

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 1, 2012

Diane M. Fremgen
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. 2011AP1293

Cir. Ct. No. 2009CV1553

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

DAWN KAREN ADAMS AND MICHAEL JAY MARTIN,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

v.

WESTMARK DEVELOPMENT, LLC AND GREGORY GOTTSACKER,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Homeowners Dawn Adams and Michael Martin appeal from a judgment dismissing their negligence claim against builder and original seller Westmark Development, LLC and Gregory Gottsacker for an allegedly defective roof. The circuit court ruled that the homeowners had no claim

against the builder because the roofing work was done by an independent contractor. The homeowners argue that under the public policy established in *Fisher v. Simon*, 15 Wis.2d 207, 112 N.W.2d 705 (1961), the builder is responsible for installation of the roof even if the work was performed by an independent contractor. They also claim that summary judgment was improper because an issue of fact exists as to whether the person who installed the roof was an independent contractor. The builder cross-appeals the issue of whether the homeowners' negligence claim should have been dismissed because of the economic loss doctrine. We conclude that the builder does not have liability for work performed by an independent contractor and we affirm the judgment. We do not address the cross-appeal.

¶2 The homeowners commenced this action alleging negligent construction. Their amended complaint alleged that the builder "hired individuals for construction and installation of the roof on the house and garage who he knew or should have known were unlicensed to do roofing work and were unqualified to install a roof in a workmanlike manner." The builder moved for summary judgment dismissing the action as barred by the economic loss doctrine. For purposes of deciding that motion the parties stipulated to the following facts. The builder owned a parcel in a subdivision and constructed a single family home on it. In constructing the home, the builder subcontracted with individuals to install the roof on the house and garage. The home was sold in 2004. In 2005 the homeowners purchased the home from the original buyers. In 2009 the homeowners discovered that the roof was leaking and that the roof for the house and garage had not been properly installed. The roof was defective and presented a latent defect. The homeowners replaced the roof but did not suffer any damage to any other property.

¶3 The circuit court denied the builder’s motion to dismiss the case. It ruled that under *Fisher*, 15 Wis. 2d at 216, and *Trinity Lutheran Church v. Dorschner Excavating, Inc.*, 2006 WI App 22, ¶20, 289 Wis. 2d 252, 710 N.W.2d 680, in the absence of a contractual relationship between the homeowners and builder, the economic loss doctrine did not bar the homeowners’ negligence claim. This is the ruling challenged by the cross-appeal.

¶4 The builder filed a second motion for summary judgment for dismissal based on the general rule that an owner or general contractor of a construction project is not liable for the negligence of an independent contractor. See WIS JI—CIVIL 1022.6. The motion was granted and the homeowners appeal.

¶5 We review the circuit court’s grant of summary judgment using the same methodology as the circuit court. *City of Beaver Dam v. Cromheecke*, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principal is that when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. *Id.*; WIS. STAT. § 802.08(2) (2009-10).¹

¶6 It is without dispute that generally “one who contracts with an independent contractor is not liable to others for the torts of the independent contractor.” *Snider v. Northern States Power Co.*, 81 Wis. 2d 224, 232, 260 N.W.2d 260 (1977). Exceptions to the rule are: (1) when a general contractor has a contractual duty of care to the homeowner, *Brooks v. Hayes*, 133 Wis. 2d 228,

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

236, 395 N.W.2d 167 (1986); (2) when a non-delegable duty is statutorily imposed on an owner, *Barry v. Employers Mut. Cas. Co.*, 2001 WI 101, ¶¶41-42, 245 Wis. 2d 560, 630 N.W.2d 517; and (3) when the subcontracted work is inherently dangerous, *Snider*, 81 Wis. 2d at 233. None of these exceptions apply. The homeowners did not have a contract with the builder, no statute imposed a non-delegable duty on the builder, and the installation of a roof is not an inherently dangerous activity.

¶7 The homeowners attempt to trump the independent contractor rule with the public policy adopted in *Fisher*, 15 Wis.2d at 216. In *Fisher* the homeowners purchased a fully completed house from the builder and within one year discovered latent defects in the basement floor. *Id.* at 209. They sought to recover from the builder damages for the leaky floor. The court addressed whether a cause of action exists in favor of the homeowner against the builder for alleged negligent construction resulting in a latent defect where damages were limited to the expense of repairing the defect. *Id.* at 211. In turn the court considered whether the builder had a legal duty to exercise ordinary care in construction of the home. *Id.* at 211-12. The court's public policy determination was:

[W]e can perceive of no public policy which would be promoted by relieving a builder-vendor from liability for damages caused by defective construction due to his failure to exercise ordinary care. As between the vendee and the builder-vendor, we deem it more equitable that the loss resulting from negligent construction, in a case of a latent defect, should be borne by the latter rather than the former.

Id. at 216.

¶8 The public policy of *Fisher* is not as far reaching as the homeowners suggest. *Fisher* involved neither a subsequent third-party purchaser nor the

independent contractor rule. It cannot be expanded to eviscerate the independent contractor rule. Indeed in *Brooks*, 133 Wis. 2d at 234, the court recognized the vitality of the independent contractor rule to “protect[] the general contractor from vicarious liability to a third party for the independent contractor’s tortious conduct.” That the homeowners may have no remedy against the independent contractor does not mean the independent contractor rule can be ignored. Under the facts here the builder is not liable for the roofing work performed by an independent contractor.

¶9 The homeowners claim entitlement to a jury trial on whether in fact the hired roofer was an independent contractor. The builder responds that the homeowners never challenged the roofer’s independent contractor status and that homeowners argue for the first time on appeal that a factual issue exists. We agree.

¶10 “The most important single criterion in determining whether a person is an independent contractor is the degree to which the owner, rather than the independent contractor, retains the right to control the details of the work.” *Snider*, 81 Wis. 2d at 232. The builder’s summary judgment motion established that the builder did not supervise, direct, or inspect the roofer’s work. The homeowners offered no contrary evidentiary facts and did not challenge the assertion that the roofer was an independent contractor. Earlier in the litigation the parties stipulated that the builder had “subcontracted with individuals” for the installation of the roof. The homeowners did not establish that a dispute of fact exists as to whether the roof was installed by an independent contractor. *See Dawson v. Goldammer*, 2006 WI App. 158, ¶¶30-31, 295 Wis. 2d 728, 722 N.W.2d 106 (the opponent of a summary judgment motion may not rest on mere denials but must affirmatively counter with evidentiary materials demonstrating a

factual dispute). A claim that a disputed factual issue precludes summary judgment will not be addressed for the first time on appeal. *See Finch v. Southside Lincoln-Mercury, Inc.*, 2004 WI App 110, ¶42, 274 Wis. 2d 719, 685 N.W.2d 154.

¶11 Because we affirm the dismissal of the action based on the application of the independent contractor rule, we need not address the cross-appeal. *See Clark v. Waupaca Cnty. Bd. of Adjustment*, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994) (we need only address dispositive issues and decide the appeal on the narrowest ground).

¶12 No costs to either party.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

