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CASE NUMBER: 116307

No. 16-116307-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CORVIAS MILITARY LIVING, LLC, and
CORVIAS MILITARY CONSTRUCTION, LLC,

Plaintiffs/Appellants,

vs.

VENTAMATIC, LTD., and JAKEL, INC. n/k/a JAKEL MOTORS INCORPORATED,

Defendants-Appellees.

BRIEF OF APPELLEE JAKEL MOTORS INCORPORATED

Appeal from the District Court of Geary County, Kansas
The Honorable Benjamin J. Sexton, District Judge
District Court Case No. 14 CV 138

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Oral Argument Requested

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Statement of the Issues

(1) Whether, under Kansas's "integrated systems" rule, which holds that a manufacturer of a subcomponent part is not liable in a product liability action when the defective part causes damage to the larger product into which the subcomponent is integrated, Jakel could be liable for fire damage caused to housing units by alleged defective in-ceiling bathroom-exhaust fans that were installed by Plaintiffs' subcontractors during and as part of their construction of Plaintiffs' housing development?

(2) Whether, under Kansas law, which holds that a component-part manufacturer is not liable for a plaintiff's "economic loss" (which includes costs relating to the plaintiff's removal and replacement of the defective product) in a product liability action, can Jakel, a remote component-part manufacturer of the allegedly defective product in this case, be liable for Plaintiffs' removal-and-replacement costs?

(3) Are in-ceiling bathroom-exhaust fans "inherently dangerous"?

Statement of the Case

1. Introduction to the parties and Plaintiffs' housing development.

Jakel manufactures small component-part electrical motors. (R. Vol. 1 at 288, ¶ 4, Vol. 2 at 53–54.) Jakel built the motors at issue in this case between 1991–2001 and sold the motors to Ventamatic, an OEM manufacturer. (R. Vol. 1 at 288, ¶¶ 4–5.) Ventamatic integrated those motors into the 3,785 "NuVent" in-ceiling bathroom-exhaust fans that are at issue in this case. (Vol. 2 at 53–54, ¶¶ 2–5.)

Jakel and Plaintiffs are not in privity. After Ventamatic incorporated the Jakel-supplied motors into the in-ceiling bathroom-exhaust fans, Ventamatic sold the 3,785 fans to two distributors—Kornis Electric Supply and Consolidated Electric Distributors. (Vol. 3 at 28, ¶¶ 1–2.) The fans were eventually purchased by Plaintiffs through two subcontractors—United Heating & Cooling and Fahnestock Heating and Air (collectively the "subcontractors") for purposes of constructing a housing development in Fort Riley, Kansas. (R. Vol. 1 at 288, ¶ 2; Vol. 2 at 52–53, ¶ 2.) Kornis, Consolidated, United, and Fahnestock were each initially defendants in this action, but have all since settled with Plaintiffs and been dismissed. (R. Vol. 3 at unnumbered pages 140–41 (hearing transcript pp. 3–4).)

During construction of a privatized family housing development owned by Plaintiffs and located in Fort Riley, Kansas, the subcontractors installed the fans into the ceilings of 1,251 houses pursuant to their Master Subcontractor Agreements with Plaintiffs. (R. Vol. 1 at 287, ¶ 2; Vol. 2 at 52–53, ¶ 2.) In these

agreements, the subcontractors warranted that all workmanship, materials, and equipment furnished during their construction of the houses would be defect free, agreed to be liable for any remediation costs relating to such defects, including for diminution in value of the housing project, and agreed to be liable for Plaintiffs' attorneys' fees relating to such defects or costs. (R. Vol. 1 at 289–90, ¶¶ 6, 9–10; Vol. 2 at 54–56, ¶¶ 6, 9–10.) This warranty included the Ventamatic in-ceiling fans because those fans were part of the "workmanship, materials, and equipment" provided to Plaintiffs by the subcontractors. (R. Vol. 1 at 293–94, ¶ 28; Vol. 2 at 62, ¶ 28.)

Plaintiffs contend that before the events that led to this lawsuit, they experienced "widespread" failure of about 100 Ventamatic fans—less than 3% of the 3,785 installed fans. (R. Vol. 2 at 64, ¶¶ 10–11.) Plaintiffs filed a warranty claim with its subcontractors for each of these 100 fans that allegedly failed. In filing those warranty claims, Plaintiffs asserted that the issues with the fans related "to construction for warranty deficiencies." In each case, the subcontractors honored the warranty claims. (R. Vol. 1 at 293–94, ¶ 28; Vol. 2 at 62, ¶ 28.) Plaintiffs do not seek any alleged damages in connection with those warranty claims.

2. The fires.

Two fires occurred in Plaintiffs' housing development that gave rise to this lawsuit; one in June 2012 and a second in February 2013. Plaintiffs allege that both fires were caused by defective Ventamatic fans and/or Jakel motors. The

2012 fire allegedly caused $656.26 in damage to the fan itself and the house. (R. Vol. 1 at 290, ¶¶ 11–12; Vol. 2 at 56, ¶¶ 11–12.) The 2013 fire caused $88,994 in alleged property damage, of which Plaintiffs seek recovery of their insurance deductible, $50,000. (R. Vol. 2 at 76, ¶ 31. *See also* R. Vol. 3 unnumbered page at 173 (hearing transcript p. 36).) In all, Plaintiffs seek $50,656.26 in property damage as a result of the two fires.

Plaintiffs are not seeking any damages for personal property; their property damage claim only includes alleged harm to the fire-damaged housing units themselves. Plaintiffs assert that a tenant's "personal property" was damaged by the 2013 fire, but, significantly, it is undisputed that Plaintiffs do not claim they are entitled to recover for those damages. In support of their personal-property assertion, Plaintiffs cite the declaration of their corporate representative, Michael Keating. (R. Vol. 2 at 65, ¶ 22.) Keating's declaration, in turn (R. Vol. 2 at 74), relies on an estimate of damages by Travelers, Plaintiffs' insurer, which served as Travelers' sole basis of determining the amount owed to Plaintiffs as a result of the 2013 fire (R. Vol. 2 at 99). Travelers' estimate of damages is a detailed, 42-page document of itemized costs totaling $88,994—exactly the same amount as Plaintiffs' total alleged real property damage from the 2013 fire in this lawsuit. (R. Vol. 2 at 141; Vol. 2 at 65, ¶ 22; Vol. 2 at 74 (declaration); Vol. 2 at 99–141 (Travelers' itemized list of damages).) Significantly, none of the items listed in Travelers' determination of benefits are for personal property. (R. Vol. 2 at 279, ¶

22.) And, at oral argument on Jakel's motion for summary judgment, ***Plaintiffs conceded that they are not seeking compensation for any personal property that may have been damaged by either fire***. (R. Vol. 3 at unnumbered pages 71–72 (transcript pp. 34–35) ("Jakel points out that Corvias . . . is not seeking damages for the destroyed personalty, and they are absolutely right about that. That's correct").)

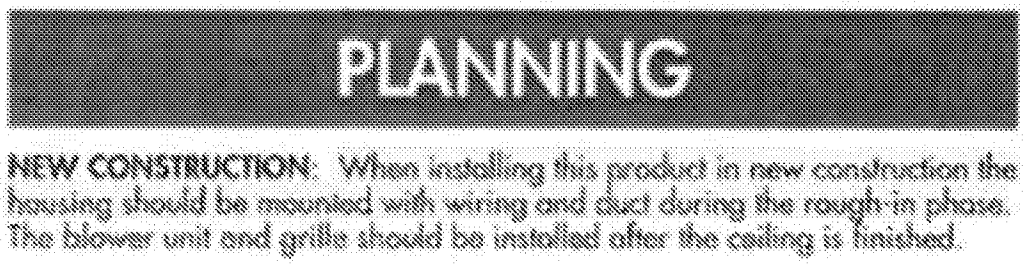
3. Removal and replacement of the undamaged fans.

Shortly after the 2013 fire, Plaintiffs removed the remaining 3,783 undamaged Ventamatic fans from 1,248 undamaged housing units and replaced them with a different brand of in-ceiling exhaust fan. (R. Vol. 1 at 291, ¶¶ 17–18; R. Vol. 2 at 57–58, ¶¶ 17–18.) Plaintiffs hired one of its subcontractors, United Heating & Cooling, to perform this removal-and-replacement work. (R. Vol. 1 at 72, ¶ 3.) Plaintiffs seek to recover their removal-and-replacement costs, which they allege is $459,026.26. (*Id.*) The district court correctly found that "Plaintiffs do not dispute that the costs they incurred for the removal and replacement of the fans from the housing units is economic loss." (R. Vol. 3 at 8, ¶ 13.)

4. Relevant details about the in-ceiling bathroom-exhaust fans.

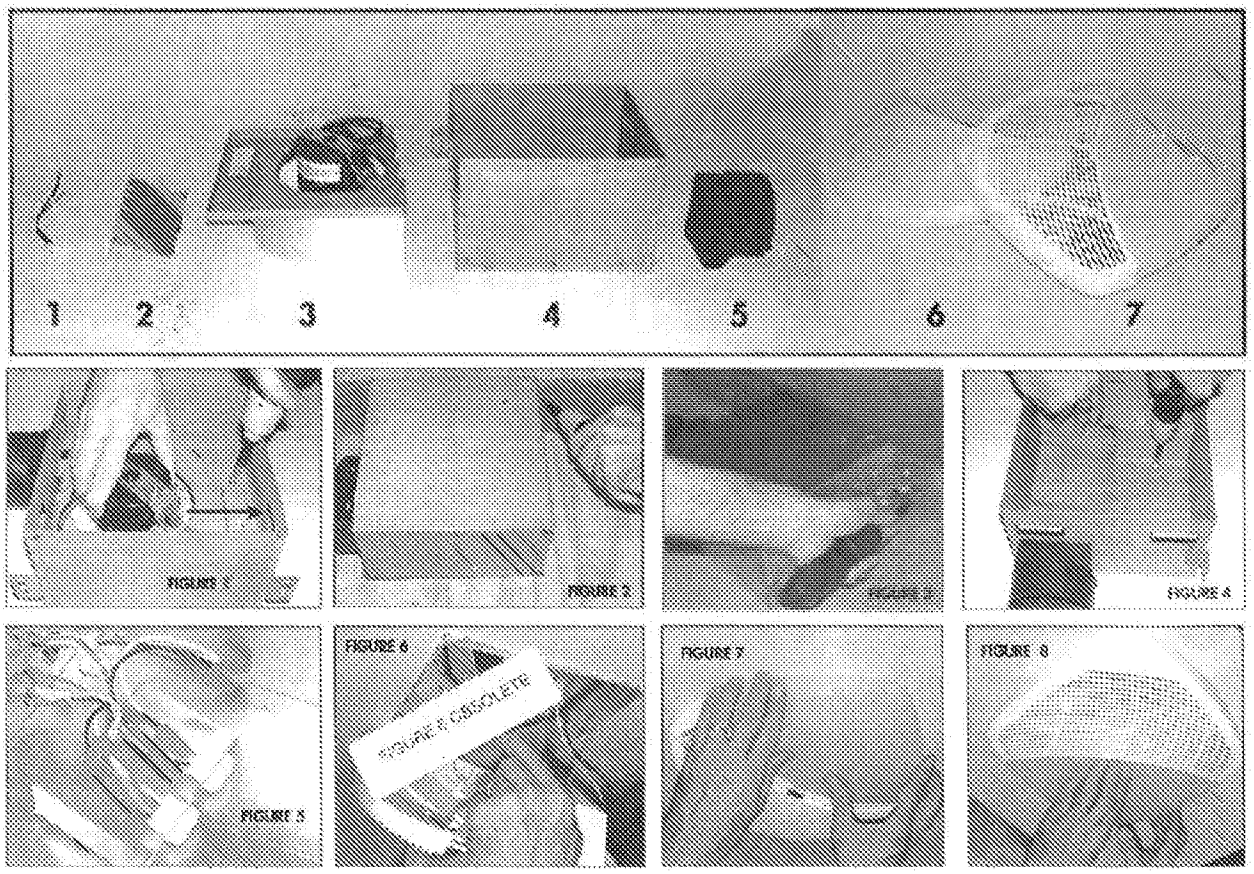
The Ventamatic fans are not free-standing desktop or floor-standing oscillating fans; rather, they are literally installed inside the ceilings of bathrooms—in this case during the construction of the housing units by the subcontractors pursuant to Plaintiffs' Master Subcontractor Agreements. (Vol. 1 at 288, ¶ 2; Vol. 2 at 53, ¶ 2.) According to Plaintiffs' own retained engineer,

Scott McKinley, the Ventamatic fans were installed in Plaintiffs' new-home constructions pursuant to Ventamatic's "NuVent" instructions, the International Building Code, and the National Electric Code. (R. Vol. 2 at 63, ¶ 7; Vol. 2 at 200, ¶ 7.) Mr. McKinley's affidavit, which was included as an exhibit to Plaintiffs' responsive briefing to Jakel's motion for summary judgment, attaches a number of photographs as well as the Ventamatic instructions, which, according to Mr. Mckinley (and Plaintiffs), were precisely followed. (R. Vol. 2 at 200, ¶ 7.) Ventamatic's "installation instructions" require the fan housing to "be mounted with wiring and duct during the rough-in phase" as part of the construction of the property. (R. Vol. 2 at 229.)


PLANNING

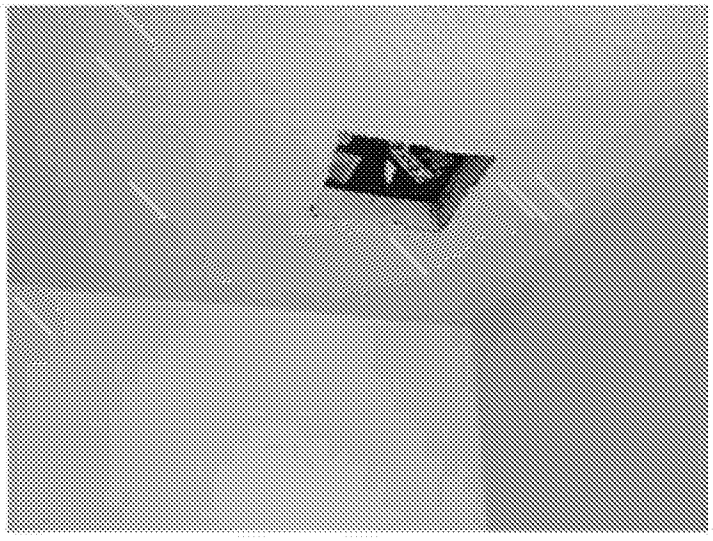
NEW CONSTRUCTION: When installing this product in new construction the housing should be mounted with wiring and duct during the rough-in phase. The blower unit and grille should be installed after the ceiling is finished.

(*Id.* (highlighting added).) Ducting runs from the fan "to the outside of the home." (*Id.*) The Ventamatic instructions include the following photographic illustrations to assist with the installation:



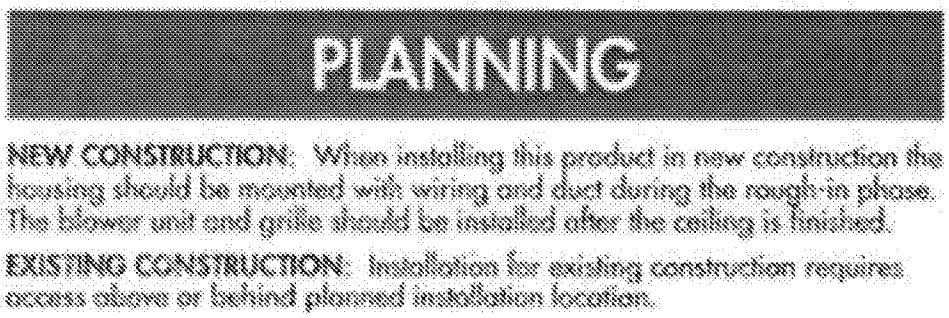
(*Id.* at 228–29.) And the instructions specifically admonish the contractor that "[i]nstallation work and electrical wiring must be done by qualified person(s) in accordance with all applicable codes and standards." (*Id.* at 227.)

Installation of the in-ceiling fans also required Plaintiffs' subcontractors to cut an appropriate hole into the ceiling of each bathroom in each housing unit:

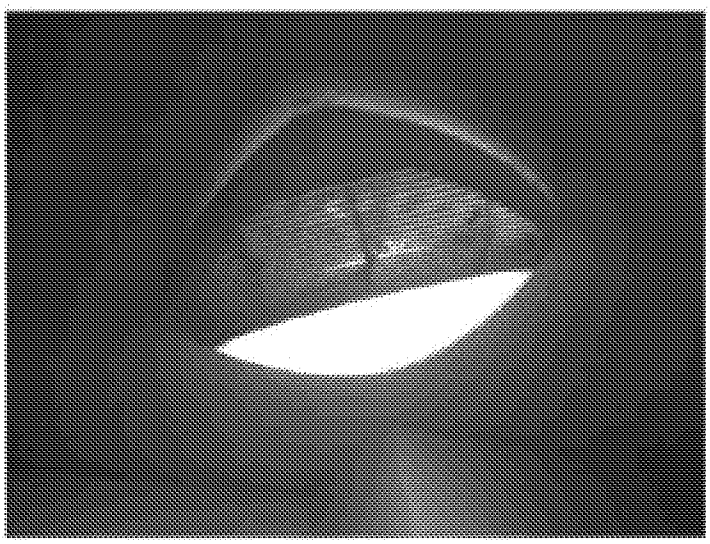


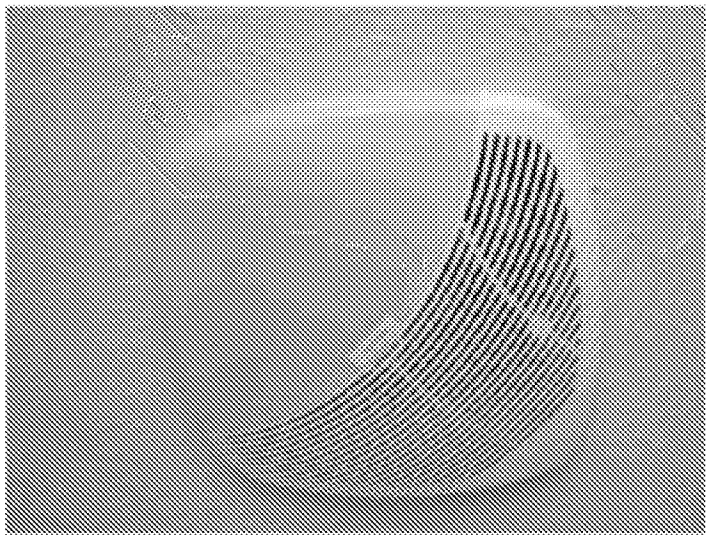
(*Id.* at 210.)

Then the "blower unit and grille should be installed after the ceiling is finished." (*Id.* at 229.)



(*Id.* at 229 (highlighting added).) Once the ceilings were finished and the blower unit and grill of the fan were installed, they looked like this:





(*Id.* at 211.)

Argument and Authorities

5. Standard of Appellate Review.

The District Court's application of the economic loss doctrine, the related "integrated systems" rule, and the "inherently dangerous" exception to privity in a product liability action are matters of law over which this Court exercises unlimited review. *Halsey v. Farm Bureau Mut. Ins. Co., Inc.*, 275 Kan. 129, 132, 61 P.3d 691 (2003). *Jordan v. Case Corp.*, 26 Kan. App. 2d 742, 743, 993 P.2d 650 (1999); *Koss Constr. v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 207, 960 P.2d 255 (1998); *Professional Lens Plan v. Polaris Leasing Corp.*, 234 Kan. 742, 748–49, 675 P.2d 887 (1984).

Because the controlling facts relied on by the district court in this case are based upon written or documentary evidence, including pleadings, admissions, and other documentary evidence, this Court's review of the conclusions of law is unlimited. *Crawford v. Hrabe*, 273 Kan. 565, 570, 44 P.3d 442 (2002).

6. The economic loss doctrine bars Plaintiffs' claims against Jakel.

In Kansas, a buyer of defective goods cannot recover from a component-part manufacturer for damage to the defective product in the absence of a contract. Rather, a buyer's recourse for this "economic loss" is from those with whom the buyer is in privity and via a contractual warranty claim. Put simply, the buyer has a commercial claim, not a product liability claim. *See Koss Constr. v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 207, 960 P.2d 255 (1998). "[E]conomic loss includes

damages for inadequate value, costs of repair, replacement costs, and loss of use of the defective product." *Nw. Ark. Masonry, Inc. v. Summit Specialty Prods., Inc.*, 29 Kan. App. 2d 735, 742, 31 P.3d 982 (2001) (citing *Koss*, 25 Kan. App. 2d at 206). This provides a "straightforward and predictable [rule] that establishes a logical demarcation between cases properly pursued as tort actions and those which are warranty claims." *Koss*, 25 Kan. App. 2d at 205.

As found by the district court, Plaintiffs allege two distinct categories of damage in this case. The first (and far larger) category is a claim for $459,027.26, which consists of the alleged cost to remove and replace 3,783 undamaged Ventamatic fans in about 1,248 undamaged housing units. The second (smaller) category is a claim for $50,656.26 for alleged fire damage to several housing units. (*See* R. Vol. 3 at 8, ¶ 12.) Both of these claims are foreclosed by the economic loss rule.

A. The in-ceiling bathroom-exhaust fans were integrated into the townhomes and Plaintiffs' property damage claim is, therefore, barred under the integrated systems rule.

Plaintiffs have no viable claim against Jakel for the alleged fire damage to the housing units. This category of Plaintiffs' damages accounts for just about 10%, or $50,656.26, of their total claimed loss.

As a matter of law, Plaintiffs are not entitled to compensation for damage to the burnt fans themselves or for the $459,027.26 in removal-and-replacement costs that Plaintiffs incurred to replace the undamaged in-ceiling fans following the second fire. As discussed above, such alleged damages are barred under the basic

economic loss doctrine, which Plaintiffs do not dispute, (R. Vol. 3 unnumbered page at 168–69 (Transcript pp. 31–32) (Corvias' counsel stating that "[n]o doubt that removal and replacement is a form of economic loss")), and which was noted in the district court's journal entry granting Jakel summary judgment. (R. Vol. 3 at 8, ¶ 13.)

But Plaintiffs are also not entitled to recover from Jakel for fire damage to the housing units because the fans were built into the ceilings of those units, and, under Kansas's "integrated systems" rule, damage to buildings caused by defective integrated components is not recoverable against a remote component-part manufacturer in a product liability action.

"All but the most simple machines have component parts," and when a component part causes damage to the property into which it is installed, no valid product liability claim exists against the component-part manufacturer. *Koss Constr. v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 207–09, 960 P.2d 255 (1998) (citing *E. River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 867 (1986)).

The in-ceiling exhaust fans were "integrated" into the housing units by Plaintiffs' subcontractors during and as part of the construction of those homes. Nevertheless, Plaintiffs' disingenuously argue that the fans are no different from televisions or coffeemakers. In fact, nothing could be further from true. It is undisputed that these in-ceiling fans required qualified subcontractors to install

ducting and wiring, mount the fan housing during the "rough-in" phase of construction, cut fan-sized holes into the ceilings of the bathrooms, and install the blower unit and grill after the ceiling was finished.

A qualified subcontractor is not needed to plug in a coffeemaker or television in accordance with "codes and standards." And plugging in a television or coffeemaker does not require installation of a housing that is then "mounted within wiring and duct during the rough-in phase" of a new-house construction. Neither televisions nor coffeemakers require a subcontractor to cut a television- or coffeemaker-sized hole in the ceiling or wall into which the unit will be mounted. Plugging in televisions and coffeemakers does not entail a multi-step process of affixing the unit after the ceiling (or wall) is finished. Instead, all that needs to be done to watch a television or use a coffeemaker is to plug the device in with the included power cord. Plaintiffs' notion that these fans are akin to freestanding electronic devices has no basis in reality.

Like plumbing or roofing shingles, the in-ceiling fans became a part of the house itself; they had no independent value to Plaintiffs' housing construction project apart from their function as components of the housing units. *See Linden v. Cascade Stone Co., Inc.*, 699 N.W.2d 189, 198 (Wis. 2005) (holding that individual components of a building, such as stucco and roof shingling have no independent value or use apart from their function as components of the house and

are therefore "integrated" and the economic loss doctrine applies). *See also Kice Indus., Inc. v. AWC Coatings, Inc.*, 255 F. Supp. 2d 1255, 1259 (D. Kan. 2003).

Installation of the Ventamatic in-ceiling exhaust fans occurred as part of Plaintiffs' construction of the housing development, was performed by Plaintiffs' subcontractors during construction of those units, and completed pursuant to Plaintiffs' Master Subcontractor Agreements. And following completion of the houses, the subcontractors honored warranty claims made by the Plaintiffs for malfunctioning or defective fans because those subcontractors warranted ***all workmanship, materials, and equipment*** furnished during construction of the houses. (R. Vol. 1 at 289–90, ¶¶ 6, 9–10; Vol. 2 at 54–56, ¶¶ 6, 9–10.) Plaintiffs prevailed upon their subcontractors to replace approximately 100 of the fans by asserting that the fans were included within these broad construction warranties—along with any shingles, windows, paint, or other materials or equipment provided by the subcontractors during their work building the housing units. Everyone involved understood that the final resulting *products* of Plaintiffs' housing development in Fort Riley were the *houses*. Plaintiffs' current argument in this lawsuit that the final "products" were the in-ceiling exhaust fans is simply their desired (but incorrect) legal conclusion.

B. The Plaintiffs in this case make the very same arguments rejected by *Koss v. Caterpillar*.

This Court has already weighed and rejected the very same arguments that Plaintiffs make in this case in *Koss Construction v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 960 P.2d 255 (1998):

- In this case, Plaintiffs brought a product liability claim for fire damage to housing units that caught fire allegedly because of a defective in-ceiling exhaust fan.
    - In *Koss*, the plaintiff brought a product liability claim for fire damage to a Caterpillar road roller that caught fire allegedly because of a defective hydraulic hose. 25 Kan. App. 2d at 201.
- In this case, Plaintiffs argue that the in-ceiling exhaust fans, not the housing units, are the "products" for purposes of their lawsuit and that damage to the housing units is damage to "other property."
    - In *Koss*, the plaintiff argued that the hydraulic hose, not the road roller, was the defective "product" for purposes of its lawsuit and that damage to the road roller was damage to "other property." 25 Kan. App. 2d at 207.

This Court rejected Koss's argument: "Koss also attempts to characterize this situation as an 'injury to other property' case. Koss contends that the defective product is the hydraulic hose, and that because it seeks recovery for damages to other parts of the roller, it is claiming damages for 'other property.' ***This contention is not persuasive***." 25 Kan. App. 2d at 207 (emphasis added).

The Court went on: "As the Supreme Court noted in *East River*, all but the most simple machines have component parts. This does not mean that damage to 'other property' results, when one defective part causes damage to another part

within the same product. To hold otherwise would eliminate the distinction between warranty and strict liability." *Id.* (citing *E. River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 867 (1986)).

This case involves the construction of many housing units at Fort Riley during which Plaintiffs' subcontractors installed in-ceiling fans into the houses as they were being built, allegations that two fires were caused by defective in-ceiling fans, and the resulting damage to the houses. But the in-ceiling fans were integrated into the townhomes—the product—and, just as in *Koss*, fire damage to that product is economic loss for which Jakel is not liable. Permitting this case to proceed would eliminate the distinction between tort and contract law. The District Court's order granting Jakel summary judgment should be affirmed.

C. Application of the economic loss doctrine and the integrated systems rule is a matter of law for the Court.

Application of the economic loss doctrine is a matter of law for the Court alone to determine, and Kansas courts have applied the "integrated systems" approach to bar product liability claims against component-part manufacturers in a variety of analogous scenarios. In *Jordan v. Case Corp.*, for example, the plaintiff purchased a combine that included a defective after-market engine that caused a fire destroying both the combine and an unharvested wheat crop. 26 Kan. App. 2d 742, 743, 993 P.2d 650 (1999).

Jordan was a subrogation case, and the plaintiff's subrogee, Farm Bureau Insurance, only sought to recover for fire damage to the combine—not to the

unharvested wheat crop (just like in this case—Plaintiffs only seek to recover for fire damage to the housing units—not alleged damages to personal property). *See id.* Thus, "the only question [the Court] must determine is whether the engine in the combine was a component part of the combine or a separate product." *Id.* at 744. In fact, the Court specifically noted that this question—whether the engine was an "integrated" component part of the combine—is a "question[] of law." *Id.* And ultimately, the Court held "***as a matter of law***, [that] the . . . engine was a component part of the combine" and further held that the economic loss/integrated systems rule barred the plaintiff's claim. *Id.* (emphasis added).

Similarly, in *Koss*, the defendant moved for judgment on the pleadings because fire damage to the road roller was pure economic loss when the fire was caused by a hydraulic hose that was "integrated" into the road roller. The plaintiff argued that the road roller was separate property from the defective component-part hydraulic hose that caused the fire and requested additional discovery on that issue. The court rejected Koss's argument and denied its request for further discovery: "Koss's assertion that discovery should have been permitted to show damage to other parts of the roller is without merit." *Koss*, 25 Kan. App. 2d at 207.

The district court correctly concluded, as a matter of law, that the in-ceiling fans were "integrated" into the housing units for purposes of applying the economic loss rule.

D. Plaintiffs' removal-and-replacement damages are economic losses for which Jakel has no liability.[1]

As noted above, Plaintiffs do not dispute that the $459,027.26 in costs relating to removal and replacement of the Ventamatic fans is "economic loss." (R. Vol. 3 unnumbered page at 168–69 (Transcript pp. 31–32) (Corvias' counsel stating that ***"[n]o doubt that removal and replacement is a form of economic loss***" and noting that *Professional Lens Plan, Inc. v. Polaris Leasing Corp.*, 234 Kan. 742, 675 P.2d 887 (1984), "specifically says that removal and replacement costs constitute direct economic losses. ***We get that. We've never contested otherwise***.") (emphasis added).) Thus, the district court found that "Plaintiffs do not dispute that the costs they incurred for the removal and replacement of the fans from the housing units is economic loss." (R. Vol. 3 at 8, ¶ 13.)

Plaintiffs' concession is necessary in light of Kansas's well-established law that removal-and-replacement costs are economic losses for which there is no liability in a product liability action. *Nw. Ark. Masonry, Inc.*, 29 Kan. App. 2d at 743 ("Actually, what [the plaintiff] is seeking is repair and/or replacement costs rather than damage to 'other property.' Thus, the damages constitute economic losses which are not included as a type of harm recoverable under a products

[1] Though Jakel made this argument below, (R. Vol. 1 at unnumbered pages 295–97 (Document pp. 10–12)), the district court did not rely on it in granting Jakel summary judgment; rather, the district court based its holding entirely on the "integrated systems" rule—a correct conclusion that should be affirmed. (*See* R. Vol. 3 at unnumbered pages 193–96 (transcript pp. 56–59).) Jakel offers the present argument as an independent legal basis on which this Court should affirm the dismissal of Plaintiffs' removal-and-replacement costs.

liability claim."). *See also See* 63B Am. Jur. 2d *Prods. Liability* § 1792 ("Damages for direct economic losses are generally measured by . . . the cost of repairing or replacing the product.") (citing numerous cases across a number of jurisdictions).

Yet Plaintiffs argued below, and will likely argue in their reply brief, that because about 10% of their claim is damage to "other property," Jakel should be liable for all of their alleged losses, regardless of whether those losses are economic or not. Plaintiffs' argument should be rejected. When a party suffers both economic and noneconomic losses, he may, via a product liability action, seek to recover damage to "other property" caused by the defective product. But he may *not* recover economic losses from a remote component-part manufacturer in such an action. *See Nw. Ark. Masonry, Inc.*, 29 Kan. App. 2d at 735, syl. ¶ 4. Suffering a small amount of damage to "other property" does not instantaneously enlarge a litigant's product liability claim to include economic losses—those must still be pursued via a warranty claim.

For example, in *Full Faith Church of Love West, Inc. v. Hoover Treated Wood Products, Inc.*, the Federal District Court of Kansas, applying Kansas law, barred a plaintiff from seeking economic losses from a remote manufacturer, but permitted the plaintiff to pursue its claim for damage to "other property." 224 F. Supp. 2d 1285, 1290 (D. Kan. 2002). In that case, Full Faith treated its church complex with fire-retardant chemical manufactured by the defendants. *Id.* at 1287.

The chemical was defective, causing Full Faith's roof trusses to prematurely deteriorate. *Id.* In its lawsuit against the chemical manufacturers, Full Faith alleged four categories of costs relating to: "(1) inspect and test the existing roof; (2) design and repair the existing roof; (3) repair and replace other property damaged as a result of the treated wood deterioration; and (4) relocate students and staff during roof repairs and during periods in which the facilities are unsafe." *Id.* at 1290. Applying *Northwest Arkansas Masonry*, the Court dismissed Full Faith's claims for the damage categories relating to economic loss: "The *Northwest* holding precludes the first, second and fourth categories of damages." *Id.* But the court did not dismiss Full Faith's claims for damage to "other property": "The *Northwest* ruling, however, does not bar the third category of damages: costs to repair and replace ***other property*** which has been damaged on account of the treated wood failure." *Id.* (citing *Northwest*, 29 Kan. App. 2d at 742; *Elite Prof., Inc. v. Carrier Corp.*, 16 Kan. App. 2d 625, 633, 827 P.2d 1195 (1992)) (emphasis in original).

Despite *Northwest Arkansas Masonry* and *Full Faith*, Plaintiffs would have this Court rule that a litigant may entirely avoid any application of the economic loss doctrine even if there is $999,999.95 in undisputed economic loss and a mere nickel's worth of damage to "other property." That is not the law in Kansas, and *Professional Lens* and its progeny supply an additional reason to affirm the dismissal of Plaintiffs' removal-and-replacement costs.

7. The in-ceiling exhaust fans are not "inherently dangerous."

Corvias asks this Court to extend liability to all remote subcomponent manufacturers of in-ceiling exhaust fans (or, really, any electrically powered device) under the theory that all such devices are "inherently dangerous." Kansas law and public policy require a different result. As with its arguments against the integrated systems rule, the very same "inherently dangerous" arguments that Plaintiffs make here were evaluated, and rejected, in *Koss*. That case, just like here, involved an allegedly defective component part that caused a fire. *Koss Constr. v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 206–07, 960 P.2d 255 (1998). And just like here, the plaintiff in that case argued that because the defective product caused a fire, i.e., a "calamitous event," it was inherently dangerous—an argument the Court rejected:

> Koss emphasizes that in this case the damages occurred as a result of a ***calamitous event***, arguing that the hydraulic hoses were unreasonably dangerous. ***As noted above, however, the Supreme Court expressly rejected an attempt to distinguish between cases based on the manner in which the product is injured.*** 476 U.S. at 872, 106 S. Ct. 2295. Regardless of how it occurs, damage which is limited to the defective product itself is essentially economic loss.

Id. (emphasis added).

In *Professional Lens Plan, Inc. v. Polaris Leasing Corp.*, the Kansas Supreme Court addressed the scope of the "inherently dangerous" exception to contractual privity in a breach of implied warranty claim. There, the Court was asked to hold a remote component-part hard disc manufacturer liable for a

defective computer. The Court first noted that "imposing implied warranties on non-privity manufacturers for a buyer's economic loss is a major step, not to be taken lightly." *Professional Lens*, 234 Kan. 742, 754–55, 675 P.2d 887 (1984). The Court continued: "An across-the-board extension of implied warranties to non-privity manufacturers or sellers, without regard to the nature of either the involved product or the type of damage sought, would spawn numerous problems in the operation of Article 2 of the Uniform Commercial Code." *Id.* The Court went on to flatly reject the notion that a computer or its subcomponent hard disc are inherently dangerous if defectively designed, stating that "[t]he computer and its component part, the hard disc, are clearly not products which are inherently dangerous. Here damages are sought only for economic loss, no personal injuries or property damage being involved. We find no public policy dictates extending implied warranties of fitness and merchantability to the non-privity manufacturers herein." *Id.* at 755. In an earlier case, the Kansas Supreme Court held that a soda bottle recapping device was also not inherently dangerous. *Evangelist v. Bellern Research Corp.*, 199 Kan. 638, 648, 433 P.2d 380 (1967) (overturned by statute on other grounds as noted in *Professional Lens*, 234 Kan. at 749).

In contrast, courts applying Kansas law have held that airplanes and automobile tires are inherently dangerous. *Fullerton Aircraft Sales and Rentals, Inc. v. Beech Aircraft Corp.*, 842 F.2d 717, 721–22 (4th Cir. 1988) (applying Kansas law). In both cases, the designed purpose of the product was a key factor.

For example, in holding that an automobile tire is inherently dangerous, the Tenth Circuit noted that a tire is "designed and manufactured to afford protection from sudden or violent blowouts and was intended to be used as a tire protected against such blowouts. Such defect rendered the tire inherently dangerous when used for its intended purpose." *B.F. Goodrich Co. v. Hammond*, 269 F.2d 501, 506 (10th Cir. 1959).

In this case, the bathroom exhaust fans are much more like a computer and its component hard drive than an airplane or automobile tire. The designed purpose of a bathroom exhaust fan is to remove moisture from the air. It is not to travel down the highway carrying people at high speeds or to carry passengers through the air. Bathroom exhaust fans, like computers and their hard drives, are powered by electricity; they produce some measure of heat; and there is some risk of fire in the use of each product. "The law, however, does not require that every product be accident-proof or totally incapable of doing harm." *Professional Lens*, 234 Kan. at 748. The *purpose* of the in-ceiling fans is clearly not inherently dangerous. And the fans are certainly not so inherently dangerous as to justify the "major step" of extending implied warranty liability to remote manufacturers not in privity. Plaintiffs' argument to the contrary should be rejected.

8. Conclusion

The district court's order granting Jakel summary judgment should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 3rd day of February, 2017, this Brief of Appellee Jakel Motors Incorporated was served as follows:

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