ATTORNEY FOR APPELLANTS:

GREGORY W. BLACK
The Black Law Office
Plainfield, Indiana

ATTORNEY FOR APPELLEE:

THERESA LAUGHLIN SILVER
Easter & Cavosie
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

DENNIS HOFFMAN, MERLE HOFFMAN, ERIC HARVEY, and ANGELA HARVEY,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 54A04-0807-CV-393
WCC EQUITY PARTNERS, L.P.	)	
Appellee-Defendant.	)	

APPEAL FROM THE MONTGOMERY CIRCUIT COURT
The Honorable David A. Ault, Judge
Cause No. 54C01-0608-PL-341

December 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Dennis Hoffman, Merle Hoffman, Eric Harvey, and Angela Harvey (collectively, "the Neighbors") appeal the trial court's entry of partial summary judgment in favor of WCC Equity Partners, L.P. ("WCC"). We reverse and remand.

Issues

The Neighbors and WCC raise three issues, which we restate as follows:

I. Does the economic loss doctrine bar the Neighbors from recovering economic damages pursuant to their claim of negligence against WCC?

II. Does the law of the case doctrine require us to affirm the trial court's decision?

III. Does the doctrine of res judicata prevent this Court from reviewing the appealed order in this case?

Facts and Procedural History

The Neighbors reside on the north side of 21st Street in Avon. WCC is the owner and developer of Woodcreek Crossing, a residential neighborhood under construction on property adjacent to and north of the Neighbors' parcels. On June 20, 2006, the Neighbors filed their First Amended Complaint against WCC along with Woodcreek's design engineer, Benchmark Consulting, Inc. ("Benchmark") and excavator, Eaton Excavating, Inc. ("Eaton"). The Neighbors allege that in developing and excavating Woodcreek, "defendants without limit and among other things piled high much dirt and earth, changed or altered the flow of water, damaged ancient or venerable tile system … all to the detriment of owners and owners' land and improvements." Appellants' App. at 60. The Neighbors further alleged that "[s]uch

development and excavation has interfered with and damaged septic systems, crawl spaces, [and] basements[,]" and has caused emotional distress. *Id*. at 61.

In July and August of 2006, Eaton and Benchmark, respectively, filed motions for summary judgment. On October 2, 2006, the Neighbors filed their response and designation of evidence. On February 7 2007, the trial court granted final summary judgment for Benchmark, and on March 6, 2007, the trial court granted final summary judgment for Eaton. Regarding the Neighbors' case against Eaton and Benchmark, the trial court determined, among other things, (1) that neither Eaton nor Benchmark owed a duty to the Neighbors, (2) that the common enemy doctrine[1] barred relief, (3) that the Neighbors' emotional distress claim could not succeed, and (4) that the economic loss doctrine prevented the Neighbors from recovering damages for negligence. *Id*. at 125-141. The Neighbors appealed the trial court's grant of summary judgment. On November 28, 2007, another panel of this Court affirmed the trial court's decision, concluding that "the Neighbors' designation of evidence to the trial court is insufficient as a matter of law." *Hoffman v. WCC Equity Partners, L.P.*, No. 54A01-0705-CV-213 (Ind. Ct. App. November 28, 2007), slip op. at 6. *See* Ind. Trial Rule 56(H) ("A party opposing the motion shall also designate to the court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto.")

[1] Pursuant to the common enemy doctrine, surface water which does not flow in defined channels is a common enemy, and each landowner may deal with it in such manner as best suits his own convenience, including walling it out, walling it in, and diverting or accelerating its flow by any means whatever. *Harlan Bakeries v. Muncy*, 835 N.E.2d 1018, 1033 (Ind. Ct. App. 2005). The only limitation on the common enemy doctrine recognized thus far is that "one may not collect or concentrate surface water and cast it, in a body, upon its neighbor." *Id*. (quoting *Argyelan v. Haviland*, 435 N.E.2d 973, 975 (Ind. 1982).

On March 14, 2007, WCC filed a motion for summary judgment, citing the common enemy doctrine and the economic loss doctrine. In their designation of evidence, the Neighbors included several affidavits and reports prepared by two engineers, a developer, and a county surveyor. This evidence was all obtained *after* the trial court granted summary judgment in favor of Eaton and Benchmark. At a hearing on July 13, 2007, WCC conceded that Hoffman had established, through the expert affidavits and reports, genuine issues of material fact regarding the common enemy doctrine. WCC argued, however, that as to the applicability of the economic loss doctrine, the trial court should rule in its favor, as it did in granting summary judgment on that issue for Eaton and Benchmark.

On September 19, 2007, the Neighbors requested a change of judge, and shortly thereafter, Special Judge David Ault was selected to hear the case. On February 6, 2008, Judge Ault held a hearing on WCC's summary judgment motion. On April 4, 2008, the trial court granted partial summary judgment for WCC, finding that "there is no genuine issue of material fact, that the economic loss doctrine … bars recovery for economic losses claimed by the plaintiffs under a negligence theory." Appellant's App. at 29. The Neighbors now appeal.

Discussion and Decision

I. Doctrine of Economic Loss

The Neighbors contend that the trial court erred by granting summary judgment in WCC's favor on the issue of the economic loss doctrine. Our standard of review is well established.

> An appellate court faces the same issues that were before the trial court and follows the same process. The party appealing from a summary judgment

> decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous. Summary judgment is appropriate only if the pleadings and evidence sanctioned by the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving party.

Asbestos Corp. v. Akaiwa, 872 N.E.2d 1095, 1096 (Ind. Ct. App. 2007) (citations and quotation marks omitted).

The Neighbors contend that the economic loss doctrine is not applicable to this case and thus cannot bar their recovery of economic damages suffered due to WCC's alleged negligence. We agree. As our supreme court has explained, Indiana courts define economic loss as "the diminution in the value of a product and consequent loss of profits because the product is inferior in quality and does not work for the general purposes for which it was manufactured and sold." *Gunkel v. Renovations, Inc*., 822 N.E.2d 150, 154 (Ind. 2005). Economic loss includes incidental and consequential losses such as lost profits, rental expense, and lost time. *Id*. Moreover, "economic loss" in this context does not contemplate personal injury or physical harm to other property. *Id*. at 153-54. "In sum, … damage from a defective product or service may be recoverable under a tort theory if the defect causes personal injury or damage to other property, but contract law governs damage to the product or service itself and purely economic loss arising from the failure of the product or service to perform as expected." *Id*. at 153. There is no evidence of a contractual relationship between the Neighbors and WCC, and the types of damages claimed by the Neighbors—including property

damage and emotional distress—clearly fall outside the scope of the economic loss doctrine, as explained above. Moreover, the Neighbors are suing in tort, not contract. For all these reasons, the economic loss doctrine is inapposite, and therefore, we must reverse the trial court's grant of summary judgment in favor of WCC on this issue.

II. Law of the Case Doctrine

WCC argues that we are required, pursuant to the law of the case doctrine, to affirm the trial court's grant of summary judgment.

> The law of the case doctrine is a discretionary tool by which appellate courts decline to revisit legal issues already determined on appeal in the same case and on substantially similar facts. To invoke the law of the case doctrine, the matters decided in the prior appeal clearly must appear to be the only possible construction of an opinion, and questions not conclusively decided in the prior appeal do not become the law of the case. The doctrine is based upon the sound policy that once an issue is litigated and decided, that should be the end of the matter.

Godby v. Whitehead, 837 N.E.2d 146, 152 (Ind. Ct. App. 2005), (citations omitted), *trans. denied* (2006). As discussed above, Eaton and Benchmark succeeded in persuading the trial court that the economic loss doctrine barred the Neighbors from recovering from those two defendants any economic damages for negligence. Another panel of this Court affirmed the trial court's decision. According to WCC, this Court's ruling as to Eaton and Benchmark is binding upon us as we consider the instant appeal. We disagree.

As stated above, the law of the case doctrine applies to an appellate court's determination of "legal issues[.]" *See id*. In the prior appeal, this Court affirmed the trial court's grant of summary judgment in favor of Eaton and Benchmark because the Neighbors

had failed to properly designate evidence to the trial court in its summary judgment motion. "[W]hile the Neighbors referenced the referred to specific parts of the designated evidence in support of their arguments on appeal, we are limited in our review to the material that was designated to the trial court." *Hoffman*, slip op. at 6 (citing Ind. Trial Rule 56(H)). The panel itself acknowledged that it "[could not] review the grant of summary judgment" and affirmed on this basis. *Id*. at 7. Thus, there was no resolution of a "legal issue" that would trigger the law of the case doctrine in this appeal.

WCC also contends that we should apply the law of the case doctrine because "[f]airness dictates that all three defendants be treated equally." Appellee's Br. at 10-11. While we understand WCC's frustration at the path this case has taken, we think that it would be likewise unfair for us to bar the Neighbors from pursuing recovery against WCC simply because a procedural error may have prevented them from pursuing similar claims against Eaton and Benchmark.

In sum, the law of the case doctrine is inapplicable here. In the Neighbors' prior appeal, this Court did not address the issue of the economic loss doctrine on its merits, and therefore, we are not bound to find in WCC's favor in the instant case.

III. Res Judicata

WCC also argues that the doctrine of res judicata prevents us from reversing the trial court's summary judgment order. Four requirements must be satisfied for res judicata to preclude a claim: 1) the former judgment must have been rendered by a court of competent jurisdiction; 2) the former judgment must have been rendered on the merits; 3) the matter now

in issue was, or could have been, determined in the prior action; and 4) the controversy adjudicated in the former action must have been between the parties to the present suit or their privies. *Indianapolis Downs, LLC v. Herr*, 834 N.E.2d 699, 703 (Ind. Ct. App. 2005), *trans. denied* (2006). Clearly, res judicata does not apply because the prior panel of this Court did not render a decision on the merits regarding the applicability of the economic loss doctrine to these facts.

For all the reasons set forth above, we reverse the trial court's partial summary judgment order and remand for further proceedings consistent with this opinion.

Reversed and remanded.

KIRSCH, J., and VAIDIK, J., concur.