STATE OF MICHIGAN

COURT OF APPEALS

HARRY BLACKWARD and D'ANNE KLEINSMITH,

Plaintiffs-Appellants/Cross-Appellees,

V

SIMPLEX PRODUCTS DIVISION and K2, INC.,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
October 19, 2001

No. 221066
Oakland Circuit Court
LC No. 97-551584-NP

Before: K.F. Kelly, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition to defendants on the ground that their claim was barred by the statute of limitations, MCR 2.116(C)(7). Defendants cross appeal, claiming that they were also entitled to summary disposition on the alternative ground of release. We reverse and remand for further proceedings.

After moving into their home, plaintiffs immediately began experiencing numerous problems such as swelling doors, mold, and cracked ceilings. Eventually the problems were linked to the use of the external insulation finish system (EIFS) that was applied to the outside of the house. Plaintiffs, who instituted several other suits arising out of the construction of their home, eventually sued Simplex Products Division, a wholly owned division of defendant K2, Inc. (Simplex). Plaintiffs alleged breaches of implied and express warranties and alleged a product liability claim. Simplex manufactured the EIFS that plaintiffs purchased for use on their home. The trial court granted summary disposition to defendants on the ground that the economic loss doctrine applied to the case and, therefore, the Uniform Commercial Code (UCC) provided plaintiffs' exclusive remedy. The trial court further stated that any claim under the UCC was barred by the applicable statute of limitations, MCL 440.2725.

Plaintiffs assert on appeal that the trial court erred in granting summary disposition to defendants because the economic loss doctrine does not apply to their claims and, therefore, the case is not governed by the UCC's statute of limitations. We agree.

In *Neibarger v Universal Cooperatives, Inc,* 439 Mich 512; 486 NW2d 612 (1992), our Supreme Court formally adopted the economic loss doctrine in Michigan. That doctrine, when applicable, bars all tort recovery and limits remedies to only those found within the UCC. *Id*. at 520-521. In adopting and applying the economic loss doctrine, the Court specifically acknowledged that it distinguishes between "transactions involving the sale of goods *for commercial purposes where economic expectations are protected by commercial and contract law,* and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts." *Id.* (emphasis added). In adopting the economic loss doctrine, the Court recognized that the term "economic loss" may be an inappropriate term for the doctrine and that "commercial loss" might be more appropriate:

> It would be better to call it a "commercial loss," not only because personal injuries and especially property losses are economic losses, too - - they destroy values which can be and are monetized - - but also, and more important, because tort law is a superfluous and inapt tool for resolving purely commercial disputes. We have a body of law designed for such disputes. It is called contract law. Products liability law had evolved into a specialized branch of tort law for use in cases in which a defective product caused, *not the usual commercial loss*, but a personal injury to a consumer or bystander. [*Id.* at 522, quoting *Miller v United States Steel Corp,* 902 F2d 573, 574 (CA 7, 1990) (emphasis added).]

The Court defined the economic loss doctrine to encompass direct, incidental, and consequential losses, including property damage to other property, as the result of a product not performing in the manner that it should. *Id.* at 532.

The Court held that "where a plaintiff seeks to recover for economic loss caused by a defective product *purchased for commercial purposes,* the exclusive remedy is provided by the UCC, including its statute of limitations." *Id.* at 527-528 (emphasis added). In applying the doctrine to the facts of the cases, the Court stated:

> [I]t is apparent that the damages suffered by the plaintiffs are properly considered to be economic loss, the result of a defect in the quality of the milking systems they purchased. The plaintiffs made business decisions to purchase new milking systems, hoping. . . . to expand the size of their herds and, we presume, thereby increase their incomes. Their commercial expectations were not met, however, and they experienced decreases in milk production and medical problems. Their complaints were properly viewed by the courts below as attempts to recover for lost profits and consequential damages, losses which are compensable under the UCC. Thus, these actions fall squarely within the economic loss doctrine and are governed by the provisions of the UCC, including its four year statute of limitations. [*Id.* at 533.]

Neibarger also explained the policy reasons behind treating the noncommercial consumer different from the commercial one. The maintenance of product liability actions is based on policy considerations that products be designed safely and without risk of danger. *Id.* at 524-526. Allowing consumers to maintain such actions through tort claims promotes the concerns of

product safety. *Id.* Those concerns are not present in situations where contracting parties of relatively equal economic strength, in a commercial setting, bargain for certain products and sustain losses *based on their economic expectations*. *Id.* Since *Neibarger,* this Court has applied the economic loss doctrine on several occasions. In each instance, we have acknowledged that the economic loss doctrine applies to claims involving the sale of products for commercial purposes.

In *MASB-SEG Property/Casualty Pool v Metalux*, 231 Mich App 393, 401; 586 NW2d 549 (1998), we reiterated the concept "that where a plaintiff seeks to recover for economic loss caused *by a defective product purchased for commercial purposes*, the exclusive remedy is provided by the UCC." In *MASB-SEG*, the parties were both commercial entities with the knowledge and ability to provide for liability in their purchase and sale agreement. *Id*. at 402. In fact, the light fixture that was the subject of the sales agreement was to be used for a commercial purpose on the premises of a school. *Id*. For these reasons the Court concluded that "the consequences of the product's potential failure were likely to have been within the contemplation of the parties when they entered into the agreement for the sale of the light fixture, the economic loss doctrine applies." *Id*. Thus, the exclusive remedy available for the parties in *MASB-SEG* was provided by the UCC. *Id*.

Similarly, in *Citizens Ins Co v Osmose Wood Preserving, Inc*, 231 Mich App 40, 43; 585 NW2d 314 (1998), quoting *Neibarger, supra* at 527-528, we indicated that the economic loss doctrine applied "where a plaintiff seeks to recover for economic loss caused by a defective product purchased for *commercial* purposes . . . ." (Emphasis added). In that case, Kim's owned and operated a restaurant. Treated wood was used in the original construction of the restaurant and during the subsequent addition. *Id*. at 41-42. More than a decade after the addition, the wood deteriorated and collapsed, causing damage to the real and business property. *Id*. at 42. Because Kim's was a commercial business, the wood was purchased for commercial purposes, and the losses were economic, the UCC applied. *Id.* at 45.

In *Detroit Bd of Education v Celotex Corp*, 196 Mich App 694, 702; 493 NW2d 513 (1992), this Court recognized the rulings of *Neibarger* and summarized:

> An individual consumer's tort remedy for a defective product is not premised upon an agreement between the parties, but rather on policy considerations and duties imposed by law that allocate the risk of damage caused by an unsafe product to the manufacturer and seller. On the other hand, in a commercial transaction the parties have the ability to bargain for the terms of the sale, including warranties, disclaimers, and limitation of remedies.

The economic loss doctrine as adopted in Michigan clearly distinguishes between transactions involving the sale of goods for commercial purposes, where there are economic expectations attached to the purchases, and those involving the sale of defective products which result in losses traditionally remedied by resort to tort law. The traditional product liability action in Michigan encompasses liability for damage to property caused by or resulting from the production of a product. MCL 600.2945(h). If we applied the economic loss doctrine, as defined by *Neibarger,* to transactions involving individual consumers making noncommercial purchases,

we would render that language useless and obliterate the use of product liability actions for damage to property caused by defective products.

In this case, plaintiffs purchased an EIFS for use on the exterior of their home. They had no commercial or economic expectations with regard to the EIFS. This case does not involve the "usual commercial loss," and the parties were not a commercial business. While the losses are economic in the sense that they are monetary, they are not encompassed by the economic loss doctrine as defined by our courts. Plaintiffs are therefore entitled to pursue their claims by resort to traditional tort law.

In making our ruling, we note that defendants point to case law from several other jurisdictions that have applied the economic loss doctrine to individual consumers in certain circumstances. These cases are not controlling and, because our Supreme Court has expressly limited the operation of the economic loss doctrine to situations involving the sale of products for commercial purposes, they are not relevant. Summary disposition for defendants on plaintiffs' claims was inappropriate on the ground that the economic loss doctrine applied, such that the UCC and its statute of limitations were exclusive.

Defendants raise, by way of cross-appeal, the alternative argument that summary disposition was proper based on a release signed by plaintiffs with regard to other litigation and claims arising out of the construction project. We disagree.

First, we note plaintiffs' response that the affirmative defense of release was untimely pleaded and should be stricken. We need not address this argument because, even if the defense was properly pleaded, it does not operate to bar plaintiffs' claims. Furthermore, while this issue was unpreserved because the trial court declined to address it, we will still review it because the issue is a question of law and the facts necessary for its resolution have been presented. See *Westfield Companies v Grand Valley Health Plan*, 224 Mich App 385, 387; 568 NW2d 854 (1997).

A claim may be barred because of a release. MCR 2.116(C)(7); *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). The interpretation of the release is an issue of law for the court. *Cole, supra* at 13.

> The scope of a release is governed by the intent of the parties as it is expressed in the release. If the text in the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release. A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity. [*Id.* at 13-14 (citations omitted).]

In this case, the release provided in relevant part:

> 4. Subject to the terms of this Agreement, the Blackwards and their agents, heirs, personal representatives, successors and assigns forever release and discharge Singer-Gorge and its present and former officers, directors,

> shareholders, employees, agents, attorneys, parent corporation(s), divisions, successors, affiliates, and assigns, Alan Singer and Michael Gorge and their agents, attorneys, heirs, personal representatives, successors and assigns, and all subcontractors involved in the construction of the Residence (hereinafter collectively referred to as the "Singer-Gorge Releasees") from all actions, causes of action, claims, charges, debts, demands, damages, and all liability of whatever nature whether in law or equity, known or unknown, foreseen or unforeseen, by reason of any facts existing on or before the date hereof, including, without limiting the generality of the foregoing, any and all liability to the Blackwards pertaining or relating to the (a) Contract; (b) the construction of the Residence; (c) the matters in controversy in the Litigation; (d) all matters asserted or which might have been asserted in the Litigation; and (e) complaints with local and/or state administrative, licensing or professional agencies, societies and organizations, which the Blackwards have, or may have, against any of the Singer-Gorge Releasees by reason of any contract, agreement, or course of dealing between the parties related to the Residence or the construction thereof.
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> 7. The Blackwards hereby covenant that they have resolved any and all disputes of the following subcontractors relating to claims for payment for materials and/or labor supplied by the subcontractor(s) in connection with construction of the Residence; Controlled Water, Inc.; Blake Finish Systems/Simplex Products; Intex Construction Services; Russell Hardware Company; Al's Glass; Foster Flooring Corporation; and Duross Painting Company/Maintenance (collectively referred to as "Blackward Subcontractors"). Blackwards agree that they shall indemnify, defend and hold the Singer-Gorge Releasees harmless from and against any claims, loss or expense, including attorney fees and expenses arising out of claims made by the Blackward subcontractors . . . .

The plain terms of the release provide that Singer-Gorge and the subcontractors involved in the construction of the residence (the Singer-Gorge releasees), were released from all matters and claims arising from the contract, the construction, the matters currently being litigated and those that could have been included as well as from all complaints to state and local agencies. Defendants were not Singer-Gorge releasees as defined by the release, and they neither argue nor offer any evidence to support such a claim. They were not subcontractors involved in the construction of the residence as those terms are plainly used. Their representative testified at deposition that defendant company sells the materials of the EIFS to distributors who sell to contractors. Because they were not subcontractors involved in the construction, plaintiffs did not release, by way of paragraph 4, their ability to assert the claims now raised.

Paragraph seven of the release, by its plain and unambiguous language, also did not release defendants from the litigation at hand. Through that provision, plaintiffs represented that they had resolved all issues of payment with subcontractors for materials and/or labor. In listing those with whom payment issues had been resolved, the release included Blake Finishing

Systems/Simplex Products. Paragraph seven defines the subcontractors and material suppliers as "Blackward subcontractors." It then sets forth an indemnification agreement, which provides that plaintiffs would indemnify the Singer-Gorge releasees from any claims made by the Blackward subcontractors. This plain language from the indemnification provision does not operate to bar plaintiffs from pursuing their product liability claim.

The two release provisions are entirely separate, serve different purposes, are clear and unambiguous and do not lead to a conclusion that plaintiffs released their right to sue any of the material suppliers, including defendants herein, for product liability. Summary disposition on this alternative ground is inappropriate.

Reversed and remanded for further proceedings on plaintiffs' claim consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper