IN THE COURT OF APPEALS OF IOWA

No. 2-605 / 11-1842
Filed October 31, 2012

THE VILLAGE AT WHITE BIRCH TOWN HOMEOWNERS ASSOCIATION,
Plaintiff-Appellant,

vs.

GOODMAN ASSOCIATES, INC., JCORP, INC., and DUANE E. JENSEN,
Defendants,

NORANDEX BUILDING MATERIALS DISTRIBUTION, INC., RBM-II, L.C., and WOLF CONSTRUCTION COMMERCIAL, INC.,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

A homeowners association challenges the district court's grant of summary judgment in favor of three subcontractors. **AFFIRMED.**

George A. LaMarca, Ryan C. Nixon, and Philip J. De Koster of LaMarca & Landry, P.C., Des Moines, for appellant.

Steven Scharnberg and Eric G. Hoch of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellee Norandex Building Materials.

Jeffrey D. Stone of Whitfield & Eddy, P.L.C., West Des Moines, for appellee RBM-II, L.C.

William L. Dawe and Patrick T. Vint of Hopkins & Huebner, P.C., Des Moines, for appellee Wolf Construction Commercial.

Mark Thomas, Des Moines, for JCorp.

Heard by Potterfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.

A homeowners association challenges the district court's grant of summary judgment, which dismissed its claims against three subcontractors for breach of implied warranty of workmanlike construction and negligence. The association encourages us to extend the span of both legal theories based on the general contractor's insolvency and fairness principles, arguing the subcontractors will not otherwise be held accountable for their deficient performance.

Our case law specifically excludes subcontractors from the definition of builder-vendor, the only party against whom a homeowner may now recover for breach of implied warranty of workmanlike construction. Placing the burden of workmanlike construction on anyone other than the builder-vendor—who is deemed to hold ultimate responsibility for construction—would result in a substantive expansion of the law. We do not see that expansion as within the purview of our court. In addition, to find the subcontractors liable for negligence would contradict recent precedent from our supreme court barring recovery in tort for purely economic losses. We accordingly affirm the grant of summary judgment.

I. Background Facts and Proceedings

The Village at White Birch Town Homeowners Association ("White Birch") is an Ankeny townhome community that Triton Homes, L.C. developed from 2004 to 2008. The association consists of 236 townhome owners and is

responsible for building exteriors as well as common area maintenance and repairs.

Developer Triton Homes is not a party to this suit. As the builder and general contractor for the development, Triton Homes executed individual agreements with Rhino Materials, Norandex, and Wolf Construction ("the subcontractors")[1] to perform labor and installation services, and to supply materials during the construction of White Birch. Rhino Materials contracted to provide and install stone veneer; Norandex agreed to deliver and install vinyl siding and windows; and Wolf Construction contracted to install windows and provide framing work and house wrap. After the subcontractors completed their work, Triton Homes sold the townhomes to individual buyers.

In 2008, homeowners began noticing design and construction defects White Birch alleges are attributable to the subcontractors. The problems involved water not draining properly from vinyl siding and stone veneer, water penetration into window encasements, and sagging garage door headers. In July 2009, an engineering firm inspected the townhome units and reported multiple construction and building defects to White Birch.

Because the subcontractors did not contract with White Birch, White Birch did not assert any contract claims against them. Triton Homes filed for Chapter 7 bankruptcy, is insolvent, has no assets to satisfy any judgments, and did not

[1] We will individually refer to RBM-II, L.C., Norandex Building Materials Distribution, Inc., and Wolf Construction Commercial, Inc. as Rhino Materials, Norandex, and Wolf Construction, respectively.

retain liability insurance coverage.[2] Accordingly, White Birch is unable to recover against the developer.

On November 19, 2010, White Birch filed suit against eight defendants, including the architect, structural engineer, and their respective firms; a building inspection company; and the three subcontractors. Claims against the architect, his firm, and the inspection company have since been dismissed without prejudice, but White Birch maintained claims against the engineer and his firm for professional negligence in designing the homes, and the three subcontractors for breach of implied warranty of workmanlike construction and negligence. The subcontractors individually filed motions for summary judgment, arguing White Birch was unable to assert either claim against them.[3]

On October 25, 2011, the district court granted the motions and dismissed the claims against the subcontractors with prejudice, leaving only engineer Duane Jensen and his firm JCorp, Inc. as defendants in the suit.[4] White Birch filed an interlocutory appeal of the district court's grant of summary judgment for the subcontractors, which our supreme court granted on June 6, 2012. The case was subsequently transferred to our court.

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[2] In its brief, White Birch states "Triton Homes, L.C. was administratively dissolved at the time White Birch HOA filed its lawsuit," but provides no citation in the record in support of this assertion.

[3] Rhino Materials filed its motion for summary judgment on August 17, 2011. Norandex filed its motion for summary judgment on August 23, 2011. Wolf Construction filed its motion for summary judgment on October 13, 2011. The district court ruled on all three in its October 25 order.

[4] Jensen and JCorp filed a motion for summary judgment on October 3, 2011, which the district court denied on December 6.

II. Scope and Standard of Review

We review a district court's grant of summary judgment for correction of legal error. *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012). "Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Emp'rs Mut. Cas. Co. v. Van Haaften*, 815 N.W.2d 17, 22 (Iowa 2012). We view the record in the light most favorable to the nonmoving party. *Minor v. State*, 819 N.W.2d 383, 393 (Iowa 2012).

III. Analysis

A. Did the Subcontractors Owe an Implied Warranty of Workmanlike Construction to White Birch?

White Birch urges us to extend our state's implied warranty of workmanlike construction to allow recovery for shoddy work by a subcontractor. Our state recognizes construction contracts as promising an implied warranty that the structure to be built will be constructed "in a reasonably good and workmanlike manner and that it will be reasonably fit for the intended purpose." *Kirk v. Ridgway*, 373 N.W.2d 491, 493 (Iowa 1985) (citing to cases as early as *Smith & Nelson v. Bristol*, 33 Iowa 24, 25 (1871), to support this implied warranty).

In *Kirk*, our supreme court allowed purchasers of new homes who discovered latent defects to recover from a builder-vendor under this implied warranty. *Id.* at 494. To recover, the buyer must show:

> (1) the house was constructed to be occupied by the warrantee as a home;

> (2) the house was purchased from a builder-vendor, who had constructed it for the purpose of sale;
>
> (3) when sold, the house was not reasonably fit for its intended purpose or had not been constructed in a good and workmanlike manner;
>
> (4) at the time of purchase, the buyer was unaware of the defect and had no reasonable means of discovering it; and
>
> (5) by reason of the defective condition the buyer suffered damages.

Id. at 496. The court defined "builder-vendor" as:

> [a] person who is in the business of building or assembling homes designed for dwelling purposes upon land owned by him, and who then sells the houses, either after they are completed or during the course of their construction, together with the tracts of land upon which they are situated, to members of the buying public.
>
> The term "builder" denotes a general building contractor who controls and directs the construction of a building, has ultimate responsibility for a completion of the whole contract and for putting the structure into permanent form thus, necessarily excluding merchants, material men, artisans, laborers, subcontractors, and employees of a general contractor.

Id.

Four years ago, our supreme court extended the implied warranty of workmanlike construction to subsequent purchasers. *Speight v. Walters Dev. Co.*, 744 N.W.2d 108, 115 (Iowa 2008). It reiterated the warranty is a "judicially created doctrine" running between the home builder and the home buyer for the purpose of "protect[ing] an innocent home buyer by holding the experienced builder accountable for the quality of construction." *Id.* at 110. Although rooted in contract law, the *Speight* court recognized the warranty does not arise from contractual language binding a builder-vendor and the original purchaser. *Id.* at 114. On that basis, it extended the implied warranty of workmanlike construction

to allow subsequent purchasers who were not in contractual privity to recover from the builder-vendor. *Id.*

White Birch concedes Iowa case law regarding this implied warranty "provides liability for only the builder-vendor," but asserts no case addresses the instant circumstances—an insolvent general contractor and subcontractors agreeing in their contracts to take responsibility for their work. White Birch asserts that extending the warranty would advance our state's support for consumer protection, which was one reason cited by our supreme court for expansion of the doctrine in *Speight*. *See* 744 N.W.2d at 111. The association emphasizes that because the warranty is independent from contract law, the lack of privity between White Birch and the subcontractors does not bar its application. White Birch directs us to an Illinois case that extended an implied warranty of habitability to include a subcontractor's performance when the builder-vendor was judgment-proof. *See Minton v. Richards Group of Chicago* 452 N.E.2d 835, 836 (Ill. App. Ct. 1983).

The subcontractors focus on the *Kirk* definition of builder-vendor, which specifically excludes "subcontractors," and places ultimate responsibility for completion of construction project on the general contractor. Moreover, they argue, as a homeowners association, White Birch was not the typical unskilled buyer the implied warranty is intended to protect. The subcontractors cite to an Illinois case decided two years after *Minton* refusing to adopt *Minton*'s extension, and contend no other jurisdiction has expanded the implied warranty to reach

subcontractors. They also assert a general contractor's insolvency and the terms of subcontractors' agreements are irrelevant to the warranty's application.

Outside authority is obviously not binding on this court. And while *Minton* did apply Illinois' version of the implied warranty to a subcontractor where the general contractor was insolvent, another Illinois case issued two years later directly disagreed with the decision. *See Lehmann v. Arnold*, 484 N.E.2d 473, 477 (Ill. App. Ct. 1985) (holding "[w]e cannot concur in the view that plaintiffs must have a warranty action against someone other than the builder simply because the builder went bankrupt"). There is currently a split in the Illinois appellate courts, and White Birch is unable to cite any other jurisdiction extending the implied warranty to subcontractors. The *Minton* case represents an isolated extension rather than the general consensus.

Turning to our state's recognition of the warranty, *Kirk* expressly excludes subcontractors from those defendants liable under the theory. *See Kirk*, 373 N.W.2d at 496 ("excluding . . . subcontractors" from definition of builder-vendor). We do not believe the *Kirk* definition failed to contemplate the facts before us, as White Birch suggests. The role of a builder-vendor, as the entity with "ultimate responsibility" for completing the home, is separate and distinct from those parties contributing parts to the whole. *Id.* The subcontractors in this case are among the parties who do not shoulder final responsibility for construction. That is not to say they held no responsibility; White Birch identifies language in the subcontractors' agreements with Triton Homes holding each subcontractor liable for its individual work and construction. Regardless of the home builder's

solvency, that right to indemnity does not extend to the association. We do not find the insolvency or indemnity provisions require extension of the implied warranty.

As White Birch readily concedes, to hold a subcontractor responsible under the implied warranty of workmanlike construction would overstep our current case law. We follow the lead of our court in *Speight* by declining to extend the doctrine—leaving that determination to our supreme court. *See* 744 N.W.2d at 110 (acknowledging our court's express refusal to extend the doctrine in favor of deferring to our supreme court); *see also* Iowa R. App. P. 6.1101(3).

B. Should the Subcontractors be Held Liable for Negligence?

White Birch asserts if we determine the association cannot recover from the subcontractors under the implied warranty of workmanlike construction, then the association should alternatively recover for negligence. White Birch argues the theory behind the economic loss doctrine's limitation on recovery for negligence is based in contract. The association reasons that because it did not enter an agreement with the subcontractors, it should be able to recover from them under a negligence claim. White Birch directs our attention to outside jurisdictions that have allowed recovery for negligent subcontractors when the builder-vendor was insolvent. White Birch also asserts that had Triton Homes remained solvent, the subcontractors would have been liable to the general contractor to indemnify it for claims arising out of their defective performance, and it is counter to public policy to allow the subcontractors to escape liability.

The subcontractors contend our state's law is clear that a homeowner may not recover damages for alleged construction defects under a negligence theory. They argue that because White Birch's claim relates to the cost of repairing the alleged defects, and there was no sudden or dangerous occurrence causing the damages, the association's remedy may be brought only through contract claims. The subcontractors argue the general contractor's insolvency is irrelevant because, based on the economic loss doctrine, White Birch's claim against a solvent Triton Homes would equally fail. They point out the allocation of risk of insolvency is inherent in every contract, and should not serve as a basis to provide an alternate remedy. With regard to the outside jurisdictional case law, the subcontractors assert those holdings were not based on the general contractors' insolvency, but rather on other states' differing interpretation on the economic loss doctrine.

The economic loss doctrine bars recovery for negligence claims when the claimant suffered only economic loss. *Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 502 (Iowa 2011); *see also Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 126 (Iowa 1984) (recognizing "the well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable").

The doctrine applies to prevent one of two parties to a contract from bringing a negligence claim against the other over the injured party's defeated expectations. *Annett*, 801 N.W.2d at 503. The prohibition is based on the

presumption that such subject matter should be allocated between the parties in the contract. *Id.* (recognizing the purpose of the rule is to prevent the "[d]eath of [c]ontract" or the "tortification of contract law"); *see also Nelson v. Todd's Ltd.*, 426 N.W.2d 120, 125 (Iowa 1988) ("When a buyer loses the benefit of his bargain because the goods are defective . . . he has his contract to look to for remedies; [t]ort law need not and should not, enter the picture.") (internal citations omitted).

Because of the economic loss doctrine, a home purchaser is unable to successfully assert a negligence claim against the seller for a purely economic loss. *Determan v. Johnson*, 613 N.W.2d 259, 264 (Iowa 2000) (refusing recovery in tort for damages related to home's inadequate beam support system and improperly installed vapor barrier). As our supreme court explains,

> the line to be drawn is one between tort and contract rather than between physical harm and economic loss. When, as here, the loss relates to a consumer or user's disappointed expectations due to deterioration, internal breakdown or non-accidental cause, the remedy lies in contract.
>
> Tort theory, on the other hand, is generally appropriate when the harm is a sudden or dangerous occurrence, frequently involving some violence or collision with external objects, resulting from a genuine hazard in the nature of the product defect.

Id. (alterations and citations omitted). Courts consider factors such as the type of risk, nature of the defect, and the manner in which an injury arose to determine whether we should apply the "safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law" to a particular claim. *Id.* at 262. While various exceptions have been carved into the economic loss rule, none apply to the facts before us. *See Annett*, 801 N.W.2d at 504 (recognizing

qualifications for cases regarding professional negligence against accountants and attorneys, actions arising out of principal-agent relationships, and claims of negligent misrepresentation).

Our supreme court recently declined to allow a claim in tort where a company entered into a contract with a second party, who in turn contracted with a third. *See id.* at 506.[5] The court concluded the lack of contractual privity between the first company and the third company did not defeat application of the economic loss doctrine. *Id.* at 504 ("When parties enter into a chain of contracts, even if the two parties at issue have not actually entered into an agreement with each other, courts have applied the 'contractual economic loss rule' to bar tort claims for economic loss, on the theory that tort law should not supplant a consensual network of contracts.")

The *Annett* dissent asserted: "[i]f there is no contract between the parties to litigation, there is no boundary-line function [between contract and tort law] to be performed by the economic loss rule." *Id.* at 511–12 (Wiggins, J., dissenting).

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[5] The court provided additional examples of the relationship of the claimant to the party with whom they were not in contractual privity:

> An illustration of this principle is *Richards v. Midland Brick Sales Co., Inc.,* 551 N.W.2d 649, 650–52 (Iowa Ct. App.1996), in which the court of appeals found that the economic loss rule barred a tort claim by a homeowner against a brick supplier. The homeowner there had contracted with a builder, which in turn had contracted with the brick supplier. *Richards,* 551 N.W.2d at 650. Similarly, in *Tomka v. Hoechst Celanese Corp.,* 528 N.W.2d 103, 106–07 (Iowa 1995), we rejected economic loss claims by a cattle feeder against a manufacturer of synthetic growth hormones, even though the feeder had no contract with the manufacturer, having purchased the hormones through local veterinarians.

Annett, 801 N.W.2d at 505.

White Birch embraces the dissent's reasoning in support of finding its claim stands as an exception to the doctrine.

White Birch encourages us to change existing law, first by carving a new exception into the economic loss doctrine for a form of loss our supreme court considers contractual in nature. *See Determan*, 613 N.W.2d at 264. The association also suggests we contradict our supreme court's recent holding that the doctrine applies even when there is no contractual privity between parties to the suit. *Annett*, 801 N.W.2d at 506.

Because our court's role is to apply existing legal principals, we decline White Birch's request to extend the doctrine. Iowa R. App. P. 6.1101(3). Holding otherwise would contravene our supreme court's recent application of the economic loss doctrine. *See Healy v. Carr*, 449 N.W.2d 883, 885 (Iowa Ct. App. 1989) (recognizing our supreme court's statement that "[i]f our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves"). Accordingly, we affirm the district court's grant of summary judgment.

AFFIRMED.