STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1687

Northern States Power Company,
Southern Minnesota Municipal Power Agency,
Aegis Insurance Services, LTD.,
and other interested insurers as subrogees of
Northern States Power Company,
Appellants,

vs.

General Electric Company, et al.,
Respondents.

Filed July 17, 2017
Reversed and remanded; motion denied
Smith, Tracy M., Judge

Sherburne County District Court
File No. 71-CV-13-1472

Timothy R. Thornton, Leah Ceee O. Boomsma, Briggs and Morgan, P.A., Minneapolis, Minnesota (for appellant Northern States Power Company)

David S. Evinger, Daniel W. Berglund, Grotefeld, Hoffmann, Schleiter, Gordon, Ochoa & Evinger, LLP, Minneapolis, Minnesota (for appellants Aegis Insurance Services, Ltd. and other interested insurers)

William E. Flynn, Jessica Meyer, Lindquist & Vennum, Minneapolis, Minnesota (for appellant Southern Minnesota Municipal Power Agency)

Timothy R. Schupp, Robert W. Vaccaro, Ryan O. Vettleson, Gaskins, Bennett, Birrell, Schupp, L.L.P., Minneapolis, Minnesota (for respondents)

Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and Smith,

Tracy M., Judge.

U N P U B L I S H E D O P I N I O N

SMITH, TRACY M., Judge

A steam turbine in a coal-fired power-production unit failed catastrophically as a result of a phenomenon called stress corrosion cracking. Appellants, the power companies that own the turbine, brought a number of tort claims against respondents, the turbine's manufacturer and related companies. Respondents dispute the claims and assert a number of defenses.

One of those defenses—the economic-loss doctrine—was the basis for the district court's summary-judgment dismissal of all of appellants' tort claims. Appellants argue that the district court erred in applying that doctrine because, they assert, the alleged tortious conduct underlying the claims was independent of the parties' contract for the sale of the turbine.

Because the district court erred in its application of the economic-loss doctrine and did not address any of the other defenses raised by respondents in their summary-judgment motion, we reverse the summary judgment and remand for the district court to decide the remaining issues.

FACTS

Appellants Northern States Power Co. (NSP) and Southern Minnesota Municipal Power Agency (SMMPA)[1] jointly own Unit 3, a coal-fired power-production unit consisting of several turbines, a generator, an exciter, and a drum boiler, at NSP's

[1] Several interested insurers are also appellants in this case.

Sherburne County Generating Station (SHERCO), an electric generating facility. Respondents General Electric Company (GE) and GE-related entities manufactured and assembled what would become Unit 3.

Contracts

GE sold the turbine at issue to NSP in 1977 pursuant to a contract (the sales contract). In 1993, GE and NSP also entered into a General Conditions Agreement (the GCA) for equipment, parts, and service on Unit 3. GE performed some service projects on Unit 3 pursuant to the GCA and individual contracts subject to the GCA between 1993 and 2011, although GE performed no service work on Unit 3's low-pressure turbines after 1999.

GE Information Regarding Stress Corrosion Cracking

Stress corrosion cracking is a problem that occurs when certain materials used in the construction of steam turbines are subjected to contaminants in the steam. Over time, stress corrosion cracking can lead to turbine failures. The most reliable method to detect stress corrosion cracking is "magnetic particle testing," which requires removal of the turbine blades. Blades attach to the turbine rotor wheel at an area called the "dovetail" by one of two means: (1) a tangential-entry design or (2) a finger-attachment design, which uses pins. Removal of blades with the finger attachment is difficult and expensive, and can only be performed a limited number of times because the pinholes used to affix the blades to the rotor wheel are enlarged each time the blades are removed, meaning that, if the blades are removed too many times, the pinholes will become too large to hold the blades tightly.

Over the years since the sale of Unit 3 to NSP, GE occasionally issued "technical information letters" (TILs) that informed turbine owners and operators of new information about turbine hazards and recommendations for inspecting for those hazards. Neither the sales contract nor the GCA required GE to provide TILs or updated safety information to NSP.

Also not pursuant to any contractual obligation, GE offered turbine owners and operators access to the GE Power Answer Center (PAC). Through the PAC, a unit operator could ask a GE field-services representative questions about the operation and maintenance of GE equipment. GE engineers would review the PAC inquiries and deliver answers to the field-service representatives. The field-service representatives would then provide the answers to the turbine operators who made the inquiry. GE employees also attended conferences where they discussed new information regarding GE turbines with people in the industry, again not pursuant to a contractual obligation.

In 1993, GE issued TIL 1121-3ARI, which warned that stress corrosion cracking may occur in turbines with finger dovetails and explained how to inspect them using magnetic particle testing. TIL 1121-3ARI recommended magnetic particle testing of finger dovetails only after certain abnormal events or operational anomalies, or if the blades were removed for another reason. GE issued TIL 1277-2 in 1999, recommending magnetic particle testing after ten years of operation in certain types of turbines, including those with finger dovetails, but only in connection with "once-through" boilers. That advice did not apply to Unit 3, which used a different type of boiler called a drum boiler. Between 1999

and 2008, GE designed and patented an improved blade-attachment system that would reduce susceptibility to stress corrosion cracking in steam turbines.

NSP employee Tim Murray attended a GE conference in 2001 at which GE informally recommended that operators of drum-boiler units conduct time-based inspections as prescribed for once-through-boiler turbines in TIL 1277-2, on tangential-entry-dovetail rotor wheels. At that time, GE did not recommend time-based inspections for drum-boiler-unit rotor wheels with finger dovetails, like the ones at issue in Unit 3. In 2005, when seeking bids for service, Murray told GE that NSP would not inspect the finger dovetails of Unit 3 unless GE recommended otherwise. GE made no recommendation.

In 2008, Murray asked a GE field-services representative a question, resulting in an inquiry being entered in the PAC system. In February 2008, in response to the PAC inquiry, a GE engineer wrote to the GE field-services representative:

> Although TIL 1277 is written for once through boilers we have been recommending customers with drum boilers follow the recommendations also. We have found instances with SCC on drum boiler units also and will likely continue to find more as the age of the units continues to climb. It has been on my list of TIL's requiring a revision for some time now, just hasn't gotten to the top of the priority list.

Appellants assert that GE never provided this information to NSP.

Failure of Turbine and Lawsuit

On November 19, 2011, Unit 3 failed catastrophically when a blade liberated from the rotor wheel in a Unit 3 low-pressure turbine as a result of stress corrosion cracking in the rotor wheel. The failure "substantially destroyed" components of Unit 3 and caused other property damage to the SHERCO facility. NSP and SMMPA lost profits for two

years during which Unit 3 was inoperable and SHERCO had to purchase energy on the open market for its customers. No one was injured.

Appellants commenced this suit, alleging that respondents caused the damages by failing to disclose technical information or recommend time-based service inspections that would have reduced the likelihood of failure. Appellants alleged five causes of action: (1) fraudulent concealment, (2) willful and wanton negligence, (3) gross negligence, (4) professional negligence, and (5) post-sale failure to warn.

Appellants moved for summary judgment on the post-sale-failure-to-warn claim (count V). The district court denied appellants' motion and granted summary judgment in favor of respondents on that claim on the ground that the economic-loss doctrine bars recovery in tort for purely economic loss arising out of the parties' contract for the sale of Unit 3. Respondents then moved for summary judgment on the four remaining claims (counts I-IV), arguing that (1) the economic-loss doctrine bars all of the claims; (2) exculpatory clauses in the parties' contracts foreclose any potential liability of GE; (3) appellants did not establish the necessary elements of a fraudulent-concealment claim; (4) the claims are barred by a statute of repose because they arise out of improvements to real property; and (5) the professional-negligence claim is unsupported. The district court concluded that the economic-loss doctrine precluded tort recovery on all of the claims, granted summary judgment for respondents, and dismissed counts I through IV with prejudice. The district court did not reach any of respondents' arguments other than the economic-loss-doctrine argument.

This appeal follows.[2]

D E C I S I O N

Summary judgment must be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party. *Frieler v. Carlson Mktg. Grp.*, 751 N.W.2d 558, 564 (Minn. 2008). A district court "may not decide factual issues on a motion for summary judgment; its sole function is to determine whether fact issues exist." *Hamilton v. Ind. Sch. Dist. No. 114*, 355 N.W.2d 182, 184 (Minn. App. 1984). Summary judgment is mandatory against a party who bears the burden of proof and fails to make a showing sufficient to establish an essential element of a claim. *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989).

On appeal from the summary-judgment dismissal of claims, we conduct a de novo review to determine whether (1) there are any genuine issues of material fact, and (2) judgment is appropriate as a matter of law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). We review the district court's legal conclusions de novo and view the evidence in the light most favorable to the party against whom

[2] Appellants do not challenge the dismissal of the professional-negligence claim (count IV).

summary judgment was granted. *Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015).

I. Economic-Loss Doctrine

The district court granted summary judgment in favor of respondents and dismissed all of appellants' claims on the ground that the economic-loss doctrine bars recovery in tort for damages arising out of a commercial sales contract.[3] The economic-loss doctrine precludes a plaintiff from recovering in tort for purely monetary loss arising out of a commercial-sales transaction. *Ptacek*, 844 N.W.2d at 538. "[T]he Uniform Commercial Code must control exclusively with respect to damages in a commercial transaction which involves property damage only." *Hapka v. Paquin Farms*, 458 N.W.2d 683, 688 (Minn. 1990). The economic-loss doctrine is founded on the principle that, for the Uniform Commercial Code to be effective, "parties engaged in commercial activity must be able to depend with certainty on the exclusivity of the remedies provided by the Code in the event of a breach of their negotiated agreement." *Id.* Appellants argue that the economic-loss doctrine does not bar their claims because their losses arose not from a breach of the sales contract but rather from alleged tortious conduct independent of the sales contract. *See id.*

[3] Minnesota's economic-loss doctrine is codified in Minn. Stat. § 604.101 (2016). Neither that statute nor its predecessor, Minn. Stat. § 604.10 (1992), applies retroactively to claims arising from a sale that occurred before the statute's effective date of August 1, 2000, or August 1, 1991, respectively. *See* Minn. Stat. § 604.101, subd. 6; *Ptacek v. Earthsoils, Inc.*, 844 N.W.2d 535, 539 (Minn. App. 2014); *see also Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 223 F.3d 873, 882 (8th Cir. 2000). The parties agree that the common law controls here rather than the statutes.

The district court first applied the economic-loss doctrine in its May 2016 order denying appellants' summary-judgment motion and granting summary judgment for respondents on the post-sale-failure-to-warn claim. The district court stated, "The first question when evaluating the appropriateness of the application of the economic loss doctrine is: did the contract between the parties involve the sale of goods and was the sale a commercial transaction." The district court then determined that the "predominant purpose" of the "parties' relationship," which included agreements for both the sale of goods and the rendition of services, was for the sale of goods. The district court next determined that the sale was between two sophisticated parties and thus was a commercial transaction. The court concluded that the post-sale-failure-to-warn claim was therefore barred by the economic-loss doctrine.

In its August 2016 order granting respondents summary judgment on the remaining claims, the district court expressly adopted the economic-loss-doctrine analysis from its May order and, without conducting other analysis, concluded that the economic-loss doctrine also barred all of the negligence claims for the same reasons stated in its analysis of the post-sale-failure-to-warn claim in the previous order. The district court also concluded that the fraudulent-concealment claim was barred by the economic-loss doctrine, reasoning that the only misrepresentation alleged by appellants concerned "the quality or character of the goods sold" and therefore the claim was within the scope of the contract for the sale of Unit 3.

Appellants assert that the district court erred by analyzing only whether the case involved a commercial sale of goods and failing to analyze whether appellants' claims

arose out of or are independent of the commercial sale-of-goods contract. We agree. The district court's summary-judgment orders assume that the claims arose out of a sale-of-goods contract, without addressing appellants' argument that the claims arose out of GE's voluntary provision of technical recommendations long after the sale of Unit 3. But the economic-loss doctrine bars recovery only if the damages suffered actually arose out of the contract. *See ZumBerge v. N. States Power Co.*, 481 N.W.2d 103, 108 (Minn. App. 1992) (concluding that economic-loss doctrine did not bar tort claims where the damages arose from actions outside of the parties' sales transaction), *review denied* (Minn. Apr. 29, 1992). We thus must determine whether, on the summary-judgment record before the district court, respondents are entitled to judgment as a matter of law because appellants' claims are not independent of a sale-of-goods contract.

We must first identify the contract. The district court analyzed whether the "predominant purpose of the parties' relationship" was for the sale of goods or for the sale of services, citing *McCarthy Well Co., Inc. v. St. Peter Creamery, Inc.*, 410 N.W.2d 312 (Minn. 1987). The district court concluded that the predominant purpose of the relationship was for the sale of goods. But *McCarthy Well* does not identify a predominant-purpose-of-the-relationship test. Rather, that case addresses how to classify a hybrid agreement that involves both the sale of goods and the sale of services, and holds that, if the predominant purpose of the contract is the sale of goods, then the contract is governed by the Uniform Commercial Code and the economic-loss doctrine may apply. *McCarthy Well*, 410 N.W.2d at 315. This case does not involve a hybrid agreement. Although the parties had additional contractual relationships over the years, both appellants and respondents identify

the 1977 contract as a sale-of-goods contract, and they agree that that sale-of-goods contract is the relevant contract for determining whether the tort claims arose from a sale-of-goods contract and whether the economic-loss doctrine applies.[4]

Having identified the relevant contract, we turn to the claims. Appellants argue that their tort claims arose not out of the sales contract but rather out of GE's voluntary actions that were independent of the contract, namely failing to advise appellants that they should conduct time-based inspections of Unit 3 when GE learned that its contrary recommendations in prior TILs and other communications were imprudent or when NSP asked for clarification.

We first observe that, on appeal, appellants cast their claims entirely in terms of respondents' voluntary assumption of duties post-sale. For example, in their opening brief, appellants state, "GE's failure to correct this no-longer-valid advisory [i.e., the 1993 TIL 1121], and not the sale of Unit 3, is the gravamen of the amended complaint." And in their reply brief, appellants write, "This lawsuit concerns GE's voluntary assumption [of] responsibility for updating turbine technical information."

Respondents take issue with appellants' characterization of their claims, arguing that appellants are attempting to "distance themselves from their design and manufacturing defect claim." Respondents' point is well taken. In their amended complaint and before the district court, appellants based their tort claims not solely on an alleged duty arising

[4] While respondents make other arguments about the impact of the GCA on appellants' claims, they do not identify the GCA as a sale-of-goods contract.

after the sale of the turbine but also on the theory that GE failed to disclose a product defect that it knew existed at the time of the sale.

To the extent that any of appellants' claims was based on an alleged failure to disclose a product defect present and known at the time of sale, the district court correctly determined that such a claim is barred by the economic-loss doctrine. The decision of the United States Court of Appeals for the Eighth Circuit in *Marvin Lumber* is persuasive. 223 F.3d at 873. In *Marvin Lumber*, the Eighth Circuit affirmed the summary-judgment dismissal of fraud and misrepresentation claims asserted by a window manufacturer against the supplier of a wood preservative. *Id.* at 875. The Eighth Circuit reasoned that, while fraudulent-inducement claims are independent of a contract and not barred by the economic-loss doctrine, fraud and misrepresentation claims that concern "the quality or character of the goods sold" are "substantially redundant with warranty claims" and thus barred by the economic-loss doctrine. *Id.* at 885.

But the bases for appellants' claims were not limited to an alleged product defect and instead included the assumption of a duty to provide updated technical information. The sales contract does not provide for TILs or require GE to provide updated technical information, and thus any duty to provide that information is not found in the contract. Respondents argue that the sales contract nevertheless encompasses "the provision of technical information" generally because the contract states that "instruction manuals" will be supplied at the time of shipment. The instruction manual referenced in the sales contract is the Operations and Maintenance Manual (OMM), which was delivered to NSP in 1979. Included in the OMM is a document called GEK-63355, which mentions that GE provides

"[r]ecommendations to owners on specific matters" "by means of [TILs]." But GEK-63355 is not a contract and does not obligate GE to issue TILs or provide any other information.

Because the undisputed facts demonstrate that the sales contract does not encompass any bargained-for obligation or allocation of liability related to the post-sale advice and lack of advice at issue in this action, we conclude that that alleged tortious conduct is independent of the sales contract. *See ZumBerge*, 481 N.W.2d at 108. We therefore reverse the district court's grant of summary judgment based on the economic-loss doctrine. *See Ptacek*, 844 N.W.2d at 538.[5]

II. Remaining Issues

While we disagree with the court's ruling on the economic-loss doctrine, the district court's orders on multiple dispositive motions in this complex case were extensive and thoughtful. Understandably, after concluding that respondents were entitled to summary judgment based on the economic-loss doctrine alone, the district court declined to reach any of the alternative grounds for summary judgment asserted by respondents. We have authority to consider the remaining legal issues in order to determine whether the grant of summary judgment may be sustained on any ground. *Archdiocese of St. Paul &*

[5] In arguing that appellants' tort claims are barred by the economic-loss doctrine, respondents assert that appellants cannot establish any duty owed by respondents outside of the warranties and obligations of the sales contract. Whether appellants can prove the existence of a tort duty outside of the sale-of-goods contract, however, is a different question from whether appellants' alleged tort claims arise from the sale-of-goods contract and are thus barred by the economic-loss doctrine. The existence, or not, of a duty in tort goes to the merits of the tort claims, which we do not address on this appeal.

Minneapolis, 817 N.W.2d at 163. However, "an undecided question is not usually amenable to appellate review." *Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assocs.*, 418 N.W.2d 173, 175 (Minn. 1988). Furthermore, when the district court decided not to address the statute-of-repose issue, it did not have the benefit of this court's decision in *Great N. Ins. Co. v. Honeywell Int'l, Inc.*, which, for the first time in a published Minnesota case, defines "equipment" and "machinery" for purposes of the equipment-or-machinery exception to the statute of repose. *See Great N. Ins. Co. v. Honeywell Int'l, Inc.*, 895 N.W.2d 255, 258-59 (Minn. App. 2017), *review granted* (Minn. June 28, 2017). Given that intervening case and the district court's familiarity with the record and the remaining issues generally, we remand for the district court to decide the remaining issues in the first instance. The district court has discretion to reopen the record on remand.[6]

Reversed and remanded; motion denied.

[6] Appellants' motion to supplement the record on appeal is denied.