COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2008

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2007AP503 **Cir. Ct. No. 2006CV3290**

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

MIRSAD ASLANI, DALE BRASTED, JEANNIE BRASTED, PAUL BRINGS, PAT BRINGS, JOE CASSINELLI, JEANNE CASSINELLI, JOHN CRAIG, DON DEMBIEC, LINDA DEMBIEC, RANDALL FIRMIN, KIM FIRMIN, JOHN GAMM, STEPHEN GENDREAU, IWONA GUNIA, DONALD HANSEN, ILA HANSEN, DAN HARGREAVES, JAY HARTSHORN, OWEN HENNEMANN, JULIE HENNEMANN, MATT KLUTH, RONALD KRUEGER, DONNA MAX, BRIAN MCCORMICK, KIM MCCORMICK, LEE NIEMIEC, WALTER NOWOTNY, SUZANNE NOWOTNY, ROBERT PALMER, DALE PETERS, KENNETH PETERS, MARK RICK, LORI RICK, STEVE SCHMITT, DANA SCHMITT, DAN SCHOEMANN, ANGIE SCHOEMANN, BONNIE SCHOENIKE, RUSS STAERKEL, SANDY STAERKEL, JANUSZ STANULA, MINH TONG, DUANE TRAUTNER, RANDY TRUE, VICKIE TRUE, GREG WEILAND, FRANK WELLSTEIN, EUGENE WHEELER, JR., MARY WILSON, CHRISTOPHER CONSTANTINE AND NICOLE CONSTANTINE,

PLAINTIFFS-APPELLANTS,

V.

COUNTRY CREEK HOMES, INC., CONTINENTAL INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, VALLEY FORGE INSURANCE COMPANY, ONEBEACON AMERICA INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, RUDY KONECKY D/B/A RK INSTALLATIONS AND GENERAL CASUALTY COMPANY OF WISCONSIN,

DEFENDANTS-RESPONDENTS,

CONTINENTAL WESTERN INSURANCE GROUP, MARYLAND CASUALTY COMPANY AND BNW INSTALLATIONS,

DEFENDANTS.

APPEAL from orders of the circuit court for Milwaukee County: JEAN W. DI MOTTO, Judge. *Affirmed*.

Before Wedemeyer, Fine and Kessler, JJ.

¶1 KESSLER, J. The plaintiffs' claims in this action arose from a defect in the construction of the roofs on the homes the plaintiffs occupy. Construction of the various homes was completed, at the latest, by August 1997. The defect was discovered in October 2005. This action was commenced in April 2006. The plaintiffs' claims involve breach of contract, negligence, and misrepresentation. The trial court ruled that: (1) the contract claims were barred because the action was commenced after the applicable statute of limitations had expired, and because the contract in question was fundamentally for a product (a home) rather than for professional services; and (2) the negligence and misrepresentation claims were barred by the economic loss doctrine. The trial court then granted summary judgment to defendants dismissing all of the plaintiffs' claims. We affirm.

BACKGROUND

¶2 Country Creek Homes, Inc. contracted with the original owners to construct homes within the community of Oak Creek in Milwaukee County. Country Creek hired Rudy Konecky d/b/a RK Installations (Konecky) as a

subcontractor to install the roofs on these homes. The fifty-two plaintiffs are either the original owners of homes constructed by Country Creek or are subsequent owners. All are collectively referred to herein as Plaintiffs. The homes were completed between nine and ten years before this action was commenced in April 2006.

¶3 In October 2005, a home inspector hired by one of the owners discovered that the felt paper, required to be placed under the shingles, had not been installed around the edges and peaks of the home's roof. This caused water to penetrate and the roof to rot to such a degree that the inspector's foot went through the roof. Subsequently, it was discovered that each residence occupied by one of the fifty-two plaintiffs in this case has the same roof defect.

¶4 Plaintiffs sued the general contractor Country Creek and its insurers, as well as the roofing subcontractors, Konecky and another with whom settlement was reached, and their insurers. Plaintiffs alleged breach of the express warranty in the construction contract, breach of contract by Country Creek, negligence in construction of the homes, negligent supervision of subcontractors by Country Creek, negligent or strict responsibility misrepresentation by Country Creek, and fraudulent misrepresentations by Country Creek in violation of WIS. STAT. § 100.18 (1995-96).[1]

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted. Additionally, none of the statutes cited in this opinion have changed substantively from the 1995-96 version to the present, except for WIS. STAT. § 100.18, which was modified in 1997 (motor fuel provision); 2001 (use of area name by out-of-area businesses); and 2003 (liquidation sales).

¶5 Country Creek and Konecky moved for summary judgment arguing, as summarized by the trial court, that the contract-based claims are barred by a six-year statute of limitations, that the tort-based claims are barred by the economic loss doctrine, and that the fraudulent misrepresentation claims under WIS. STAT. § 100.18 (1995-96) are barred by a three-year statute of repose. Plaintiffs argued that WIS. STAT. § 893.89(3)(b) permitted this action for damages caused by a defect in the improvement of real estate, and that equitable estoppel should preclude application of the six-year statute of limitations in WIS. STAT. § 893.43 because Country Creek's failure to disclose the defect was inequitable conduct.

¶6 The trial court found there was no dispute that:

- "All the homes at issue were … delivered to the … original homeowners, by August 1st of 1997."
- "[T]he defect in the incomplete felt papering of the roofs of these … homes was in existence for approximately nine to ten years."
- "[S]uit was commenced … April 7th of 2006."

Based on those findings, the trial court concluded that the actions based on contract (i.e., breach of contract for failing to supervise the roofing subcontractor, and breach of warranty) were barred by the statute of limitations, WIS. STAT. § 893.43,[2] and dismissed the contract claims.

[2] WISCONSIN STAT. § 893.43, entitled, "Action on contract," provides: "An action upon any contract, obligation or liability, express or implied, including an action to recover fees for professional services, except those mentioned in s. 893.40, shall be commenced within 6 years after the cause of action accrues or be barred."

¶7 The contracts between the original-owner plaintiffs and Country Creek are part of this record. No party has argued here that other original owners had significantly different contracts with Country Creek. The contracts are all four-page documents (some with an additional page detailing extra construction changes and charges). All are on forms of the Metropolitan Builders Association of Greater Milwaukee; all are titled "Building Construction Agreement"; and all are alike except as to buyers, dates, specific price, and details of construction options selected by the buyer. The first page is devoted to identifying the parties, the total cost, specific construction allowances, and specific construction-related items included in the contract. The second page is devoted to financial matters such as down payment, financing contingencies, and buyer's responsibility for insurance. The third page topics, some of which are deleted by cross outs, include: buyer establishing ownership of the lot (deleted); lien notice process; when construction will begin and end—and that builder will complete the building "in a good workmanlike manner in quality equal to the standards of the industry"—with exceptions as to completion date based on other circumstances; building site and weather conditions provisions (deleted); builder's obligation to supervise the work; buyer's responsibility to apply for utilities; provisions for work stoppage and payment defaults; possession and occupancy requirements; a warranty clause (substantially deleted); and a provision requiring arbitration of disputes under the contract. The fourth page actually fills approximately two-thirds of the page. It contains a paragraph entitled "air quality" (which appears to allocate to the buyer on occupancy any risk of poor air quality because of excessive moisture in the home), a provision discussing conditions relating to settlement of discrepancies involving the plans and specifications and noting builder's obligation to comply with all soil erosion requirements, provisions

regarding enforceability and finality of the agreement, and the earnest money receipt, and the signatures of all parties.

¶8 The trial court concluded that these contracts were ultimately for the purchase of a product—a home—at a fixed price. On that basis, the trial court concluded that the economic loss doctrine barred the tort claims and dismissed all of those claims. Plaintiffs appealed.

STANDARD OF REVIEW

¶9 We review the granting or denial of motions for summary judgment *de novo*, applying the same methodology and standards as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 316, 401 N.W.2d 816 (1987). Summary judgment is appropriate where the pleadings and evidentiary submissions show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***Maynard v. Port Publ'ns, Inc***., 98 Wis. 2d 555, 558, 297 N.W.2d 500 (1980). This court will reverse a decision granting summary judgment if the trial court incorrectly decided legal issues or if material facts are in dispute. ***Coopman v. State Farm Fire & Cas. Co***., 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). We, like the trial court, may not decide issues of fact but must determine only whether a material factual issue exists. ***Id.*** "Finally, if there is doubt as to whether a genuine issue of material fact exists, we will resolve those doubts against the party moving for summary judgment." ***Kerry Inc. v. Angus-Young Assocs., Inc***., 2005 WI App 42, ¶7, 280 Wis. 2d 418, 694 N.W.2d 407.

ANALYSIS

I. Contract claims

¶10 Plaintiffs, recognizing the six-year bar imposed by WIS. STAT. § 893.43, argue that, for policy reasons, we should apply the discovery rule applicable to tort claims[3] to contracts for construction of residences. Country Creek and Konecky argue that under settled Wisconsin law, claims brought for breach of contract six years after the breach occurred are barred, based on § 893.43, regardless of whether the party claiming damages from the breach had discovered the breach by that time.

¶11 For a century, our supreme court has held that a breach of contract claim accrues at the time of the breach, even if the defect is latent and even if the party may not have known of its existence. *See* ***CLL Assocs. Ltd. P'ship v. Arrowhead Pac. Corp.***, 174 Wis. 2d 604, 609, 497 N.W.2d 115 (1993); ***State v. Holland Plastics Co.***, 111 Wis. 2d 497, 506, 331 N.W.2d 320 (1983); ***Denzer v. Rouse***, 48 Wis. 2d 528, 531, 180 N.W.2d 521 (1970) *overruled on other grounds by* ***Hansen v. A.H. Robins, Inc.***, 113 Wis. 2d 550, 335 N.W.2d 578 (1983); ***Milwaukee County v. Schmidt, Garden & Erickson***, 43 Wis. 2d 445, 455, 168 N.W.2d 559 (1969); ***Krueger v. V.P. Christianson Silo Co.***, 206 Wis. 460, 462-63, 240 N.W. 145 (1932); ***Ott v. Hood***, 152 Wis. 97, 100-01, 139 N.W. 762 (1913)

[3] The statute of limitations for tort claims begins to run when the injured party learned, discovered or with reasonable diligence should have learned of the conduct causing the injury. ***Hansen v. A.H. Robins, Inc.***, 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983); *see also* ***Doe v. Archdiocese of Milwaukee***, 2005 WI 123, ¶24, 284 Wis. 2d 307, 700 N.W.2d 180; ***CLL Assocs. Ltd. P'ship v. Arrowhead Pac. Corp.***, 174 Wis. 2d 604, 609, 497 N.W.2d 115 (1993); ***Borello v. U.S. Oil Co.***, 130 Wis. 2d 397, 411, 388 N.W.2d 140 (1986); ***Schmidt v. Northern States Power Co.***, 2006 WI App 201, ¶14, 296 Wis. 2d 813, 724 N.W.2d 354.

(citing Wisconsin Supreme Court cases for this proposition dating from 1903). This proposition is applicable when applying the statute of limitations to contract cases. ***CLL Assocs. Ltd.***, 174 Wis. 2d at 609 ("[I]n a cause of action for breach of contract . . . the statute of limitations begins to run from the moment the breach occurs.").

¶12 The policy basis for the breach of contract rule was explained at length in ***CLL Assocs. Ltd.***, where the supreme court was specifically asked, as plaintiffs ask here, to apply the discovery rule in contract actions. ***Id.***, 174 Wis. 2d at 611. The case involved claims based on defective construction of two apartment buildings. ***Id.*** at 608. The defects were not discovered until eleven years after construction was completed. ***Id.*** The court refused to extend the discovery rule to contract actions for several reasons: liability insurance available to protect potential tort victims is not generally available in contract situations, ***id.*** at 611-12; and contracts allow the parties to control and allocate their risks of loss (unlike tort victims who may not be able to control, for example, getting hit by a motor vehicle), ***id.*** at 612. The legislative decision to adopt a statute of limitations triggered by the time of breach in the Uniform Commercial Code "constitutes a legislative judgment" that determines policy interests consistent with the supreme court's historic holdings involving the statute of limitations in contract settings. ***Id.*** at 613. The court concluded that if policy changes were to be made, it is the legislature that should make them:

> Our holding rests on the fact that policy considerations do not favor a broadly applied discovery rule in the contract context. If the general rule that we uphold today creates unjust results in specific situations not now before this court, i.e. in the consumer context where contracting consumers have limited bargaining power, the legislature, with its greater resources for weighing policy, is best equipped to enact specific ameliorative laws

Id.

¶13 We cannot modify or overrule supreme court holdings. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Nor can we modify or withdraw holdings of this court. ***Id.*** The trial court correctly held that WIS. STAT. § 893.43 bars the contract claims asserted here because the action was commenced more than six years after the construction contract was completed by Country Creek. We acknowledge that this is a harsh result from the perspective of the homeowners who, we assume, had no reason to earlier suspect that the roofs of their homes had been constructed improperly. However, as our supreme court has observed, the remedy lies with the legislature which has the power to adopt a new policy and modify application of the statute of limitations relating to contracts.

II. Negligence claims

¶14 A tort cause of action "accrues" when the injury is discovered, or reasonably should have been discovered. ***Hansen***, 113 Wis. 2d at 560. Hence, if plaintiffs stated a claim for common law negligence by Country Creek and/or Konecky, and that negligence was independent of the contract, *see* ***Kerry Inc.***, 280 Wis. 2d 418, ¶9; ***Milwaukee Partners v. Collins Eng'rs, Inc.***, 169 Wis. 2d 355, 361-62, 485 N.W.2d 274 (Ct. App. 1992), then the negligence action would be timely filed because the damage was discovered in October 2005 and the action commenced in April 2006.[4] However, if the negligence was not independent of the contract, then as the trial court concluded, the negligence claim would be

[4] WISCONSIN STAT. § 893.53 provides that "[a]n action to recover damages for an injury to the ... rights of another, not arising on contract, shall be commenced within 6 years after the cause of action accrues, except where a different period is expressly prescribed, or be barred."

barred by the economic loss doctrine. ***Linden v. Cascade Stone Co.***, 2005 WI 113, ¶32, 283 Wis. 2d 606, 699 N.W.2d 189.

¶15 A common law tort claim, based on negligent performance of professional services, exists independently of a contract whose primary purpose is to obtain those professional services and the contract merely triggers the duty. *See* ***Milwaukee Partners***, 169 Wis. 2d at 361-62 (holding that, in a contract with engineers to determine structural soundness of a building, the "[f]ailure to exercise ordinary care in fulfillment of [a] contract is tort if common-law duty to exercise ordinary care exists independent of the contract and [the] 'contract is mere[ly the] inducement creating the state of things which furnishes the occasion of the tort'" (citation and one set of internal quotations omitted)); *see also* ***Kerry Inc.***, 280 Wis. 2d 418, ¶9 (holding that in contract with architects to determine structural stability of renovation site, "claims against architects for improperly performed work may often sound in either contract or tort, but their common-law duty to exercise the standard of professional care for architects exists independent of any contract, which merely 'furnishe[s] the occasion' for fulfillment of that duty") (citations and one set of internal quotations omitted)).

¶16 However, if the contract is predominantly one for a product, although services are required to obtain the product, the tort claim is barred by the economic loss doctrine.[5] ***Linden***, 283 Wis. 2d 606, ¶8 ("We use the predominant purpose test to determine whether a mixed contract for products and services is

[5] "'The economic loss doctrine is a judicially created doctrine under which a purchaser of a product cannot recover from a manufacturer on a tort theory for damages that are solely economic.'" ***1325 North Van Buren, LLC v. T-3 Group, Ltd***., 2006 WI 94, ¶24, 293 Wis. 2d 410, 716 N.W.2d 822 (citation and one set of internal quotations omitted). There is no claim in this record of any loss other than repair and/or replacement of the roofs.

predominantly a sale of a product and therefore subject to the economic loss doctrine, or predominantly a contract for services and therefore not subject to the economic loss doctrine." (internal citations omitted)); *see also* ***1325 North Van Buren, LLC v. T-3 Group, Ltd***., 2006 WI 94, ¶5, 293 Wis. 2d 410, 716 N.W.2d 822 (holding that the economic loss doctrine applies to contracts for services and products where the predominant purpose of the contract is to construct a condominium complex and adjacent parking garages).

¶17 It is undisputed that the contracts here for the construction of homes were titled "Building Construction Agreement," and were printed on a form identified as coming from the Metropolitan Builders Association of Greater Milwaukee. We have described in detail the terms of the contract. The references to Country Creek's obligations cover a very small part of the contract as a whole. The references primarily relate to producing a house within a particular time and in accord with detailed plans and specifications (which are not part of the record). We conclude, based on the terms of the contract taken as a whole, that the predominant purpose here was to produce a product—a residence—for a fixed price. Thus, under the teachings of ***Linden*** and ***1325 North Van Buren***, the economic loss doctrine bars the tort claims plaintiffs assert, and summary judgment dismissing those claims was proper.

CONCLUSION

¶18 Consistent with the holdings in ***CLL Assocs. Ltd.*** that WIS. STAT. § 893.43, the six-year statute of limitations applicable to contract actions, requires commencement of a suit within six years from the date the contract is breached, not within six years from the date the breach is discovered, plaintiffs' contract claims are time-barred. Because the contracts here were predominantly for the

purchase of a product, consistent with the holdings of ***Linden*** and ***1325 North Van Buren***, the economic loss doctrine bars the tort claims plaintiffs assert. Thus we affirm the trial court's dismissal of all claims.[6]

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

[6] Plaintiffs did not argue on appeal that the trial court erred in dismissing the various misrepresentation claims. Issues not raised on appeal are deemed abandoned. ***Adler v. D & H Indus., Inc.***, 2005 WI App 43, ¶18, 279 Wis. 2d 472, 694 N.W.2d 480. In addition, plaintiffs concede in their reply brief that the doctrine of issue preclusion relieves Konecky from liability for all claims of which Country Creek is relieved in this case.