STATE OF MICHIGAN

COURT OF APPEALS

STATE FARM FIRE & CASUALTY COMPANY, Plaintiff-Appellant, v FORD MOTOR COMPANY, Defendant-Appellee.	UNPUBLISHED March 11, 2010 No. 287512 Livingston Circuit Court LC No. 08-023590-NP

Before: Meter, P.J., and Murphy, C.J., and Zahra, J.

PER CURIAM.

Plaintiff State Farm Fire & Casualty Company ("State Farm") appeals as of right the trial court's order granting summary disposition in favor of defendant Ford Motor Company ("Ford") pursuant to MCR 2.116(C)(7) in this products liability lawsuit. The trial court found that, under the economic loss doctrine, State Farm's action was governed entirely by the Uniform Commercial Code (UCC) – Sales, MCL 440.2101 *et seq.*, and time-barred pursuant to the applicable statute of limitations contained in the UCC. We reverse and remand for further proceedings.

In 2001, Chris and Julie Sredzinski purchased a used 1994 Ford F-150. State Farm insured the Sredzinskis' vehicles, home, and personal property. The Sredzinskis used the Ford F-150 solely for personal rather than commercial purposes. The vehicle was generally garaged at the Sredzinskis' home. On December 29, 2006, the vehicle caught fire while parked at the Sredzinskis' residence and, as a result, was destroyed. The fire also caused severe damage to the Sredzinskis' home, their garage, and a 2005 GMC Crew Cab. State Farm's investigators concluded that the fire originated in the engine compartment of the Ford F-150 and was caused by a defective cruise control deactivation switch. Following the accident, State Farm paid $123,926 to the Sredzinskis under the terms of their insurance policies. State Farm, as subrogee of the Sredzinskis, commenced the instant products liability action against Ford in May 2008, alleging negligent design, a manufacturing defect, and breach of express and implied warranties.

Ford filed a motion for summary disposition, arguing that State Farm's products liability claims were governed by the economic loss doctrine, which bars tort recovery and limits remedies to those available under the UCC, where the damages arise out of the sale of goods and the losses incurred are purely economic. *Neibarger v Universal Coops, Inc*, 439 Mich 512, 515; 486 NW2d 612 (1992). Ford asserted that State Farm sought purely economic damages because

it requested reimbursement for losses associated with the Sredzinskis' Ford F-150 and the other property. Ford maintained that because the economic loss doctrine applied, State Farm's claims were limited to those found under the UCC. Ford argued that any claims brought by State Farm under the UCC would be barred by the UCC's four-year statute of limitations provided in MCL 440.2725, which began to run the day the vehicle was tendered back in the 1990s. In response, State Farm contended that the economic loss doctrine only applies to commercial transactions and not in the context of a consumer purchase. The primary focus of the arguments below was on whether the economic loss doctrine applies to consumer transactions, as opposed to commercial transactions alone. The trial court granted summary disposition in favor of Ford, concluding that, under *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41; 649 NW2d 783 (2002), the economic loss doctrine applies to consumer transactions and that State Farm's action was thus time-barred under the UCC.[1]

Among various arguments posed by State Farm on appeal, it maintains that the trial court erred because, while the economic loss doctrine applies where there is damage to the defective product itself and to other property if such loss was within the contemplation of the parties at the time of the transaction, it clearly was not implicated under the circumstances presented here. According to State Farm, the Sredzinskis did not anticipate or contemplate that the vehicle, if defective as to a minor part like a cruise control switch, might cause a fire that would damage the vehicle, their home, garage, and the GMC Crew Cab, such that the potential harm would have been taken into account in negotiating the transaction.[2]

State Farm did not raise this particular argument below, and Ford argues that State Farm's failure to preserve the issue precludes appellate review. As a general rule, this Court

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[1] "An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued." MCL 440.2725(1). "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach[, and] [a] breach of warranty occurs when tender of delivery is made . . . ." MCL 440.2725(2).

[2] We note that the Sredzinskis apparently did not purchase the vehicle in a transaction with Ford or a Ford dealership, but rather bought the vehicle second hand from a private party. We shall proceed on the assumption that the lack of privity of contract between Ford and the Sredzinskis, and thus State Farm, does not preclude application of the economic loss doctrine. We do note that this Court "has expressly rejected the argument that the economic loss doctrine does not apply in the absence of privity of contract." *Citizens Ins Co v Osmose Wood Preserving, Inc*, 231 Mich App 40, 45; 585 NW2d 314 (1998), citing *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333; 480 NW2d 623 (1991), and *Freeman v DEC Int'l, Inc*, 212 Mich App 34; 536 NW2d 815 (1995). All three of those cases involved commercial settings, which factor was stressed by the panels in ruling that the economic loss doctrine applied even in the absence of privity of contract. *Citizens Ins, supra* at 45; *Freeman, supra* at 36-38; *Sullivan Industries, supra* at 343-344. *Sherman*, which was decided after the three cases cited above were issued, did hold that the economic loss doctrine applies to consumer transactions, although the panel did not concern itself with the issue of privity of contract. *Sherman, supra* at 46-53, 54 n 6 ("the parties have not raised, addressed, or disputed any privity of contract issues").

need not consider issues raised for the first time on appeal. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). However, the "Court may overlook preservation requirements . . . if consideration [of the issue] is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Id.* We choose to overlook the preservation failure because addressing the argument presented by State Farm is necessary for a proper determination of the case and because the issue involves a question of law that can be resolved on the basis of the facts found in the existing record.

We review a trial court's summary disposition ruling de novo to determine whether the moving party was entitled to judgment as a matter of law. *Shember v Univ of Michigan Medical Ctr*, 280 Mich App 309, 313; 760 NW2d 699 (2008). Summary disposition is proper when a "claim is barred because of . . . [the] statute of limitations." MCR 2.116(C)(7). The following principles are applicable to motions brought pursuant to MCR 2.116(C)(7):

> [T]his Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [*RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008)(citations omitted).]

We hold that the trial court erred in granting Ford's motion for summary disposition. The economic loss doctrine does not bar State Farm's products liability (tort) claims because, at the time the Sredzinskis purchased the Ford F-150, or even when a previous owner first purchased the vehicle from Ford, losses incurred by fire were certainly not anticipated or contemplated. Moreover, the nature of this lawsuit is simply not consistent with the types of actions that typically implicate the UCC. Therefore, State Farm's suit is not limited to claims under the UCC, and the UCC's four-year statute of limitations and accrual provisions found in MCL 440.2725 do not apply.

In 1992, the Michigan Supreme Court formally adopted the economic loss doctrine. *Neibarger*, *supra* at 527-528. As indicated above, the economic loss doctrine "bars tort recovery and limits remedies to those available under the [UCC] where a claim for damages arises out of the commercial sale of goods and losses incurred are purely economic." *Id.* at 515. The *Neibarger* Court also stated that the economic loss doctrine is implicated and economic losses alone are suffered when a purchaser's expectations in a sale are frustrated because the purchased product is not working properly. *Id.* at 520. The Court stressed that the doctrine 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.* at 520-521.

The *Neibarger* Court also addressed the applicability of the economic loss doctrine where the failure of a product causes damage to other property. The Court stated that the doctrine still applies when a product purchased for commercial purposes causes damage to other property, reasoning "that the UCC provides remedies sufficient to compensate the buyer of a defective product for direct, incidental, and consequential losses, including property damage." *Id.* at 531-532. The Court, however, also added:

> Where damage to other property was caused by the failure of a product purchased for commercial purposes to perform as expected, and this damage was within the contemplation of the parties to the agreement, the occurrence of such damage could have been the subject of negotiations between the parties. [*Id.* at 532.]

This proposition was echoed in *Quest Diagnostics, Inc v MCI Worldcom, Inc*, 254 Mich App 372, 378 n 4; 656 NW2d 858 (2002), wherein the Court, citing and quoting *Neibarger, supra* at 532, stated that "Michigan's economic loss doctrine is broader than other jurisdictions in that it . . . may also include damage to other property when 'this damage was within the contemplation of the parties to the agreement.'"

In *Neibarger, supra* at 532-533, the Court, addressing consolidated cases involving alleged defective milking systems used on dairy farms, found that it was necessary to invoke the economic loss doctrine under the following set of circumstances:

> The physical damage to property alleged by the plaintiffs includes instances of mastitis and other illnesses that allegedly caused the death of some cattle or necessitated culling them from the herd and selling them for beef. However, in his deposition, plaintiff Darwin Neibarger testified that mastitis is a common problem for dairy farmers. Plaintiff Charles Houghton testified that mastitis could occur even where the cows were milked by hand, and his testimony reveals that he was aware that mastitis could be caused by the milking system. Deposition testimony also reveals that culling the cows was a normal part of the dairy business, and that the Houghtons would replace as many as twenty-five percent of their cows every year. Houghton, in fact, testified that he anticipated problems with the new system because some cows would not adapt to the new system and would have to be replaced.
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> Viewing the complaints in light of this testimony, it 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, as Charles Houghton and Darwin Neibarger testified, 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.

Here, as opposed to the anticipatable and foreseeable mastitis resulting from the alleged defective milking systems in *Neibarger*, it cannot reasonably be argued that a consumer purchaser of a motor vehicle would anticipate and contemplate fire damages as a possible consequence of ownership of the vehicle, even a defective vehicle, let alone that the purchaser would be leery of or concerned about fire damages to a garage, home, and other property. Therefore, the potential for fire-related damages would not have been the subject of negotiations on a vehicle purchase agreement. It would defy logic to conclude that a "common problem" for motor vehicle purchasers is destruction by fire resulting from a vehicle defect. Our conclusion is buttressed by additional language in *Neibarger*, where the Court expressed that "[d]amage to property, where it is the result of a commercial transaction otherwise within the ambit of the UCC, should not preclude application of the economic loss doctrine where such property damage *necessarily results* from the delivery of a product of poor quality." *Neibarger, supra* at 531 (emphasis added). The delivery of a vehicle of poor quality does not necessarily result in a fire and one's garage and home burning down.[3] Indeed, it is highly doubtful that a prospective vehicle purchaser, concerned about the quality and possible defects of an automobile, would be contemplating the ramifications of a fire in negotiating a transaction.

Ten years after *Neibarger*, this Court extended the economic loss doctrine to cover individual consumer transactions. See *Sherman*, *supra* at 47-50; see also *Quest Diagnostics*, *supra* at 378 ("This Court [in *Sherman*] . . . extended the economic loss doctrine beyond commercial transactions involving sophisticated users to the sale of consumer goods, even when the plaintiff consumer enters into a transaction with an entity of greater knowledge or bargaining power."). In *Sherman*, the plaintiff purchased a boat for personal use with the expectation that its useful life would exceed twenty-five years. Twelve years later, the plaintiff discovered that the boat had developed extensive wood rot damage and decay. Consequently, the plaintiff

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[3] We acknowledge this Court's decision in *MASB-SEG Property/Casualty Pool, Inc v Metalux*, 231 Mich App 393; 586 NW2d 549 (1998), wherein the plaintiff alleged that a defective fluorescent light fixture manufactured by the defendant caused a fire at a technology center. The Court held that the economic loss doctrine applied to the plaintiff's tort claim arising out of the fire damage, reasoning that "the potential failure of the capacitor within the light fixture . . ., and the damage caused by the resulting fire, were direct and consequential losses that were within the contemplation of the parties when they entered into the agreement for the sale of the light fixture." *Id.* at 403. We find *MASB-SEG* to be distinguishable, given that a fire caused by a light fixture could reasonably be anticipated and contemplated should the fixture be faulty or defective. We also note that the *MASB-SEG* panel emphasized in its analysis that the primary bases for its decision to invoke the economic loss doctrine were that the plaintiff purchaser was a sophisticated commercial entity with the knowledge and ability to allocate liability in the purchase and sale agreement and that the light fixture was used for a commercial purpose. *Id.* at 402. Here, we are addressing a vehicle purchase by consumers outside of a commercial context. While we recognize that *Sherman* held that the economic loss doctrine generally applies to consumer transactions, this does not mean that we are precluded from taking into consideration that consumers were involved in a transaction, as opposed to commercial entities or parties, when examining the question whether certain damages would have been contemplated during the negotiation of an agreement.

brought numerous claims against the defendants who manufactured and sold her the boat, including claims of negligence and design defect. *Id.* at 42–43.[4]

The *Sherman* panel held that the economic loss doctrine applied to the plaintiff's negligence and design defect claims. *Id.* at 53–55. The Court reasoned:

> While plaintiff alleges that the application of the economic loss doctrine is contingent on whether a consumer is involved in the transaction, the test enunciated by the *Neibarger* Court provides that "the proper approach requires consideration of the underlying policies of tort and contract law as well as the nature of the damages." In this case, even if plaintiff could support a claim of negligence [or design defect], any harm did not result in physical injury, but structural damage to the boat only. The nature of damages arises not from physical harm, but loss of economic expectation in the product. Additionally, the overriding concern of the economic loss doctrine provides that where a plaintiff seeks damages for economic losses only, tort concerns with product safety no longer apply, and economic expectation issues prevail. [*Sherman, supra* at 53-54.]

Turning to the case at bar, we first note that *Sherman* did not entail consideration of damage to "other property," which is a relevant matter here and one that we addressed above under *Neibarger*. However, the Ford F-150, which had the alleged defective cruise control deactivation switch, was itself damaged in the fire, requiring us to ascertain whether *Sherman* compels us to conclude, at a minimum, that damages associated with the F-150 alone needed to be litigated under the UCC. In *Sherman*, the Court emphasized that the plaintiff's losses arose out of her disappointed economic expectations relative to the useful life of a boat that simply did not stand the test of time and incurred decay. Such is not the situation here, where the F-150 became engulfed in a fire due to an alleged defect. This is not a case in which the vehicle merely failed to live up to economic expectations held by the purchasers. The Sredzinskis would not be properly characterized as purchasers who were disappointed that the F-150 did not run for as many miles as hoped for when it was purchased due to wear and tear that occurred prematurely because of faulty craftsmanship. It would simply be inaccurate to describe State Farm's case as one in which the purchasers' expectations in the sale were frustrated because the F-150 did not work properly, *Neibarger, supra* at 520; *the F-150 actually ignited*. We also note that *Neibarger* stated that a consumer's tort remedy for products liability derives from a duty imposed by law or from policy considerations that allocate the risk of dangerous and unsafe products to the manufacturer rather than the consumer, thereby serving to encourage the design and production of safe products. *Id.* at 523. Allowing State Farm's action to proceed outside of

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[4] We find it unnecessary to analyze the issue of whether the economic loss doctrine is properly applied to consumer transactions. Binding precedent makes clear that the doctrine is generally applicable to consumer transactions like the one at issue here. And, assuming that we agreed with the concurring opinion issued by our colleague, there still would be no need to contemplate a request for a conflict panel, given that our ruling is that the economic loss doctrine does not bar State Farm's suit regardless of whether a consumer or commercial transaction was involved.

the UCC would serve the purpose of encouraging the design and production of safer cruise control deactivation switches. Additionally, *Neibarger* suggested that contemplation of certain damages and the addressing of these potential damages through a negotiated agreement were principles equally applicable to assessing whether damage to the product itself implicated the UCC and not just when determining whether damages to "other property" implicated the UCC. See *Neibarger, supra* at 521.

Furthermore, we note that Michigan law defines a "product liability action" as "an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person *or damage to property* caused by or resulting from the production of a product. MCL 600.2945(h) (emphasis added). Moreover, under statutory products liability law, "economic loss" is defined as including "loss of use of property" and "costs of repair or replacement of property." MCL 600.2945(c). Accordingly, the mere fact that only property was damaged, i.e., economic losses were incurred, does not mean that the case automatically became a UCC case to be removed from underneath the umbrella of products liability law. This case is a classic example of a products liability action, absent physical injury or death to a person. We conclude, for the reasons stated above, that the economic loss doctrine does not apply in this case as to any of the claimed damages.

In sum, the trial court erred in finding that the UCC controlled this action and that the UCC's statute of limitations and accrual provisions dictated summary dismissal under the circumstances presented. In light of our ruling, it is unnecessary to address the additional appellate arguments posed by State Farm.

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

/s/ Patrick M. Meter
/s/ William B. Murphy