

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 9, 2014

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. 2013AP1472

Cir. Ct. No. 2010CV680

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ERIC MAZEMKE AND KRISTAN MAZEMKE,

PLAINTIFFS-APPELLANTS,

v.

KEITH PUSCH AND PUSCH BUILDERS, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Washington County:
ANDREW T. GONRING, Judge. *Affirmed.*

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

¶1 PER CURIAM. Eric and Kristan Mazemke appeal from an order dismissing on summary judgment their claim against Keith Pusch and Pusch Builders, Inc., for negligent siding installation. The Mazemkes contend that the circuit court erred in holding that the economic loss doctrine barred their claim. For the reasons that follow, we affirm.

¶2 In December 2005, J.C. & Sons, LLC, as owner and general contractor, entered into a subcontract with Pusch Builders to install siding on a newly constructed home in Hartford, Wisconsin. After the installation was completed, J.C. & Sons approved of the work and Pusch Builders sent it an invoice.

¶3 In March 2007, the Mazemkes purchased the home from J.C. & Sons. By then, the home was already completed, so the Mazemkes never entered into any construction contract with J.C. & Sons or any sort of contract with Pusch Builders.

¶4 After moving in and living at the home for a few years, the Mazemkes noticed problems with the siding. Accordingly, they commenced a civil action against Keith Pusch and Pusch Builders for negligent siding installation.

¶5 Keith Pusch and Pusch Builders responded to the action by moving for summary judgment. The motion alleged that the economic loss doctrine¹ barred the Mazemkes' claim. The circuit court agreed and dismissed the claim, relying primarily on *Linden v. Cascade Stone Co., Inc.*, 2005 WI 113, 283 Wis. 2d 606, 699 N.W.2d 189. This appeal follows.

¶6 We review a grant of summary judgment using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d

¹ The economic loss doctrine is a judicially created rule that seeks to preserve the distinction between contract and tort. *Ferris v. Location 3 Corp.*, 2011 WI App 134, ¶12, 337 Wis. 2d 155, 804 N.W.2d 822. The rule provides that a party to a contract may not pursue remedies in tort to recover solely economic losses arising out of the performance or nonperformance of the contract. *Id.*

304, 314–15, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12).²

¶7 On appeal, the Mazemkes contend that the circuit court erred in holding that the economic loss doctrine barred their claim. They ask that we modify *Linden* and return the economic loss doctrine to its product liability origins. Alternatively, they ask that we distinguish *Linden* and hold that the matter is governed by *Trinity Lutheran Church v. Dorschner Excavating, Inc.*, 2006 WI App 22, 289 Wis. 2d 252, 710 N.W.2d 680.

¶8 We must deny the Mazemkes' first request, as this court lacks the authority to modify *Linden*. See *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (“The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.”)

¶9 As for the Mazemkes' second request, we begin our analysis by briefly discussing the cases in question. In *Linden*, the plaintiffs hired a general contractor to build them a house. *Linden*, 283 Wis. 2d 606, ¶2. The general contractor, in turn, hired various subcontractors to do portions of work on the house. *Id.* Subsequently, the plaintiffs sued both the general contractor and the subcontractors, alleging that their negligent work caused the house to sustain water damage. *Id.*, ¶3. The circuit court held that the economic loss doctrine barred the plaintiffs' tort claims against the subcontractors. *Id.*, ¶4. The plaintiffs appealed,

² All references to the Wisconsin Statutes are to the 2011-12 version.

and both this court and the Wisconsin Supreme Court affirmed the circuit court's decision. *Id.*, ¶1.

¶10 In its decision, the Wisconsin Supreme Court noted that the plaintiffs had contractual remedies against the general contractor, who in turn had its own remedies against the subcontractors. *Id.*, ¶17. The court further noted that, at its core, the plaintiffs' complaint was that the house they received was not the house for which they had contracted. *Id.* Ultimately, the court concluded that allowing the plaintiffs to maintain a tort claim against the subcontractors for services rendered to the general contractor would undermine the distinction between contract and tort that the economic loss doctrine seeks to preserve. *Id.* That is because it would allow the plaintiffs to make an end run around the contractual remedies for which they had already bargained. *Id.*, ¶¶17, 18.

¶11 Meanwhile, in *Trinity*, the plaintiff hired two different contractors to construct an addition to a church: one to coordinate the work of various subcontractors and the other to excavate for the project's footings. *Trinity*, 289 Wis.2d 252, ¶6. The plaintiff eventually sued the excavating contractor for negligence, and that contractor filed a negligence claim against the coordinating contractor for contribution. *See id.*, ¶11. After a jury determined that both contractors were negligent, the circuit court entered judgment in favor of the plaintiff. *Id.*, ¶¶12, 15. The coordinating contractor appealed, arguing, among other things, that the economic loss doctrine insulated it from the excavating contractor's negligence claim. *Id.*, ¶16. This court disagreed.

¶12 In our decision, we noted that, unlike the parties in *Linden*, the contractors in question were "not links in a vertical chain of contractual relationships; rather, their position with respect to each other is better analogized

to that of successive spokes in a wheel, with [the plaintiff] at the hub.” *Trinity*, 289 Wis. 2d 252, ¶19. Given this positioning, the application of the economic loss doctrine made little sense. After all, the contractors were essentially “strangers” working on the same project, not parties who had the opportunity to allocate economic risk between them by contract. *Id.*, ¶18.

¶13 Reviewing the above cases, we are persuaded that the facts in this case are closer to those in *Linden* than in *Trinity*. As in *Linden*, the facts involve a subcontractor working for a general contractor and a contract for a new home.³ Moreover, unlike the parties in *Trinity*, the Mazemkes had an opportunity to allocate economic risk in their purchase contract with J.C. & Sons.⁴ Under these circumstances, we conclude that allowing the Mazemkes to maintain a tort claim against Pusch and Pusch Builders for services rendered to J.C. & Sons would undermine the distinction between contract and tort that the economic loss doctrine seeks to preserve. That is because it would allow the Mazemkes to make an end run around their contractual remedies with J.C. & Sons.

¶14 In light of the foregoing, we agree with the circuit court’s application of the economic loss doctrine to this case. Accordingly, we affirm its order dismissing the Mazemkes’ claim on summary judgment.

³ Although the home in *Linden* was not yet completed, we do not view this fact as a material distinction.

⁴ While the Mazemkes may not have had the opportunity to negotiate the building specifications on their new home, they presumably had the opportunity to negotiate the terms surrounding the purchase of the home, which would include adjustments to the purchase price, the opportunity for inspections, any requested modifications to the property prior to closing, and/or the terms of any warranty to accompany the contract.

By the Court.—Order affirmed.

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

