MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

William Applegarth and Renee Applegarth,

Appellants-Plaintiffs,

v.

Rans Custom Builders, Inc., Jim Rans, Ryan Rans, and Rans Development, LLC,

Appellees-Defendants.

September 29, 2022

Court of Appeals Case No. 22A-PL-214

Appeal from the LaPorte Superior Court

The Honorable Jeffrey L. Thorne, Special Judge

Trial Court Cause No. 46D03-1202-PL-22

Brown, Judge.

[1] William and Renee Applegarth appeal the trial court's entry of partial summary judgment in favor of Jim Rans and Rans Custom Builders, Inc., ("Defendants") and denial of their motion to correct error. We reverse.

Facts and Procedural History

[2] In May 2007, the Applegarths entered into an agreement with Rans Custom Builders, Inc., for the construction of a residential dwelling. It provided in part that the Applegarths agreed to pay $3,717,026.51 together with certain additional amounts.

[3] On March 14, 2017, the Applegarths filed a second amended complaint against Jim Rans, Rans Custom Builders, Inc., Ryan Rans, Rans Development, LLC, and Pella Corporation alleging: Count I, breach of the construction agreement and express and implied warranties by Rans Custom Builders, Inc., and Jim Rans; Count II, negligence by Jim Rans, Rans Custom Builders, Inc., Ryan Rans, and Rans Development, LLC; Count III, the manufacture of defective windows by Pella Corporation; Count IV, false misrepresentations by Jim Rans and Rans Custom Builders, Inc.; and Count V, construction defects and failure to repair by Jim Rans, Rans Custom Builders, Inc., Ryan Rans, and Rans Development, LLC.

[4] On July 24, 2017, Jim Rans, Ryan Rans, Rans Custom Builders, Inc., and Rans Development, LLC, filed a motion for partial summary judgment asserting: they were entitled to judgment as a matter of law as to the negligence claims based on the economic loss rule; they were entitled to summary judgment on

the punitive damage claim; Jim Rans and Ryan Rans, as individuals, were entitled to summary judgment as to Plaintiffs' claims for breach of contract, negligent construction, negligence, and construction defects; Rans Development, LLC, as an improper party, was entitled to judgment as a matter of law on all claims; and Jim Rans and Rans Custom Builders were entitled to summary judgment on the fraud claims. They designated certain evidence including affidavits of Jim Rans, Douglas Osthimer, a certified public accountant, and Jeffrey Liechty, the owner and president of J.A. Liechty & Sons, Inc. On August 23, 2017, the Applegarths filed a response in opposition to the motion.

[5] On September 12, 2017, the Applegarths filed a motion to strike portions of Jim Rans's affidavit. Specifically, they alleged that certain paragraphs constituted legal conclusions or speculation and failed to affirmatively show personal knowledge. On February 14, 2018, the Applegarths filed a supplemental motion to strike the affidavits of Ryan Rans, Jim Rans, and Douglas Osthimer.

[6] On July 27, 2021, the court held a hearing on the motion for partial summary judgment. Defendants' counsel stated: "We're not asking for [summary judgment] on a breach of contract analysis, but we are on a fraud analysis." Transcript Volume II at 36. He also stated: "This case should go to trial only on Counts I and V, loaded with all kinds of breach of contract claims in the realm of alleged defects of construction." *Id.* at 40-41. The Applegarths' counsel stated that he believed there were "171 counts in the second amended

complaint," "[m]any of them deal with fraud," and Defendants "don't even mention some of these allegations" and "just used a broad brush." *Id.* at 49.

[7] On August 11, 2021, the court entered an order granting the motion for partial summary judgment with respect to Jim Rans individually, Ryan Rans individually, and Rans Development, LLC, as well as with respect to "the tortious fraud counts contained in . . . Count IV" of the second amended complaint and the claims of negligence pursuant to the economic loss doctrine. Appellants' Appendix Volume 2 at 73. It granted the Applegarths' motion to strike portions of Jim Rans's affidavit with respect to paragraphs 18, 19, 23, 26, and 36 as well as the language ". . . as allowed under the Construction Agreement . . ." contained in paragraphs 25, 30, and 31 and found "[a]ll other portions of the Affidavit of JIM RANS [were] allowed." *Id.* at 72. The court denied the Applegarths' motion to strike portions of Osthimer's affidavit.

[8] On August 18, 2021, Defendants filed a Motion to Amend August 11, 2021 Order to Render Order Final for Immediate Appeal. On September 10, 2021, the court entered an order stating that it intended its August 11, 2021 order to be final and appealable and amended its order by finding that the order completely resolved all pending issues between the Applegarths and Jim Rans, Ryan Rans, and Rans Development, LLC; finding the order completely resolved the negligence and fraud claims between the Applegarths and Rans Custom Builders, Inc.; and entering the judgment under Trial Rule 56(C) as to fewer than all the issues, claims, and parties. It also dismissed Jim Rans, Ryan Rans, and Rans Development, LLC, with prejudice, dismissed "all of [the

Applegarths'] negligence and fraud claims against Rans Custom Builders, Inc. with prejudice" and granted "the Rans Defendants' motion for partial summary judgment." *Id.* at 76 (capitalization omitted).

[9] On October 8, 2021, the Applegarths filed a motion to correct error. They asserted in part that their complaint "sets out, in addition to a claim for common law fraud, a claim for criminal deception under the Indiana Crime Victims Relief Act," Defendants "never addressed [their] claims for deception," and the court "erred in dismissing Count IV in its entirety." Appellants' Appendix Volume 16 at 146-147.

[10] On November 30, 2021, the court held a hearing on the motion to correct error. The Applegarths' counsel argued in part that Jim Rans deliberately inflated totals "on numerous different change orders where he was giving the Applegarths the final total of invoices" and that he charged them more than what was actually spent. Transcript Volume II at 76. He also stated: "Our fraud claims are focused specifically on representations by Jim Rans in various change orders that induced the Applegarths to agree to modify the allowance amounts and pay Jim Rans and Rans Custom Builders more, and that is classic fraud." *Id.* at 77.

[11] On January 7, 2022, the court entered an order amending the August 11, 2021 order to provide that "the Economic Loss Doctrine does not apply to the allegations of Common Law Tortious Fraud or Statutory Criminal Deception as allegedly set forth in Count IV" and that the motion for summary judgment

regarding the claims of Count IV should be granted as the Applegarths had failed to establish that there were any genuine issues of material fact and that the allegations were examples of "relatively de minimis discrepancies (of a construction project totaling in excess of $4,000,000.00)" and they had failed to provide any evidence of false material misrepresentations made with knowledge or reckless disregard of their falsity by Rans Custom Builders, Inc.[1] Appellants' Appendix Volume 2 at 82. The court ordered that, "in all other respects, Applegarths' motion to correct error is denied." *Id.* (capitalization omitted). On January 31, 2022, the Applegarths filed a notice of appeal of the orders dated August 11, 2021, September 10, 2021, and January 7, 2022.

Discussion

[12] We review an order for summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). The moving party bears the initial burden of making a *prima facie* showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Manley v. Sherer*, 992 N.E.2d 670, 673 (Ind. 2013). "[W]hile federal practice permits the moving party to merely show that the party carrying the burden of proof *lacks* evidence on a necessary element, we impose a more onerous burden: to affirmatively 'negate an opponent's claim.'" *Hughley*, 15 N.E.3d at 1003 (quoting *Jarboe v. Landmark Cmty. Newspapers of Ind., Inc.*, 644

[1] On appeal, Defendants do not mention the economic loss doctrine or challenge the trial court's finding regarding the applicability of the economic loss doctrine.

N.E.2d 118, 123 (Ind. 1994)). Summary judgment is improper if the moving party fails to carry its burden, but if it succeeds, then the nonmoving party must come forward with evidence establishing the existence of a genuine issue of material fact. *Manley*, 992 N.E.2d at 673. We construe all factual inferences in favor of the nonmoving party and resolve all doubts as to the existence of a material issue against the moving party. *Id.* The review of summary judgment is limited to the materials designated to the trial court. *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 827 (Ind. 2011). We generally review rulings on motions to correct error for an abuse of discretion. *Speedway SuperAmerica, LLC v. Holmes*, 885 N.E.2d 1265, 1270 (Ind. 2008), *reh'g denied*.

[13] The Applegarths phrase the issue as "[w]hether the trial court erred in granting summary judgment on Count IV of [their] Second Amended Complaint and denying [their] Motion to Correct Error." Appellants' Brief at 5. Accordingly, we focus our decision on Count IV. With respect to the trial court's finding that "the allegations are examples of relatively de minimis discrepancies (of a construction project totaling in excess of $4,000,000.00)," Appellants' Appendix Volume 2 at 82 (capitalization omitted), we note that the Applegarths alleged that they had been defrauded in an amount not less than $376,898.09. We cannot say that this amount, which constitutes approximately ten percent of the price set forth in the construction agreement and more than nine percent of the $4,000,000 value mentioned in the trial court's order, is *de minimus*.

[14] To the extent the Applegarths raised a common law fraud claim, the elements of common-law fraud are (1) a material misrepresentation of past or existing

fact which (2) was untrue, (3) was made with knowledge of or in reckless ignorance of its falsity, (4) was made with the intent to deceive, (5) was rightfully relied upon by the complaining party, and (6) which proximately caused the injury or damage complained of. *Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 335 (Ind. 2013).

[15] We also note that, at the end of Count IV of their second amended complaint, which alleged false misrepresentations by Jim Rans and Rans Custom Builders, Inc., the Applegarths cited Ind. Code § 35-43-5-2, which at that time governed the criminal offenses of counterfeiting, making or delivering a false sales document, possession of a fraudulent sales document, and forgery. *See* Appellant's Appendix Volume 2 at 160. They also cited Ind. Code § 34-24-3-1, which falls under the Indiana Crime Victims' Relief Act ("CVRA"). Specifically, they demanded judgment against "Jim Rans and Rans Custom Builders, Inc. in an amount sufficient to compensate them for their damages, for punitive damages, for treble damages pursuant to Ind. Code § 34-24-3-1 and § 35-43-5-2, for attorneys' fees, for costs, for pre- and post-judgment interest, and for all other relief just and proper in the premises." *Id.*

[16] Under the CVRA, a person who suffers a pecuniary loss as a result of certain property crimes may bring a civil action against the person who caused the loss and recover up to three times the actual damages and a reasonable attorney's fee, along with other expenses. *Klinker v. First Merchants Bank, N.A.*, 964 N.E.2d 190, 193 (Ind. 2012) (citing Ind. Code § 34-24-3-1). A criminal conviction is not a condition precedent to recovery under this statute. *Id.* (citing *White v. Ind.*

Realty Assocs. II, 555 N.E.2d 454, 456 (Ind. 1990) (interpreting statutory predecessor)). "Rather, the claimant merely must prove each element of the underlying crime by a preponderance of the evidence." *Id.*

[17] To obtain summary judgment, Jim Rans and Rans Custom Builders, Inc., must demonstrate that they did not act with the requisite mens rea – the specific intent to defraud. "No single factor is determinative of fraudulent intent, and there is no set formula or threshold number of factors that warrant a finding of fraudulent intent." *Id.* at 194. "Rather, in a particular case the *trier of fact* must consider the evidence as a whole and in context to determine whether the badges of fraud taken together constitute a pattern of fraudulent intent." *Id.*

[18] "[T]he mens rea element for a criminal offense is almost inevitably, absent a defendant's confession or admission, a matter of circumstantial proof." *Id.* at 195 (quoting *Hampton v. State*, 961 N.E.2d 480, 487 (Ind. 2012)). Therefore, finding criminal intent in the absence of a confession invariably requires weighing evidence, judging witness credibility, and drawing reasonable inferences from the facts, all of which are improper in considering a motion for summary judgment." *Id.* "Accordingly, summary judgment is almost never appropriate where the claim requires a showing that the defendant acted with criminal intent or fraudulent intent." *Id.* "This is particularly so for [CVRA] claims." *Id.* "[B]ecause [CVRA] claims combine criminal and civil law, they implicate the state constitutional policy favoring jury intervention in both criminal trials and civil trials." *Id.*

[19] In Count IV of their second amended complaint, the Applegarths alleged that Jim Rans, acting as an agent for Rans Custom Builders, Inc., made numerous false statements and material misrepresentations to them throughout the construction of their home. They asserted that the trim labor invoices and Jim Rans's representations regarding them were false because the trim labor invoices presented to the Applegarths were fraudulently created in September or October 2009.

[20] The construction agreement provided that Rans Custom Builders, Inc., would receive periodic payments from the Applegarths including $367,000 "[w]hen the interior is trimmed out" and that Rans Custom Builders, Inc., "shall provide lien waivers or lien releases as a condition precedent to" receiving this payment. Appellants' Appendix Volume 3 at 46.[2] In a letter dated April 27, 2009, Jim Rans informed the Applegarths that "[t]his is a draw request for . . . interior trim work" and "[t]he amount due is $367,000.00." Appellants' Appendix Volume 12 at 2. The attached waiver asserted in part: "Interior Millwork substantially completed."[3] *Id.* at 3. To the extent the waiver asserted that the

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[2] At the hearing, Defendants' counsel asserted: "So each time my client came to Dr. and Mrs. Applegarth, they presented lien waivers by the subcontractors who signed the lien waiver, meaning they have – they relinquished any right to file a mechanic's lien against the [Applegarths'] property. That's what that's all about." Transcript Volume II at 57.

[3] In their Response In Opposition to the Rans Defendants' Motion For Partial Summary Judgment, the Applegarths pointed out that the construction agreement used the phrase "substantial completion." Appellants' Appendix Volume 4 at 149. Specifically, the construction agreement provided that "[t]he final closing shall take place no later than two (2) weeks after the Owners have been informed by [Rans Custom Builders, Inc.,] as to the substantial completion of the residential dwelling." Appellants' Appendix Volume 3 at 46.

interior millwork was substantially completed, we note that, in his deposition, when asked whether the trim was substantially completed in April 2009, Liechty testified that the trim work "was over half done" and "it was probably a little over halfway." Appellants' Appendix Volume 11 at 23. He answered affirmatively when asked: "But there's still a lot yet to be done? You continue to work through all the way until September according to your records." *Id.* Osthimer testified that he assumed that Liechty was paid for the interior trim work that he invoiced but acknowledged he did not have copies of checks specific to those individual invoices. We also note that the designated evidence reveals that Liechty's invoices related to other properties were mostly in chronological order while the invoices related to the Applegarths' property varied. For example, Invoice 6514, which related to a different property was dated February 1, 2010, while Invoices 6515 and 6519, which related to the Applegarths' property, were dated October 4, 2009.

[21] As for the allowances, when asked in his deposition how an allowance works, Jim Rans answered:

> If there's things that the owner doesn't know what they want, or I don't know what they want to put - - to go out and get bid on, normally I've gone to subcontractors, the cabinet guy, you know, the carpet guy, and say, hey, you know, we've got to come up with a budget. You know, we look at the plans, review them, where they think they'll be with the way we normally, and what my customers normally spend on a house.
>
> But I have customers go over quite often. I mean, I can't control if I give them $10,000 for a lighting allowance and they spend $20,000 on a dining room fixture. I can't control those

> allowances. I only try to keep them within scope of the overall price when I'm looking at it, the correct size.

Appellants' Appendix Volume 7 at 137-138. When asked "[w]hat if it comes in less than the allowance," he testified that "[i]t's credited back." *Id.* at 138. He also testified that process was followed here. However, the designated evidence raises a question of fact as to whether the proper amounts were charged or credited.

[22] With respect to the interior trim allowance, Osthimer indicated that Rans Custom Builders, Inc., paid less than an invoice amount for at least one invoice and "[i]t appears that they took advantage of some payment discount." Appellants' Appendix Volume 11 at 167. As for the wrought iron allowance, Osthimer testified that Rans Custom Builders, Inc., charged the Applegarths more than it paid and the difference was "equivalent with the discount that was provided" to Rans Custom Builders, Inc. *Id.* at 171. As to a flooring allowance, Osthimer testified that the charges for the floor were $82,784.31 while the invoices totaled only $61,529.70. Further, in a change order, Rans Custom Builders, Inc., asserted that the actual cost of decorative flue pots on the chimney had an "[a]ctual cost of $4,381.71," there was an allowance of $5,600, resulting in a credit of $1,218.39. Appellants' Appendix Volume 16 at 170. When asked if he knew whether $4,381.61 was the actual cost, Osthimer answered: "That is the actual cost charged. I was able to account for $4001.30 specifically." Appellants' Appendix Volume 11 at 210.

[23] In light of the designated evidence, we conclude that the Applegarths have demonstrated a material question of fact.[4] *See Reed v. Reid*, 980 N.E.2d 277, 293 (Ind. 2012) (addressing fraud and holding that "the question of whether any misrepresentation by Forge proximately caused damage to David is quintessentially one of fact").

[24] For the foregoing reasons, we reverse the trial court's summary judgment.

[25] Reversed.

Mathias, J., and Tavitas, J., concur.

[4] Because we reverse the trial court's grant of summary judgment, we need not address the Applegarths' arguments regarding whether the court erred in denying portions of their motion to strike certain designated evidence.