**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 26, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2016AP2197** **Cir. Ct. No. 2015CV426**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**GARON A. REINKE,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TIMOTHY W. JACOBSON AND T.C. PRODUCTS CO., INC.,**

**DEFENDANTS-APPELLANTS.**

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APPEAL from an order of the circuit court for Dane County: JULIE GENOVESE, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Timothy Jacobson and T.C. Products Co., Inc., appeal the circuit court's order granting summary judgment in favor of Garon Reinke and effectively dismissing their tort counterclaims against Reinke. The claims relate to several 2012 agreements between the parties, including an agreement titled "Stock Purchase Agreement" under which Reinke sold his T.C. Products stock to Jacobson. For purposes here, there is no dispute that Jacobson and T.C. Products breached one or more of the agreements. At issue is whether their tort counterclaims against Reinke are barred by the economic loss doctrine.

¶2 As we understand it, Jacobson and T.C. Products make four arguments: (1) the economic loss doctrine does not apply because the predominant purpose of the parties' agreements was the provision of services; (2) the economic loss doctrine should never be applied to stock purchases; (3) regardless of arguments (1) and (2), the economic loss doctrine does not bar Jacobson's and T.C. Products' breach of fiduciary duty claims; and (4) the fraud in the inducement exception to the economic loss doctrine applies.

¶3 None of these arguments persuade us that the circuit court erred in applying the economic loss doctrine to effectively dismiss the tort counterclaims. Accordingly, we affirm.

## ***Background***

¶4 T.C. Products provides services to agricultural feed producers by mixing their feed components and also orders raw ingredients to mix and manufacture their own feed supplements for resale. During the time leading up to the agreements at issue here, Reinke and Jacobson were the president and vice-president of T.C. Products, shared in T.C. Products' day-to-day operations, and each owned 50% of T.C. Products' stock.

¶5 In early 2012, the parties executed several agreements, including the Stock Purchase Agreement under which Reinke sold his T.C. Products stock to Jacobson. According to Jacobson and T.C. Products, they later discovered that, prior to these 2012 agreements, Reinke made a series of misrepresentations consisting of the following:

- A misrepresentation that T.C. Products owned all of its equipment;
- A misrepresentation as to T.C. Products' financial statements, as a result of withholding accounts payable information for inventory that was purchased and received in September 2011;
- A failure to disclose that a major T.C. Products customer would be significantly reducing its business with T.C. Products; and
- A failure to disclose that another major T.C. Products customer had decided to switch suppliers in 2012.

After discovering these alleged misrepresentations, Jacobson and T.C. Products refused to make payments that were due Reinke under the parties' agreements.

¶6 Reinke sued Jacobson and T.C. Products for breach of contract. Jacobson and T.C. Products counterclaimed, alleging several tort claims, including breach of fiduciary duty and fraudulent inducement (intentional misrepresentation).

¶7 Reinke moved for summary judgment, asserting, among other arguments, that the economic loss doctrine barred Jacobson's and T.C. Products' tort claims. The circuit court agreed with Reinke's economic loss doctrine argument, and granted judgment in favor of Reinke.

## ***Discussion***

¶8 As a preliminary matter, we note that Jacobson and T.C. Products have filed joint briefs and make no meaningful distinction between the two for purposes of their arguments. Following their lead, we do not draw a distinction between the two for purposes of addressing their arguments. For ease of discussion, we refer simply to "Jacobson" when discussing their arguments.

¶9 As noted, Jacobson makes four arguments as to why the economic loss doctrine should not bar the tort claims against Reinke. We address each argument in separate sections below.

¶10 Whether the common law doctrine applies to bar a claim under a given set of facts presents a question of law for de novo review. ***Below v. Norton***, 2008 WI 77, ¶19, 310 Wis. 2d 713, 751 N.W.2d 351.

¶11 There are no disputed facts that affect our analysis. Jacobson sprinkles his briefing with assertions that there is a genuine issue of material fact preventing summary judgment. In particular, Jacobson asserts that there are factual disputes as to how much information Jacobson knew and what information was in Reinke's exclusive control. Jacobson does not, however, identify any factual dispute that matters for purposes of addressing and resolving his economic loss doctrine arguments.

### *A. Predominant Purpose of the Parties' Agreements*

¶12 Jacobson argues that the economic loss doctrine does not apply to the parties' agreements because the predominant purpose of those agreements, taken as a whole, was the provision of services. Courts use "the predominant purpose test to determine whether a mixed contract for products and services is

predominantly a sale of a product and therefore subject to the economic loss doctrine, or predominantly a contract for services and therefore not subject to the economic loss doctrine." ***Linden v. Cascade Stone Co.***, 2005 WI 113, ¶8, 283 Wis. 2d 606, 699 N.W.2d 189 (citations omitted). We disagree with Jacobson that the predominant purpose of the agreements here was the provision of services. Instead, we agree with the circuit court and Reinke that the predominant purpose of the agreements was the sale of stock.

¶13 Jacobson's argument to the contrary focuses on a subset of the agreements that, considered in isolation, *do* appear to be primarily for the provision of services. These are the agreements titled "Deferred Compensation Agreement," "Consulting Agreement," and "Noncompetition Agreement." Jacobson argues that these agreements, along with guarantees that supported them, show that the predominant purpose of all of the parties' agreements, including the stock purchase agreement, was the provision of services.

¶14 To be clear, Jacobson does *not* argue that we should consider the predominant purpose of each agreement individually. Rather, Jacobson argues that this group of service-related agreements—which does not include the Stock Purchase Agreement—together involved significant services and, therefore, the predominant purpose of all of the agreements—including the Stock Purchase Agreement—was the provision of services.

¶15 This argument lacks merit. It is readily apparent that Reinke's sale of his stock was the primary purpose of the agreements taken as a whole. The service-related agreements, viewed collectively, primarily serve to effectuate the transfer of stock ownership. Indeed, paragraphs 3 and 4 of the Stock Purchase Agreement indicate that these other agreements were meant to facilitate the stock

purchase, including constituting conditions of the purchase. Those agreements similarly contain terms indicating that they were conditions of the stock purchase or ancillary to the stock purchase. For example, the Noncompetition Agreement acknowledges that it was required by the Stock Purchase Agreement as a condition of the stock purchase. Further, Jacobson does not dispute Reinke's assertion that over 77% of the funds due under the agreements consisted of the sales price of the stock.

¶16 Additional factors may also be relevant under the predominant purpose test. *See* ***id.***, ¶22. We agree with Reinke, however, that Jacobson makes no developed argument based on other factors.

¶17 In sum, we reject Jacobson's argument that the agreements, taken as a whole, had as their predominant purpose the provision of services.

*B. Applicability of Economic Loss Doctrine to Stock Purchase*

¶18 Jacobson argues that the economic loss doctrine should never be applied to stock purchases. He presents multiple arguments in support of this proposition. Whether any of Jacobson's arguments might have merit as applied to other stock sale scenarios is a topic we need not address. For the reasons that follow, we agree with the circuit court and Reinke that the doctrine is appropriately applied to the stock purchase here.

¶19 We first explain why we conclude that the economic loss doctrine applies to the stock purchase here. We then address and reject Jacobson's arguments.

¶20 In its earlier forms, the economic loss doctrine was more limited. For example, in 1998 our supreme court stated: "[A] commercial purchaser of a

*product* cannot recover from a *manufacturer*, under the tort theories of negligence or strict products liability, damages that are solely 'economic' in nature." ***Daanen & Janssen, Inc. v. Cedarapids, Inc.***, 216 Wis. 2d 395, 400, 573 N.W.2d 842 (1998) (emphasis added) (citing ***Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.***, 148 Wis. 2d 910, 921, 437 N.W.2d 213 (1989)). Over time, however, "Wisconsin courts have gradually enlarged the economic loss doctrine from its root" to apply in other contexts. *See* ***Van Lare v. Vogt, Inc.***, 2004 WI 110, ¶19, 274 Wis. 2d 631, 683 N.W.2d 46.

¶21 Reinke points to ***Van Lare***, a decision that both exemplifies this broader application of the doctrine and provides guidance here. In ***Van Lare***, the court addressed whether the economic loss doctrine applied to a commercial real estate transaction. *See* ***id.***, ¶¶1-2, 21, 28, 41. In concluding that it did, the ***Van Lare*** decision made clear that what mattered was not whether there was a "product" or a "manufacturer" in the usual sense, but instead whether the application of the economic loss doctrine to the transaction furthered the doctrine's underlying policies. *See* ***id.***, ¶¶16-28. Those policies are:

> "(1) to maintain the fundamental distinction between tort law and contract law; (2) to protect commercial parties' freedom to allocate economic risk by contract; and (3) to encourage the party best situated to assess the risk [of] economic loss, the commercial purchaser, to assume, allocate, or insure against that risk."

***Id.***, ¶17 (quoted source omitted).

¶22 In reasoning that the application of the economic loss doctrine to a commercial real estate purchase furthered these policies, the ***Van Lare*** court emphasized the following circumstances: there was "a written, bargained-for contract for the sale of commercial-use land between two sophisticated parties

represented by counsel during the negotiation process." *See* ***id.***, ¶21. The court characterized these circumstances as "the kind of situation that is tailor made for the application of traditional contract law." ***Id.*** The court reasoned that "[t]o allow tort recovery for a misrepresentation claim grounded in a bargained-for contract would blur the distinction we seek to preserve," and that Van Lare "had ample opportunity to … allocate the risk in the[] contract" and "the time and opportunity to investigate." ***Id.***, ¶¶26-27.

¶23 Here, the parties' circumstances are similar to those of the parties in ***Van Lare***. Reinke and Jacobson were sophisticated businesspersons who negotiated agreements primarily geared to Reinke selling his ownership interest in the business to Jacobson. There is no dispute that Reinke and Jacobson were represented by counsel. Notably, Jacobson made affirmative representations in the Stock Purchase Agreement expressly indicating that he had sufficient knowledge and experience to evaluate the risks associated with purchasing Reinke's stock. Specifically, as the circuit court noted, Jacobson affirmatively represented that Jacobson "has been actively involved in the management and financial affairs of the Company" and that Jacobson "has sufficient knowledge and experience in making investments *so as to be able to evaluate the risks* and merits of [his] investment in the Company" (emphasis added).

¶24 Thus, following the reasoning of ***Van Lare***, Jacobson's argument that the economic loss doctrine should never be applied to stock purchases is easily rejected. We agree with the circuit court that the application of the doctrine to the agreements here furthers the doctrine's underlying policies. And, as we now explain, Jacobson does not provide us with any significant countervailing reason *not* to apply the doctrine on the basis that the transaction here was a stock purchase.

¶25 First, Jacobson argues that the circuit court erred to the extent it relied on ***Parnau v. Weiman***, No. 2013AP1795, unpublished slip op. (WI App Jan. 21, 2015), to apply the economic loss doctrine to the stock purchase.[1] In ***Parnau***, we applied the economic loss doctrine to the sale of a business that published a magazine and catalog. *See* ***id.***, ¶¶1-5, 15-17. Jacobson argues that the stock purchase here is not comparable to the sale in ***Parnau***. Regardless whether the two are comparable, we find little guidance in ***Parnau*** on this topic because in ***Parnau*** it was undisputed that the economic loss doctrine applied to the sale. *See* ***id.***, ¶16. The dispute in ***Parnau*** instead involved whether the fraud in the inducement exception to the doctrine applied. *See* ***id.***, ¶¶16-17. Thus, we do not rely on ***Parnau*** to reject Jacobson's stock-purchase argument.

¶26 Second, Jacobson relies on ***Boutelle v. Winne***, 40 Wis. 2d 360, 162 N.W.2d 40 (1968), a case in which the supreme court held that corporate stock is not a "good" under the Uniform Conditional Sales Act. *See* ***id.*** at 366-68. ***Boutelle***, however, is similarly off topic. The supreme court in ***Boutelle*** did not address the economic loss doctrine and, as we have seen, the court has since extended the economic loss doctrine beyond transactions in goods.

¶27 Third, Jacobson argues, as we understand it, that the economic loss doctrine is a poor fit when it comes to stock purchases because federal and state securities laws regulate such purchases and, in some instances, expressly create statutory fraud claims. However, none of *Jacobson's* claims are based on federal

[1] As we read the circuit court's decision, the court did *not* rely on ***Parnau v. Weiman***, No. 2013AP1795, unpublished slip op. (WI App Jan. 21, 2015), for purposes of this stock purchase issue. Rather, the circuit court relied on ***Parnau***, as does Reinke, for purposes of the fraud in the inducement issue that we discuss in Section D., below.

or state securities laws, and Jacobson does not explain why the underlying transactions are regulated by such laws in a way that matters here. Thus, we fail to see why these laws are inconsistent with the circuit court's application of the economic loss doctrine to bar Jacobson's claims. And, as Reinke correctly points out, applying the doctrine here does not suggest that the doctrine must be applied in other situations that do implicate federal or state securities regulations.

¶28 Finally, Jacobson asserts that "other state courts have specifically cautioned against" applying the economic loss doctrine to stock purchases. To support this assertion, however, Jacobson cites only to authority from one other state. *See* ***Graphic Tech., Inc. v. Pitney Bowes, Inc.***, 968 F. Supp. 602, 607-09 (D. Kan. 1997) (relying on ***TBG, Inc. v. Bendis***, 841 F. Supp. 1538, 1567-68 (D. Kan. 1993)). Jacobson does not address countervailing authority that Reinke cites from other states. Because Jacobson does not explain why Kansas's approach to the economic loss doctrine is most consistent with Wisconsin's approach, we address his reliance on the Kansas authority no further.

*C. Applicability of Economic Loss Doctrine to Breach of Fiduciary Duty Claims*

¶29 Regardless whether the economic loss doctrine otherwise applies to his tort claims, Jacobson argues that the doctrine does not apply to his breach of fiduciary duty claims because those claims are based on duties independent of the parties' agreements. For the reasons that follow, we conclude that this argument is forfeited and, on that basis, we decline to address it. *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (explaining that issues not raised in the circuit court are forfeited, and supporting proposition that appellate courts generally do not address forfeited issues).

¶30 The forfeiture rule "is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice." ***State v. Huebner***, 2000 WI 59, ¶11, 235 Wis. 2d 486, 611 N.W.2d 727. This rule "promotes both efficiency and fairness, and 'go[es] to the heart of the common law tradition and the adversary system.'" ***Id.*** (quoted source omitted).

¶31 In briefing before the circuit court, Jacobson never argued that his economic loss doctrine arguments apply differently to his breach of fiduciary duty claims based on the source of that duty. That is, Jacobson never drew the circuit court's attention to the specific breach-of-fiduciary-duty-claim argument he now advances.

¶32 Understandably then, the circuit court's decision contains no discussion that is specific to whether the economic loss doctrine should apply to breach of fiduciary duty claims any differently than to other tort claims. If we were to take up this issue and reverse the circuit court based on it, we would be blindsiding the circuit court with a topic that was never brought to that court's attention. *See* ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) ("We will not ... blindside trial courts with reversals based on theories which did not originate in their forum."); *see also* ***Townsend v. Massey***, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155 ("[T]he 'fundamental' forfeiture inquiry is whether a legal argument or theory was raised before the circuit court, as opposed to being raised for the first time on appeal in a way that would 'blindside' the circuit court." (quoted source omitted)).

¶33 To be clear, Jacobson's circuit court briefing *did* make references to Reinke's alleged fiduciary duties, as well as a passing reference to ***Noonan v. Northwestern Mutual Life Insurance Co.***, 2004 WI App 154, 276 Wis. 2d 33,

687 N.W.2d 254, a case in which, lacking developed argument, we declined to address whether the economic loss doctrine applied to a breach of fiduciary duty claim. *See* ***id.***, ¶34. However, Jacobson made this passing reference to ***Noonan*** in the course of providing reasons for why he believed the economic loss doctrine should not bar his *misrepresentation* claims. Jacobson's circuit court briefing lacked argument that was specific to his breach of fiduciary duty claims, and would not have apprised the circuit court of the breach-of-fiduciary-duty-claim issue he now raises as an entirely separate issue. Thus, we deem the issue forfeited and decline to address it.

*D. Fraud in the Inducement Exception*

¶34 Jacobson argues that the fraud in the inducement exception to the economic loss doctrine applies here. Like the circuit court, we disagree.

¶35 In ***Kaloti Enterprises, Inc. v. Kellogg Sales Co.***, 2005 WI 111, 283 Wis. 2d 555, 699 N.W.2d 205, our supreme court adopted a "narrow" fraud in the inducement exception to the economic loss doctrine. ***Id.***, ¶42. To invoke this exception, the claimant must prove all of the following: (1) that the defending party engaged in intentional misrepresentation (fraud); (2) that the misrepresentation occurred before the contract was formed; and (3) that the alleged misrepresentation is "'extraneous to, rather than interwoven with, the contract.'" ***Id.*** (quoted source omitted).

¶36 As we understand the appellate briefs, there is agreement that the alleged misrepresentations occurred before the contract was formed, and the parties dispute only the first and third requirements. Further, we need address only the third requirement. To succeed under the third requirement, Jacobson

must prove that the alleged misrepresentations are not "extraneous" to the contract within the meaning of ***Kaloti***. We conclude that Jacobson fails to meet this third requirement.

¶37 ***Kaloti*** involved transactions between Kellogg and Kaloti, a wholesaler that purchased and resold Kellogg's products. ***Id.***, ¶¶1-3. Kaloti alleged that Kellogg, without telling Kaloti, continued to sell products to Kaloti while changing to a new direct marketing scheme. Kaloti further alleged that Kellogg engaged in this conduct knowing that the change in marketing would deny Kaloti its resale market. ***Id.***, ¶¶5-6. Kaloti alleged an intentional misrepresentation claim against Kellogg based on Kellogg's concealment of this information. *See* ***id.***, ¶9. Kellogg argued that the economic loss doctrine barred this claim. ***Id.***, ¶27. The supreme court disagreed, concluding that the fraud in the inducement exception to the doctrine applied. ***Id.***, ¶51.

¶38 Pertinent here, the court in ***Kaloti*** concluded that Kellogg's alleged concealment of its new marketing scheme was "extraneous" to the parties' contract. *See* ***id.***, ¶45. The court reasoned that the alleged misrepresentation was "extraneous" because it did not pertain to a matter that was addressed in the contract, or that could reasonably be expected to have been addressed in the contract. *See* ***id.*** The ***Kaloti*** court explained that "[a]s to the terms of the contract, as well as those matters that one would expect to be addressed in contract terms, parties are expected to negotiate and will be held to their agreements, as required by the law of contract." ***Id.***, ¶48.

¶39 Here, Jacobson argues that Reinke's alleged intentional misrepresentations are extraneous to the parties' agreements in much the same

way. That is, Jacobson argues that Reinke's conduct is akin to Kellogg's alleged concealment of its new marketing scheme. We disagree.

¶40 To repeat, Jacobson asserts that Reinke's misrepresentations were:

- A misrepresentation that T.C. Products owned all of its equipment;
- A misrepresentation as to T.C. Products' financial statements, as a result of withholding accounts payable information for inventory that was purchased and received in September 2011;
- A failure to disclose that a major T.C. Products customer would be significantly reducing its business with T.C. Products; and
- A failure to disclose that another major T.C. Products customer had decided to switch suppliers in 2012.

¶41 We conclude that these alleged misrepresentations are unlike those in ***Kaloti***. Unlike the alleged misrepresentation in that case, the allegations above relate to matters that the parties' agreements addressed, or should have addressed, given Jacobson's affirmative representations in those agreements as already discussed. Jacobson affirmatively represented in the Stock Purchase Agreement that he "has been actively involved in the management and financial affairs of the Company" and that he "has sufficient knowledge and experience in making investments so as to be able to evaluate the risks and merits of [his] investment in the Company."

¶42 This contractual language is unqualified. It does not indicate that Jacobson's knowledge and experience were such that he could evaluate only *some* of the risks of purchasing the stock. Rather, it indicates Jacobson's agreement that he had the ability to, and accepted the responsibility for, evaluating all risks. Jacobson points to no other terms in the parties' agreements that support a different conclusion.

¶43 Further, Jacobson gives us no reason to think that any of the information that Reinke allegedly misrepresented or failed to disclose was unknowable to Jacobson. In ***Kaloti***, in contrast, all indications were that Kellogg's new marketing scheme was Kellogg's proprietary and confidential business information that Kaloti could not have been expected to discover prior to contracting unless Kellogg chose to disclose that information. *See* ***id.***, ¶¶8, 22, 45 (referring to the confidential nature of the new strategy, and reasoning that this new strategy's effect on Kaloti was not something that one would expect Kaloti's contract with Kellogg to address).

¶44 As indicated in the footnote above, the circuit court and Reinke have looked to our unpublished ***Parnau*** decision as support for rejecting application of the fraud in the inducement exception here. We do not. While we can understand why the circuit court and Reinke would look to ***Parnau*** in the absence of other guidance, the pertinent one-paragraph discussion in that case is cursory and adds little to what we have already said. *See* ***Parnau***, No. 2013AP1795, ¶17.

## *Conclusion*

¶45 For the reasons stated, we affirm the circuit court's order granting summary judgment in favor of Reinke and effectively dismissing Jacobson's and T.C. Products' tort counterclaims.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).