and Wausau from the suit and entering final judgments in their favor in June of 2000. Salbashian appeals.

II. ANALYSIS

¶6 This court reviews the trial court's grant of a summary judgment motion *de novo*, ***Gaertner v. Holcka***, 219 Wis. 2d 436, 446, 580 N.W.2d 271 (1998), and applies the same standards as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). That methodology has been described in many cases, *see e.g.,* ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), and need not be repeated here. Summary judgment must be granted if the evidentiary materials demonstrate "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).[1] In addition, the application of the economic loss doctrine is a matter of law, which this court also reviews *de novo*. ***State Farm Mut. Auto. Ins. Co. v. Ford Motor Co***., 225 Wis. 2d 305, 314, 592 N.W.2d 201 (1999).

¶7 Under Wisconsin law, the economic loss doctrine precludes recovery in tort of damages which are solely economic in nature. ***Daanen & Janssen, Inc. v. Cedarapids, Inc.***, 216 Wis. 2d 395, 400, 573 N.W.2d 842 (1998); ***State Farm***, 225 Wis. 2d at 348. The doctrine limits the parties involved in commercial transactions to pursue only their contractual remedies when asserting a claim.

¶8 Salbashian argues that the trial court erred in applying the economic loss doctrine, thus dismissing his claims against OHI and Wausau for negligent construction. Salbashian proposes three arguments in support of his position. First, Salbashian relies, in part, on his interpretation of current Nevada case law to

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

support his argument that a foreseeability exception to the doctrine should be applied to this case. In ***Charlie Brown Construction v. Boulder City***, 797 P.2d 946 (Nev. 1990), the Nevada Supreme Court allowed a negligence action to proceed, thereby rejecting the applicability of the economic loss doctrine, because the "injuries and their extent [were] clearly foreseeable." ***Id.*** at 953. However, a subsequent Nevada supreme court decision explicitly overruled the availability of this exception:

> We now reiterate that foreseeability of damages plays no role with respect to the economic loss doctrine. Purely economic losses fall outside the purview of tort recovery, even if such losses are foreseeable.... [T]he doctrine's application turns on the type of damages at issue, and the policies underlying recovery in tort and contract. Accordingly, we overrule ***Charlie Brown*** with respect to its analysis and application of the economic loss doctrine, and we reject [the] argument that the foreseeability exception to the economic loss doctrine should be adopted.

Calloway v. City of Reno, 993 P.2d 1259, 1270 (Nev. 2000).

¶9 Likewise, Wisconsin courts have not embraced the "foreseeability of damages" exception, despite being presented with the opportunity to do so. In ***Daanen***, for example, the supreme court indicated that the economic loss doctrine *was* applicable to foreseeable losses because "[p]ermitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums." ***Daanen***, 216 Wis. 2d at 411 (citation omitted). Courts in this state focus on the type of damages suffered, i.e., economic, in determining whether to apply the doctrine, rather than on the issue of foreseeability of those damages. ***Id.*** at 406. Salbashian makes no claims for personal injuries or for damage to any property other than the house itself; his claims are solely economic in nature.

¶10 Next, Salbashian argues that OHI and Wausau were providing a service by supplying and assembling home-building components, and that the economic loss doctrine does not apply to the provision of services. The Wisconsin Supreme Court has allowed purely economic damages stemming from negligence claims involving parties who predominantly provide services, such as accountants and architects. ***Citizens State Bank v. Timm, Schmidt & Co.***, 113 Wis. 2d 376, 335 N.W.2d 361 (1983); ***A.E. Investment Corp. v. Link Builders, Inc.***, 62 Wis. 2d 479, 214 N.W.2d 764 (1974). However, the main purpose of a transaction between a home builder and its customer is a final product, i.e., a house, and not merely the providing of services.

¶11 In ***Biese v. Parker Coatings, Inc.***, 223 Wis. 2d 18, 588 N.W.2d 312 (Ct. App. 1998), the court of appeals rejected the argument that services incidental to the sale of an actual product could provide the basis for an exception to the economic loss doctrine:

> Because service is incidental to the sale of most commercial products, allowing a purchaser to recover solely economic loss for the negligent provision of services when the predominant purpose is a sale of goods would render the economic loss doctrine virtually meaningless and would allow a remote commercial purchaser who incidentally receives services from a manufacturer to circumvent the economic loss doctrine.

Id. at 26.

¶12 In this case, neither OHI nor Wausau was merely providing a service in conjunction with constructing the house in question. OHI contracted with the Matzkes to provide a final product, and Wausau contracted with OHI to provide the component parts of that product. Therefore, any such negligent services exception does not apply to either OHI or Wausau.

¶13 Finally, Salbashian argues that, as a matter of public policy, the economic loss doctrine should not apply to home builder negligence. Salbashian cites ***Oates v. Jag, Inc.***, 333 S.E.2d 222 (N.C. 1985) for the proposition that "[t]he ordinary purchaser of a home is not qualified to determine when or where a defect exists," ***id.*** at 225, and contends that the contractor is best situated to absorb the cost of any deficiencies by accepting financial responsibility for its negligence.

¶14 In Wisconsin, the courts have continued to broaden the applicability of the doctrine and have not set forth a "negligent home builder" exception. The public policies supporting the doctrine, as articulated by the supreme court in ***Daanen*** and ***State Farm***, support application of the doctrine in cases such as the one before us:

> [I]t is important to maintain the distinction between tort and contract because the two theories serve very different purposes: tort law to protect societal interests in human life, health and safety, and contract law to protect the parties' bargain.... [W]hether a commercial or consumer transaction, it is important to protect the parties' freedom to allocate economic risk by contract [and] ... to encourage the party best situated, *usually the purchaser*, to assume, allocate, or insure against economic risk. Only the purchaser, *not the manufacturer*, can appreciate the severity of the consequences of an economic loss and thereby contract accordingly.

State Farm, 225 Wis. 2d at 336-37 (emphases added).

¶15 Salbashian has provided no basis for creating an exception to the economic loss doctrine by holding the manufacturers of homes or home building products to a different standard than manufacturers in other industries. *See* ***id.*** As a matter of law and public policy, Salbashian, as the purchaser of the home, was in the best position at the time he contracted with the Matzkes to protect himself

from any damages resulting from defects in the home. For all of the above stated reasons, we conclude that Salbashian's recovery in this matter is limited to his contractual remedies against the Matzkes, and that he is not entitled to recover economic losses from OHI or Wausau. Therefore, his tort claims against OHI and Wausau were correctly dismissed.

¶16 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.