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No. 16-116307-A

**THE COURT OF APPEALS
OF THE STATE OF KANSAS**

CORVIAS MILITARY LIVING, LLC, and
CORVIAS MILITARY CONSTRUCTION, LLC
Plaintiffs-Appellants

vs.

VENTAMATIC, LTD.; JAKEL, INC. n/k/a JAKEL MOTORS INCORPORATED;
UNITED HEATING & COOLING, INC.; KORNIS ELECTRIC SUPPLY, INC.;
FAHNESTOCK HEATING AND AIR CONDITIONING, INC. d/b/a FAHNESTOCK
PLUMBING, HVAC & ELECTRIC; and CONSOLIDATED ELECTRIC
DISTRIBUTORS, INC., d/b/a AMERICAN ELECTRIC
Defendants-Appellees

REPLY BRIEF OF APPELLANTS

Appeal from the District Court of Geary County, Kansas
Honorable Benjamin J. Sexton, Judge
District Court Case No. 2014 CV 138

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Oral Argument: 15 minutes

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Plaintiffs/Appellants Corvias Military Living, LLC and Corvias Military Construction, LLC (referred to collectively as "Corvias"), by and through the undersigned counsel, and pursuant to Kan. Sup. Ct. Rule 6.05, submit this Reply Brief as to new matter contained in Defendants' Response Briefs.

INTRODUCTION

"The economic loss doctrine is a judicial creation.... In Kansas, its scope is still unfolding." *Rinehart v. Morton Buildings*, 297 Kan. 926, 930-31, 305 P.3d 622, 626 (2013). This appeal raises important issues as to the balance between tort and contract remedies as determined by the reach of the integrated systems theory.

This Court recognized "that if this development [of product liability] were allowed to progress too far, contract law would drown in a sea of tort." *Koss Construction v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 204, 960 P.2d 255, 258 *rev. denied* 265 Kan. 885 (1998), *quoting*, *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 866 (1986). And so the integrated systems theory was employed as a hedge against the approaching tide of product liability. But just as product liability law unchecked can drown contract law, so too can the integrated systems theory applied over-expansively suffocate the duty owed by manufacturers to make safe products. That is precisely what has happened here.

To paraphrase the issue posed by the courts in *East River* and *Koss Construction*:

> We must determine whether a [bathroom ceiling fan] injuring [the townhome in which it is installed] is the kind of harm against which public policy requires manufacturers to protect, independent of contractual obligation.

Koss Construction, 25 Kan. App. 2d at 204. Public policy imposes a duty on manufacturers to ensure that their products are free from defects that render the product unreasonably dangerous. *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 630, 886 P.2d 869, 886 (1994). In the contest presented here, the manufactures of a household electrical product must take reasonable steps to protect against their products catching fire and burning down homes, independent of any contractual obligation, and regardless of whether the appliance is sitting on the kitchen counter, installed under the kitchen counter or placed in a wall or ceiling.

Accordingly, Corvias asks this Court to reverse the trial court and find that the trial court misapplied the integrated systems theory when it found that the product at issue was the townhome, as opposed to a bathroom ceiling fan.

DISPUTED FACTS

Defendants have raised new matter, sometimes subtly and other times not so subtly, in their characterization of the factual record before the trial court.

A. The Subcontracts.

Both Ventamatic and Jakel highlight the fact that the installation of "3,785 NuVent fans, was performed pursuant to Master Subcontractor Agreements entered into by Corvias and the subcontractors." (Ventamatic Brief at 2; Jakel Brief at 14). The emphasis placed by Jakel on this fact highlights a fundamental error of the trial court's reasoning. The trial court set out to decide if this was a "commercial case" and if so, then it extended the integrated systems theory to achieve a desired result. Specifically, the trial judge stated: "This is, in essence, a commercial case, and it should be treated as such." (R. Vol. 5, 59). Not so.

This *was* a commercial dispute when the NuVent fans repeatedly failed to perform in a commercially reasonable way, and Corvias had and sought its commercial remedies. But when the NuVent fans began to catch fire, and burn homes, this dispute *changed* from one of commercial disappointment and *became* one of community safety. While the economic loss doctrine is intended to prevent tort law from swallowing up commercial disputes, it should not be employed so as to protect the manufacturer of products that are defective and unreasonably dangerous and thereby put the lives and property of others at risk.

B. Installation Of The Fans.

Both Ventamatic and Jakel devote a portion of their discussion of the facts to the process by which the bathroom ceiling fans are placed into the townhomes. (Ventamatic Brief at 2; Jakel Brief at 5-9). Ventamatic looks almost exclusively to its "installation instructions" to provide the factual information as to how its products should be installed. By contrast, Jakel looks to the report of Corvias' testifying expert Scott McKinley, and his observations as to the installation of the fans by which he eliminated improper installation as a potential cause of the fires. (R.Vol. 2 at 63).

The contrasting descriptions of the product installation highlights how the facts concerning the installation of a household electrical product has an impact on the application of the integrated systems theory. Some household electrical products are clearly not integrated into the townhome while for others the relationship between household electrical product and the townhome itself is more intimate. These distinctions are factual in nature and were essentially disputed between the parties on summary judgment. Therefore, determining whether Corvias seeks redress for "harm" presents

mixed issues of fact (what is the relationship between product and damaged property) and law (whether the economic law doctrine applies).

C. Disconnection And Removal Of The Fans That Did Not Catch Fire.

Ventamatic mischaracterizes Corvias' actions following the February 5, 2013 fire in a material way. According to Ventamatic, "Corvias unilaterally disconnected and removed the remaining 3,783 NuVent fans from approximately 1,248 undamaged housing units." (Ventamatic Brief at 3).

Actually, Corvias' Health and Safety manager, Michael Keating, recognized that the February 5, 2013 fire was a repeat of a substantially less severe fire involving the identical product in a unit just down the street. (R. Vol. 2 at 153-57). In light of the life threatening safety issue associated with fans that repeatedly caught fire, Corvias unilaterally disconnected all of the NuVent fans. (R. Vol. 2 at 92). Corvias did not unilaterally remove the remaining fans. Rather, Corvias reached out to Ventamatic, explained the situation and sought Ventamatic's assistance in addressing the safety issue created by Ventamatic's fans. (R. Vol. 2 at 92-94).

Ventamatic's response to Corvias was appalling. Ventamatic's President and CEO posed that the fans in question were not manufactured by Ventamatic. (R. Vol. 2 at 90). When provided with documentary evidence that the fans were Ventamatic fans, he continued to pose that Ventamatic had no responsibility and that the fans were not made by Ventamatic. (R.Vol. 2 at 85).

Ventamatic's callous disregard for the safety of others underscores the need for the law to honor the distinction between tort based liability to address safety concerns and commercial remedies to address disappointed commercial expectations.

Here, the trial court's ruling suffocates the duty Ventamatic and Jakel owe to the public generally to not manufacturer a household electrical product that causes homes to burn due to a design defect. A home was substantially destroyed from the fire, but Ventamatic and Jakel got lucky in that (1) Corvias had purchased insurance that covered the families' destroyed personal property and (2) no one died or was hurt. Luck should not be the standard that distinguishes between tort and commercial remedies. Manufacturers should not escape responsibility when they put dangerous products into the marketplace.

ANALYSIS

I. The Removal And Replacement Costs Of The Fans That Did Not Catch Fire.

Both Ventamatic and Jakel repeatedly assert that the trial court found, and Corvias has admitted, that the economic loss doctrine bars recovery for the $459,027.26 expended to remove and replace the undamaged NuVent fans. (Ventamatic Brief at 4, 16-17; Jakel Brief at 18). This constitutes a new matter by which Ventamatic and Jakel are trying to convince this Court that the economic loss doctrine bars Corvias from recovering those removal and replacement costs even if the fires had caused damage to other property. Judge Sexton did not so hold and that is not the law in Kansas.

Contrary to Ventamatic and Jakel's characterizations, Judge Sexton correctly observed that if the requirements of the Kansas Product Liability Act are satisfied, *i.e.*, that the design defect caused damage to property other than the product itself, then all of Corvias' claims are folded into a single claim. (R. Vol. 5 at 57). Corvias, like any other product liability plaintiff, would be entitled to recover all losses that were proximately caused by the incident, including economic losses.

In support of this alternative remedy, Jakel looks to two cases, *Northwest Arkansas Masonry, Inc. v. Summit Specialty Products, Inc.*, 29 Kan. App. 2d 735, 31 P.3d 982 (2001) and *Full Faith Church of Love West, Inc. v. Hoover Treated Wood Products, Inc.*, 224 F.Supp.2d 1285 (D. Kan. 2002). (Jakel Brief at 19). The former, *Northwest Arkansas Masonry*, did not involve a plaintiff that sought to recover both "harm" and economic losses, so it is of no help to Jakel in this context.

The latter case, *Full Faith Church of Love West, Inc.,* involves different facts. There, the plaintiff sought as damages economic losses associated with repairing the defective product at issue, defective roofing material. Here, Corvias does not seek to recover for the cost of removing and repairing the fans that caught fire. Rather, Corvias seeks to recover as a reasonable mitigation cost, the removal and replacement of the fans that did not catch fire. In the context of the summary judgment motions, it was undisputed that those costs constituted mitigation costs. (R. Vol. 2 at 69 ¶43 and at 284 ¶43).

In addition, the only Kansas Appellate Court decision to cite *Full Faith Church of Love West* favorably was *Prendiville v. Contemporary Homes, Inc.,* 32 Kan. App. 2d 435, 83 P.3d 1257, *rev. denied* 278 Kan. 847 (2004), which was subsequently reversed by the Kansas Supreme Court in *David v. Hett*, 293 Kan. 679, 700, 270 P.3d 1102, 1114 (2011). While *David v. Hett* concerned the extension of the economic loss doctrine to claims for negligent construction, the reversal of *Prendiville* cannot be characterized as "on other grounds" to the issue presented here because the Kansas Supreme Court stressed that the correct application of the economic loss doctrine starts with an evaluation of the duties involved. *David*, 293 Kan. at 700 ("Whether a claim sounds in tort or contract is

determined by the nature and substance of the facts alleged in the pleadings. A breach of contract claim is the failure to perform a duty arising from a contract, and a tort claim is the violation of duty imposed by law, independent of the contract.")(citations omitted).

II. The Reach Of The Integrated System Theory Is Limited.

A. Household Electrical Appliances Are Not Component Parts Of Townhomes.

When discussing whether bathroom ceiling fans are indistinguishable components of townhomes, Ventamatic and Jakel introduced new case authority from the Wisconsin Court of Appeals, *Bay Breeze Condominium Assn., Inc. v. Norco Windows, Inc.*, 257 Wis. 2d 512, 651 N.W.2d 738 (2002), which found that windows were component parts of a wall system for purposes of application of the economic loss rule and the integrated system theory. (Ventamatic Brief at 12-13). In *Bay Breeze Condominium Assn., Inc.*, the court specifically held:

> Because of the integral relationship between the windows, the casements and the surrounding walls, the windows are simply a part of a single system or structure, having no function apart from the buildings for which they are manufactured.

Bay Breeze Condominium Assn. Inc., 257 Wis. 2d at 527. This conclusion is (1) so over inclusive with regard to "functionality" as to reach everything, (2) inconsistent with Kansas law with respect to application of the integrated systems theory, and (3) even if applied here calls for reversal.

First, it can be fairly said that everything that is manufactured, be it a window or a toaster or a dishwasher or a bathroom ceiling fan, is designed for a particular function and apart from the home in which the appliance is placed, the thing would have no function.

Second, *Bay Breeze Condominium Assn., Inc.* inverts the relationship between the

common electrical appliance and the home. As made clear in *Northwest Arkansas Masonry*, the question is not whether the window can function apart from the home, but rather whether the home can function apart from the window. With regard to windows, that is admittedly a closer call. But with regard to common household electrical appliances, there is no contest. Clearly, the home is and can function perfectly well apart from any given electrical appliance that may be put into it. There can be no debate that the toaster, or the oven, or the dishwasher, or the smoke alarm, or the television, or the bathroom ceiling fan is not an integral component of the townhome.

Third and finally, when the Wisconsin Appellate Court has applied the reasoning in *Bay Breeze Condominium Assn. Inc.* in the context of a household appliance, it ruled that the household appliance was not integral to the home and the economic loss doctrine did not apply. *State Farm And Cas. Co. v. Hague Water Quality, International*, 345 Wis. 2d 741, 748-49 (Wis. Ct. App. 2012). In *Hague Water Quality*, the court reasoned that while a leaky window and the damaged drywall were part of the same integrated wall system, a defective water softener is not integral to the damaged drywall, flooring and woodwork. *Id.* The same is true here. The bathroom ceiling fan is not integral to the roof, rafters and other parts of the townhome that were destroyed by fire.

B. The Pendulum Has Swung Too Far.

Ventamatic raises a new argument that in *Koss Construction* Kansas embraced the “majority approach” as articulated in *East River S.S. Corp.* (Ventamatic Brief at 9). According to Ventamatic, Corvias’ argument “is a disguised attempt to adopt the intermediate approach” as articulated in *East River.* (Ventamatic Brief at 10). Not so.

This novel argument is near-sighted in that it fails to see how the economic loss doctrine has evolved under Kansas law since *Koss Construction*. Specifically, Ventamatic fails to view the economic loss doctrine through the lens of *David v. Hett*, in which the Kansas Supreme Court addressed whether to extend the economic loss doctrine to claims for negligent construction. In declining to extend the economic loss doctrine to negligent construction theories, the court emphasized the need to perform "an independent duty analysis," which the Appellate Court failed to employ in *Prendiville*. *David*, 293 Kan. at 702-03.

In *Prendiville*, the Court of Appeals did to the homeowner exactly what the district court did to Corvias in this matter. Both found that the product at issue was the entire home based on the integrated systems theory, so damage caused to the home by the exterior siding, and here the bathroom ceiling fan, constituted damage to the product itself. *Prendiville*, 32 Kan. App. 2d at 446. But if the contractor owed the homeowner an independent duty of care, then the economic loss doctrine does not apply. Likewise, a manufacturer of a household product owes a duty to ensure against unreasonably dangerous products as the result of defective design.

Here, Corvias offered admissible evidence on summary judgment that the bathroom ceiling fans contained a design defect that rendered them unreasonably dangerous. (R. Vol. 2 at 173-198). To allow the economic loss doctrine to suffocate that independent duty by means of the integrated systems theory is, as the court stated in *David v. Hett*, "allowing the pendulum to swing too far." *David*, 293 Kan. at 689.

CONCLUSION

For the reasons set forth herein and in its initial brief, Plaintiffs/Appellants Corvias Military Living, LLC, Corvias Military Construction, LLC respectfully request that this Court:

(1) Reverse the District Court's May 24, 2016 Journal Entry Judgment on Ventamatic's Motion for Summary Judgment;

(2) Reverse the District Court's June 20, 2016 Journal Entry Judgment on Jakel's Motion for Summary Judgment; and

(3) Grant such other relief as this Court deems necessary and proper.

Dated: February 28, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William J. Bahr, do hereby certify that on the 28th day of February, 2017, I filed the above by electronic filing with the Clerk of the Court of Appeals of the State of Kansas. I further certify that I mailed two (2) copies of the above and foregoing document, **Reply Brief of Appellants**, to each of the following:

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