

Wisconsin Court of Appeals Holds Economic Loss Doctrine Applies to Damage to Other Property If It Was a Foreseeable Result of Disappointed Contractual Expectations

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12.4.18

In *Kmart Corp. v. Herzog Roofing, Inc.*, 2018 Wisc. App. Lexis 842, the Court of Appeals of Wisconsin considered whether the economic loss doctrine barred the plaintiff's negligence claims against the defendant roofer for damages resulting from the collapse of a roof. The Court of Appeals held that, while some of the plaintiff's property damages were unrelated to the scope of the contract, the economic loss doctrine still applied to those damages because they were a foreseeable result of the defendant's breach of the contract. This case establishes that in Wisconsin, the economic loss doctrine bars tort claims for damage to property unrelated to the contract if those damages were a reasonably foreseeable risk of disappointed expectations of the contract.

In *Kmart Corp.*, the plaintiff sued Herzog Roofing (Herzog), alleging that Herzog failed to properly install a rubber roofing system on one of its stores in 2004, which resulted in the roof collapsing in 2014. The collapse caused damage to the structure, as well as to the plaintiff's inventory and fixtures. The plaintiff asserted claims for negligence and breach of contract. Herzog filed a motion for summary judgment, arguing that the economic loss doctrine barred the plaintiff's negligence claims and the statute of limitations barred the plaintiff's breach of contract claim. The lower court granted Herzog's motion and dismissed the case. The plaintiff appealed the dismissal of the negligence claims, arguing that the "other property" exception to the economic loss doctrine applied to its claims for damages to inventory and fixtures and claims for cleanup costs and lost profits.

As stated in *Kmart Corp.*, in Wisconsin, the economic loss doctrine is a judicially created doctrine that bars tort claims for economic losses arising from a contract for the sale of product. The doctrine applies if the contract is predominantly for the sale of a product and the compensation sought is solely for economic damages, which include damages to the product itself or monetary losses caused by the product. While the contract between the plaintiff and Herzog was for both the sale and installation of the roofing system, the court found that the economic loss doctrine applied because the contract was predominantly for the sale of the roofing system. The court then had to consider whether the damages sought were solely economic.

Wisconsin recognizes the "other property" exception to the economic loss doctrine. This exception generally applies to property that is not part of, or integrated with, the bargained-for product. However, the court highlighted a critical caveat to the exception, requiring that the damages not be associated with a foreseeable risk that the purchaser should have protected against through appropriate provisions in the contract. Thus, if the damages at issue were reasonably foreseeable to the purchaser, the economic loss doctrine applies even if the damages claimed were not a part of or integrated with the contracted-for product. Here, the court found that it was reasonably foreseeable that "disappointed expectations" of the contract would result in damages to the inventory and fixtures in the store, as well as related costs. As such, the court affirmed the lower court's decision.

The *Kmart Corp.* decision establishes that, in Wisconsin product cases, tort claims for damages that are unrelated to the product may still be barred by the economic loss doctrine if those damages relate to the purchaser's disappointed contractual expectations and a foreseeable risk of loss. This case significantly limits the reach of the "other property" exception to the economic loss doctrine. Essentially, the "other property" exception only applies if the damages incurred were not the reasonably foreseeable result of a contractual breach that the purchaser should have protected against in the contract. Subrogation plaintiffs in Wisconsin must be aware

of the narrowing of the “other property” exception when considering tort claims for property damages in product cases.

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