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CLERK OF THE APPELLATE COURT
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., et al.,
Defendants-Appellees

BRIEF OF APPELLEE

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

James P. Nordstrom #06929
FISHER, PATTERSON, SAYLER & SMITH, L.L.P.
3550 S.W. 5th St.
Topeka, KS 66606
Phone: (785) 232-7761 / Fax: (785) 232-6604
jnordstrom@fisherpatterson.com

ATTORNEY FOR DEFENDANT/APPELLEE VENTAMATIC, LTD.

ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

This case involves claims filed by Corvias Military Living, LLC and Corvias Military Construction, LLC (hereinafter collectively referred to as "Corvias") seeking compensation for damage caused by two allegedly defective bathroom fans that were installed in two homes located at Fort Riley, Kansas. Appellee Ventamatic, Ltd. is the manufacturer of the bathroom fans, and co-Appellee Jakel Motors, Inc. is the manufacturer of the motors used in some of the fans. Ventamatic sold fans to product suppliers, who in turn sold some of the fans to subcontractors that Corvias hired to construct Fort Riley homes. Ventamtic and Corvias are not in privity. Corvias' main theory of recovery is product liability claim pursuant to the Kansas Product Liability Act. The district court found that Corvias' product liability claim was barred by the economic loss doctrine, and granted summary judgment in favor of Ventamatic and Jakel.

STATEMENT OF THE ISSUES

I. **The district court correctly found as a matter of law that the economic loss doctrine in conjunction with the integrated systems rule barred Corvias from recovering for the damage to the two townhomes.**

II. **The district court correctly found the bathroom fans were not inherently dangerous.**

STATEMENT OF FACTS

Corvias develops, builds, owns, and maintains privatized family housing units at Fort Riley, Kansas (R. III, 77.) Ventamatic is the manufacturer of "NuVent" model bathroom exhaust fans; some of the "NuVent" fans were powered by electric motors that were manufactured by Jakel. (R. III, 77.) Ventamatic sold the "NuVent" fans to product

suppliers, and two of those suppliers sold 3,785 fans to two Corvias subcontractors that were involved in the construction of Fort Riley homes. (R. III, 40, 77.) The construction of the homes, including installation of the 3.785 "NuVent" fans, was performed pursuant to Master Subcontractor Agreements entered into by Corvias and the subcontractors. (R. I, 129.) The basic model "NuVent" bathroom fan consists of a housing, a motor, a propeller, and a cover. (R. III, 40.) The "NuVent" bathroom fans were designed to vent moisture generated within bathrooms in residential dwellings. (R. II, 73.)

"NuVent" bathroom fans are installed by inserting the housing unit, which contains the motor and propeller, into a pre-cut space that is specifically sized to accommodate the installation of a bathroom fan. (R. II, 203-226.) In new construction, the ""NuVent" installation instructions provide that the housing should be mounted with wiring and duct during the rough-in phase. (R. II, 229.) The blower unit and grille should subsequently be installed after the ceiling is finished. (R. II, 229.) After installation is completed, the fan cover protrudes slightly from the ceiling opening and covers the opening containing the housing unit, wiring, and other components. (R. II, 211.) After the "NuVent" fans were installed in the Fort Riley housing units, Corvias, as well as a third party code inspector, inspected the electrical systems of the fans to ensure that the installation was done correctly. (R. II, 73.)

On June 12, 2012, a fire occurred in the first floor bathroom of the residence located at 22107-2 Pommel Street, Fort Riley, Kansas. (R. III, 77.) An investigator determined that the fire started after the plastic fan inside the housing unit ignited. (R. II, 234.) The investigator surmised that the motor inside the fan unit may have

malfunctioned and caused the fire. (R. II, 234.) The fire destroyed the fan unit and caused damage to the surrounding paint. (R. II, 232.) The damages sought by Corvias in connection with the June 12 fire are $656.26. (R. III, 77.)

On February 5, 2013, a fire occurred in the second-floor bathroom of the residence located at 21314-2 Pommel Place, Fort Riley, Kansas. (R. III, 77.) An investigator determined that the fire originated in the attic area near the exhaust port for the bathroom fan. (R. II, 237, 257.) The investigator did not identify a cause of the fire, but surmised that the fire may have been caused by a fan malfunction. (R. II, 238.) The February 5 fire caused heat and smoke damage to the bathroom, attic, and exterior portions of the residence. (R. II, 65, 240-41, 247-49.) The damages sought by Corvias in connection with the February 5 fire are $50,000. (R. III, 77.)

After the February 5 fire, Corvias unilaterally disconnected and removed the remaining 3,783 "NuVent" fans from approximately 1,248 undamaged housing units. (R. II, 291; R. III, 78.) Prior to the removal, Corvias did not inspect or perform any testing on the 3,783 fans to determine whether those fans were defective or malfunctioning. (R. II, 19-22.) After Corvias removed the 3,783 "NuVent" fans, engineers inspected six of the fans and determined that those fans had been correctly installed and were functioning properly. (R. II, 200.)

Corvias subsequently filed this action against Ventamatic, Jakel, and various other suppliers and subcontractors involved in the sale and installation of the "NuVent" fans in Fort Riley homes. (R. I, 125-145.) Corvias' Amended Petition asserted the following claims: (1) a product liability claim under the Kansas Product Liability Act; (2) claims for

breaches of express and implied warranties of merchantability; (3) a quantum meruit claim; (4) a claim under the Magnuson-Moss Warranty Act; and (5) breach of contract claims against two subcontractors that were involved in the purchase and installation of "NuVent" fans in Fort Riley homes. (R. I, 133-141.) The damages sought by Corvias consisted of $459,027.26 for the removal and replacement of the 3,783 undamaged "NuVent" fans and $50,656.26 for the property damage caused by the June 12, 2012 and February 5, 2013 fires. (R. III, 8.)

Corvias dismissed its claims with prejudice against the various suppliers and subcontractors. (R. I, 275-76; R. II, 37-38, 300-01, 401-03; R. III, 1-4.) Ventamatic and Jakel moved the district court for summary judgment on all remaining claims. (R. I, 286-304; R. II, 302-21.) The district court granted Ventamatic's and Jakel's motions. (R. III, 5-11, 63-72; R. IV 39-40; R. V, 55-60.) Specifically, the district court made the following findings: (1) Corvias' claim for $459,027.26 for the removal and replacement of the undamaged "NuVent" fans were commercial losses that were barred by the economic loss doctrine; (2) that the economic loss doctrine in conjunction with the integrated systems rule barred recovery of the $50,656.26 sought for the property damage caused by the June 12, 2012 and February 5, 2013 fires; (3) that the "NuVent" fans were not inherently dangerous; (4) that Corvias' breach of express warranty claim against Ventamatic was barred by the one-year limited warranty; and (5) that Corvias' quantum meruit and Magnuson-Moss Warranty Act claims failed as a matter of law. (R. III, 8-10, 67-71.) Corvias timely filed its notice of appeal. (R. III, 73-75.)

ARGUMENTS AND AUTHORITIES

Corvias appeals the district court's entry of summary judgment in favor of Ventamatic and Jakel. Ventamatic concurs with the standard of review applicable to appellate review of a district court's grant of summary judgment. Before addressing the issues raised by Corvias in this appeal, Ventamatic points out that Corvias has not challenged several rulings made by the district court. Corvias does not challenge: (1) the ruling that the economic loss doctrine bars recovery of the $459,027.26 expended to remove and replace the undamaged "NuVent" fans; (2) the ruling that Corvias' breach of express warranty claim was barred by the one-year limited warranty provision; and (3) the denial of Corvias' quantum meruit and Magnuson-Moss Warranty Act claims. Thus, Corvias has waived or abandoned those issues for the purposes of this appeal. *Andover v. Kan. Bankers Sur. Co.*, 290 Kan. 247, 281, 225 P.3d 707 (2010) (noting that "an issue not briefed on appeal is deemed waived or abandoned").

I. THE DISTRICT COURT CORRECTLY FOUND THAT CORVIAS' PRODUCT LIABILITY CLAIMS ARE BARRED BY THE ECONOMIC LOSS DOCTRINE BECAUSE THE BATHROOM FANS WERE INTEGRATED INTO THE HOMES.

The first two issues raised by Corvias are interrelated. First, Corvias contends that the district court erred when it found that Corvias suffered only economic losses. Second, Corvias disagrees with the district court's finding that the economic loss doctrine and the integrated system approach are questions of law for determination by the court. Essentially, Corvias' second issue implicates what standard of review applies to claims involving consideration of the economic loss doctrine. Thus, Ventamatic will first

address the standard of review that applies to claims involving the economic loss doctrine and the integrated system approach.

A. Application of the economic loss doctrine and the integrated system approach are questions of law to be determined by the court.

The district court determined that whether a particular component is integrated into a system or device for purposes of applying the economic loss doctrine is a matter of law for a court to decide. (R. III, 89.) Corvias disagrees with this finding and argues that application of the integrated systems approach as it relates to the economic loss doctrine presents a mixed question of law and fact that requires a trial.

Kansas courts have repeatedly affirmed that application of both the economic loss doctrine and the integrated system rule involve questions of law that a court should decide. *See Rinehart v. Morton Bldgs., Inc.*, 297 Kan. 926, 931, 305 P.3d 622 (2013) (stating that whether "economic loss doctrine applies in a case is an issue of law"); *Nw. Ark. Masonry, Inc. v. Summit Specialty Prod., Inc.*, 29 Kan. App. 2d 735, 741, 31 P.3d 982 (2001) (noting that whether the economic loss doctrine bars recovery in tort "is a question of law subject to unlimited review"); *Jordan v. Case Corp.*, 26 Kan. App. 2d 742, 743, 993 P.2d 650 (1999) (based on the facts, "the only question before the court involves questions of law"); *Koss Constr. v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 207, 960 P.2d 255 (1998) (concluding as a matter of law that defective hydraulic hose was component part of roller for purposes of the economic loss doctrine).

Likewise, at least one other court has concluded that application of the economic loss doctrine and the application of the integrated system approach are questions of law

for a court to decide. *Wilson v. Tuxen*, 2008 WI App 94, ¶ 9, 312 Wis.2d 705, 717, 754 N.W.2d 220 (2008) ("Whether the economic loss doctrine applies to a given set of facts is a question of law reviewed without deference."); *Prent Corp. v. Martek Holdings, Inc.*, 238 Wis.2d 777, 785, 618 N.W.2d 201 (2000) ("Whether the loss suffered by a commercial purchaser of a product is solely an economic loss is a question of law.").

Corvias' argument that application of the economic loss doctrine and the integrated system approach present mixed questions of law and fact is conclusory and undeveloped. Corvias' argument on this point consists of two sentences. (Corvias Appeal Brief, p. 7.) Furthermore, Corvias has failed to support its argument with any pertinent legal authority. "To preserve an issue for appellate review, a party must do more than incidentally raise the issue in an appellate brief. The party must present an argument and support that argument with pertinent authority or show why the argument is sound despite a lack of supporting authority or in the face of contrary authority. Otherwise, the argument will be deemed abandoned." *State v. Gomez*, 290 Kan. 858, 866, 235 P.3d 1203 (2010).

Corvias has abandoned its argument that the application of the economic loss doctrine and the integrated system approach present mixed questions of law and fact requiring resolution by trial. Accordingly, the court should find that application of these doctrines involve questions of law that are properly decided by the court.

B. Corvias suffered only economic loss because the fans were integrated into the two homes such that the fans were component-parts of the homes.

Corvias seeks to recover $50,656.26 for the property damage caused by the June 12, 2012 and February 5, 2013 fires. Corvias alleges that the fires were caused by a defective product—bathroom fans containing electrical motors that had a design defect. Corvias asserts that it has asserted claims under the Kansas Product Liability Act. *See* K.S.A. 60-3301—3307.

A product liability claim means a claim or action brought "for harm caused by the manufacture, production, making … design … assembly [or] installation of the relevant product." K.S.A. 60-3302(c). Such claims include, but are not limited to, "any action based on strict liability in tort, negligence, breach of express or implied warranty, or under any other substantive legal theory." *Id.* The purpose of the Kansas Product Liability Act "was to consolidate all product liability actions, regardless of theory into one theory of legal liability." *Patton v. Hutchison Wil-Rich Mfg. Co.*, 253 Kan. 741, 756, 861 P.2d 1299 (1993). The term "harm" under the Kansas Product Liability Act includes "damage to property" but "does not include direct or consequential economic loss." K.S.A. 60-3302(d).

The Kansas Product Liability Act does not define the terms "damage to property" or "direct or consequential economic loss." However, Kansas has adopted the economic loss doctrine, which provides that a commercial buyer of defective goods cannot assert a product liability action against the manufacturer when the only losses suffered are economic in nature. *Koss Constr.*, 25 Kan. App. 2d at 207. Economic loss includes

"damage to the product itself." *Id.* Economic loss also includes "damages for inadequate value, costs of repair, replacement costs, and loss of use of the defective product." *Nw. Ark. Masonry, Inc.*, 29 Kan. App. 2d at 742. Accordingly, in order to assert a product liability action against a manufacturer of an allegedly defective product, the purchaser must show that the harm in terms of damage to property consists of "damage to 'other property.'" *Id.* at 743.

In determining whether damage caused by a component-part of an object constitutes damage to the property itself or damage to other property, Kansas courts apply the integrated system approach. *Id.* Under that approach "'[d]amage by a defective component of an integrated system to either the system as a whole or other system components is not damage to "other property" which precludes the application of the economic loss doctrine.'" *Id.* at 744 (quoting *Wasau Tile, Inc., v. Cnty. Concrete Corp.*, 226 Wis.2d 235, 593 N.W.2d 445, 452 (1999)).

Here, the district court applied the integrated system approach and found that the bathroom fans were component parts that were installed and integrated into the Fort Riley homes. Accordingly, the district court found that any fire damage caused to the two houses by the allegedly defective fans was damage to the property itself, and thus economic loss that was barred by the economic loss doctrine. (R. III, 89-90.) Corvias disagrees and contends that the court's rulings were incorrect for three reasons.

First, Corvias contends its product liability claim is not precluded by the economic loss doctrine because the allegedly defective bathroom fans pose a safety risk that should be addressed by tort law. Second, Corvias contends that the products at issue are the

bathroom fans and not the homes. Third, Corvias contends that the bathroom ceiling fans were not component-parts of the homes. Ventamatic will address Corvias' first issue. The second and third issues raised by Corvias are essentially disagreement with the district court's application of the integrated system approach, and thus, Ventamtic will address those two issues together.

1. Public safety concerns do not avoid application of the economic loss doctrine when the only losses incurred are economic in nature.

Corvias argues that the district court misapplied the economic loss doctrine because the allegedly defective fans posed a safety risk to the residents of the homes. Specifically, Corvias argues that the allegedly defective fans endangered occupants of the homes because the fans could, and in fact did, malfunction and start fires inside the homes. A panel of this court considered and rejected this argument.

In *Koss Constr.*, the court relied on the United States Supreme Court's decision in *E. River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 106 S. Ct. 2295, 90 L.Ed.2d 865 (1986). In *E. River*, the Supreme Court discussed three distinct approaches to applying the economic loss rule: (1) the majority approach, which prohibits a buyer from maintaining a product liability action when the only injury is to the defective product itself; (2) the intermediate approach, which permits a buyer to maintain a product liability action when a defective product injures only itself and the defective product "endangers" persons or other property; and (3) the minority approach, which permits a buyer to maintain a tort action against a manufacturer for a defective product that only causes damage to the product itself. *E. River S.S. Corp.*, 476 U.S. at 868-69. The *Koss Constr.*

court considered the three approaches discussed and adopted the majority approach. *Koss Constr.*, 25 Kan. App. 2d at 204-06.

The *Koss Constr.* court proceeded to analyze whether property damage inflicted on a steamroller after a hydraulic hose malfunctioned was damage to the property itself for purposes of the economic loss doctrine. Koss argued that the court should not apply the economic loss doctrine because "the hydraulic hoses were unreasonably dangerous." *Id.* at 206-07. However, the court rejected this argument and noted that the Supreme Court in *E. River* "rejected an attempt to distinguish cases based on the manner in which the product is injured." *Id.* at 207. The *Koss Constr.* court agreed that damage to the "defective product itself is essentially economic loss" "regardless of how [the damage] occurs." *Id.*

Here, Corvias has suffered only economic loss. The court should reject Corvias attempt to circumvent the economic loss doctrine based upon purported safety concerns. Corvias' argument is a disguised attempt to adopt the intermediate approach to the economic loss doctrine or to craft an exception to the majority approach that would allow a party to assert a tort claim when an unreasonably dangerous product causes harm only to the product itself. The *Koss Constr.* court rejected both alternatives, and thus, this court should hold that Corvias' appeal to public safety as a means of avoiding application of the economic loss doctrine is unavailing.

2. Corvias sustained only economic loss because the bathroom fans were component-parts of the two homes.

Corvias also seeks to avoid application of the economic loss doctrine by claiming that the fire damage sustained in the two homes was damage to other property. Specifically, Corvias contends that the bathroom fans are stand-alone consumer products that are separate and distinct from the homes in which the fans were installed. Corvias asserts that the bathroom fans are "common electrical appliances" that are "no different from a coffeemaker, a dishwasher, a microwave, a television, or a refrigerator." (Corvias Appeal Brief, pp. 9-10.) Corvias maintains that when a stand-alone consumer electrical appliance malfunctions causing damage to the surrounding home, the damage to the home constitutes damage to "other property."

Corvias further asserts that the fire damage caused to the two homes by the allegedly defective bathroom fans was damage to "other property" because the fans were not component-parts or materials of the homes. Both of Corvias' arguments challenge the district court's finding that the bathroom fans were component-parts of the homes due to the fans being integrated into the overall structures. In any event, Corvias' arguments lack merit because they impose a narrow interpretation of what constitutes "other property" for purposes of the economic loss doctrine.

In *Nw. Ark. Masonry, Inc.*, the panel noted that the current "trend" is "to interpret 'economic loss' broadly to include damage that formerly was considered 'other property.'" 29 Kan. App. 2d at 743; *see also Lexington Ins. Co. v. W. Roofing Co., Inc.*, 316 F.Supp.2d 1142, 1148 (D. Kan. 2004) (noting that Kansas courts have "adopted a

relatively broad view of what constitutes the relevant integrated system for purpose of the economic loss doctrine"). For instance, in *Koss Constr.*, Koss argued it incurred damage to other property by claiming that the defective hydraulic hose was separate from the roller that was damaged. *Koss Constr.*, 25 Kan. App. 2d at 207. The court rejected this argument, concluding that damage to other property does not occur "when one defective part causes damage to another part within the same product." *Id.*

In *Nw. Ark. Masonry, Inc.*, the court extended the reach of the economic loss doctrine to encompass component-materials used in the construction of a building. In that case, the product was the building walls; the component-material was the defective mortar incorporated in the cement that was used to construct the walls. *Nw. Ark. Masonry, Inc.*, 29 Kan. App. 2d at 736-37. After the cement made with the defective mortar yielded walls of inadequate structural integrity, the subcontractor was required to tear down and rebuild the walls at its own expense. *Id.* at 737. To determine whether the defective walls qualified as damage to other property for purposes of the economic loss doctrine, the court adopted and applied the integrated system approach. *Id.* at 743-44. The court concluded that the subcontractor's product liability claims against the various component suppliers were barred by the economic loss doctrine because "the masonry wall was an integrated system composed of several component materials that were indistinguishable parts of the final product." *Id.* at 744.

Federal courts applying Kansas' economic loss principles have applied the integrated system approach to other discrete component parts that were installed or applied to buildings. *See Winchester v. Lester's of Minn., Inc.*, 983 F.2d 992, 996 (10th

Cir. 1993) (holding that plaintiff's claim for damages, expenses, and lost profits for hogs affected by ventilation system improperly installed in a hog house sounded in contract rather than tort); *Lexington Ins. Co.*, 316 F.Supp.2d at 1148-49 (holding that economic loss doctrine barred a product liability claim for property damage caused by wire mesh screens installed on downspouts incorporated into the roof of the building); *Full Faith Church of Love W., Inc. v. Hoover Treated Wood Prod., Inc.*, 224 F.Supp.2d 1285, 1290 (D. Kan. 2002) (holding that economic loss doctrine barred negligence claims for damage to roof truss lumber caused by application of fire retardant chemicals).

Moreover, in *Nw. Ark. Masonry, Inc.*, the panel approvingly cited case law from other jurisdictions that held that various building components, such as paving blocks, plywood, shingles, and other roofing materials, were component parts of the overall buildings. *See Nw. Ark. Masonry, Inc.*, 29 Kan. App. 2d at 743-44 (citing other case law applying integrated system approach). Notably, the *Nw. Ark. Masonry, Inc.* court endorsed the Wisconsin Supreme Court's application of the integrated system approach in *Wausau Tile, Inc. v. Cnty. Concrete Corp.*, 226 Wis.2d 235, 593 N.W.2d 445 (1999). Wisconsin courts have since extended the application of the integrated system approach and concluded that stucco, roofing shingles, and windows are component-parts of the buildings into which they are incorporated. *Linden v. Cascade Stone Co., Inc.*, 283 Wis.2d 606, 699 N.W.2d 189, 2005 WI 113 (2005); *Bay Breeze Condominium Assoc., Inc. v. Norco Windows, Inc.*, 257 Wis.2d 511, 651 N.W.2d 738, 2002 WI App 2005 (2002).

The Wisconsin Court of Appeals' analysis in *Bay Breeze Condominium Assoc., Inc.* is especially pertinent in this case.

> While the Association argues that the defective windows caused damage to interior and exterior walls and casements, these are but other component parts in a finished product. 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 were manufactured.

Bay Breeze Condominium Assoc., Inc., 257 Wis.2d at 527. Like windows, the bathroom fans are component-parts in a finished product—the homes. Bathroom fans and windows are installed in pre-fabricated spaces that are specifically designed in terms of dimension and location to accommodate each object and have no function apart from the buildings for which they were manufactured. As such, damage caused to a home by defective building materials or parts incorporated into the home qualifies as damage to the property itself; such damage is not damage to other property for purposes of the economic loss doctrine.

Corvias argues that the bathroom fans, not the homes, were the products at issue for purposes of applying the economic loss doctrine. Corvias contends that the fans were not component-parts that were integrated into the homes because the fans are stand-alone products, were purchased separately, and can be easily removed and replaced. However, the same could be said of windows, shingles, and other roofing materials. Those items are fungible products, can be purchased separately during building construction, and can be removed and replaced as the need arises. Nevertheless, those qualities did not prevent

those objects from being classified as component-parts of the homes into which they were incorporated.

Corvias also argues that the bathroom fans were not component-parts of the homes because the fans are similar to other electrical appliances, such as a coffeemaker, a dishwasher, a microwave, a television, or a refrigerator. Unlike those items, bathroom fans are placed in a fixed location, cannot be freely moved to other areas of a home, and are likely not transferred when a resident moves to a different home. Moreover, a resident cannot disconnect a bathroom fan and place it in another area of the house for use as a personal cooling device. Rather, a bathroom fan is limited in terms of location and functionality; such devices are located in bathrooms for the primary purpose of extracting ambient moisture. Consequently, Corvias' attempt to classify the bathroom fans as separate and transferrable consumer electrical appliances is unavailing.

Corvias cites two foreign cases for the proposition that property damage to a home caused by common consumer electronic appliances placed in the home is not barred by the economic loss doctrine. However, the household appliances involved in those two cases are not comparable to the bathroom fans, and thus, those cases are inapt. *See Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1582 (10th Cir. 1984) (holding that plaintiff's tort claim for damage caused by malfunctioning commercial dryer was barred by the economic loss doctrine because the essence of plaintiff's claims were to recover damages for "dryers [that] suffered from qualitative defects that rendered them unsuitable for their intended purpose"); *Elward v. Electrolux Home Prod., Inc.*, ___ F.Supp.3d ___, No. 15 C 9882, 2016 WL 5792391 (N.D. Ill. Oct. 4, 2016) (holding economic loss

doctrine did not warrant dismissal of negligence claims for property damage caused by malfunctioning dishwasher).

Here, dryers and dishwashers are not integrated or incorporated into realty in the same form, manner, or degree as bathroom fans such that those consumer electronic appliances qualify as component-parts of a building. Furthermore, the analysis in *Daitom, Inc.* and *Elward* is not instructive. Neither case analyzed or applied the integrated system approach. Additionally, both cases focused on the unreasonably dangerous attributes of the products in demarcating contract claims from tort claims. *Daitom, Inc.*, 741 F.2d at 1582; *Elward*, 2016 WL 5792391, at *4-5. Indeed, the *Elward* court acknowledged that Illinois has adopted an exception to the economic loss doctrine in instances where an unreasonably dangerous product causes a calamitous occurrence that damages other property. *Id.* This is the very exception that the *Koss Constr.* court declined to adopt. *See supra* § I.B.1. Regardless, this exception still requires proof of damage to other property. Corvias cannot satisfy this requirement because the damage to the homes was not damage to other property due to the fact that the fans were component-parts of the homes.

C. Corvias has failed to identify any disputed material facts that rendered summary judgment inappropriate.

Corvias contends that the district court's grant of summary judgment was inappropriate because there are disputed issues of material fact.

> An issue of fact is not genuine unless it has legal controlling force as to the controlling issue. The disputed question of fact which is immaterial to the issue does not preclude summary judgment. If the disputed fact, however, resolved, could not affect the judgment, it does not present a genuine issue of material fact. [Citation omitted.]

Mitchell v. City of Wichita, 270 Kan. 56, 59, 12 P.3d 402 (2000), quoting *Bergstrom v. Noah*, 266 Kan. 847, 871-72, 974 P.2d 531 (1999). Here, Corvias' scant, conclusory, and vague argument on this point is inadequate and amounts to an abandonment of this particular issue. *See State v. Gomez*, 290 Kan. 858, 866, 235 P.3d 1203 (2010). Nevertheless, even if the merits are addressed, the facts identified by Corvias are immaterial.

Corvias argues that several facts precluded the district court's finding that the bathroom fans were sufficiently integrated into the homes such that those fans became component-parts of the buildings. Specifically, Corvias points out that the fans were purchased separately, are stand-alone devices, and can be installed, removed, and replaced without any special knowledge or skill. (Corvias Appeal Brief, pp. 13-14.) However, Corvias fails to explain why these facts are material or how these particular product characteristics disqualify bathroom fans as component-parts of the homes in which they were installed. Furthermore, these facts are not material because they do not challenge or controvert other undisputed facts regarding the degree and extent to which the bathroom fans were integrated into the two homes. The fans were placed into pre-cut spaces specifically designed to accommodate the fans, were wired into place, and then attached to the walls or ceilings. These qualities rendered the fans component-parts of the homes.

Finally, Corvias references the fact that the trial court in *Nw. Ark. Masonry, Inc.*, did not enter judgment as a matter of law until after trial. Corvias appears to insinuate

that a trial on the merits is required before a trial court can reach a decision on the application of the integrated system approach. However, the decision in *Nw. Ark. Masonry, Inc.* does not support such a proposition. Indeed, courts have ruled on the application of the integrated system rule without the need for a trial. *Jordan v. Case Corp.*, 26 Kan. App. 2d 742, 743, 993 P.2d 650 (1999) (summary judgment motion); *Koss Constr.*, 25 Kan. App. 2d at 200 (motion for judgment on the pleadings).

Corvias has failed to identify any material facts that rendered summary judgment inappropriate. The district court correctly applied the integrated system approach and found that the bathroom fans were integrated into the homes such that the fans became component parts of the homes. As such, any damage to the two affected homes caused by alleged malfunctions in the bathroom fans was damage to the property itself and not damage to other property.

D. The costs incurred by Corvias in removing and replacing the 3,783 undamaged bathroom fans are economic losses that are barred by the economic loss doctrine.

In the district court, Corvias also sought $459,027.26 in damages for the removal and replacement of the 3,783 undamaged fans. The district court found that such damages were economic losses that were barred by the economic loss doctrine, and Corvias did not dispute this finding. (R. III, 69, 167-69.) Although Ventamtic contends Corvias has waived or abandoned its claim for the removal and replacement costs of the undamaged fans (*see supra* p. 4), Ventamatic will briefly address it out of an abundance of caution.

Kansas courts have affirmed that economic loss includes repair or replacement costs. *Nw. Ark. Masonry, Inc. v. Summit Specialty Prod., Inc.*, 29 Kan. App. 2d 735, 742,

31 P.3d 982 (2001); *Koss Constr. v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 206, 960 P.2d 255 (1998). In the district court, Corvias argued that its product liability claim for repair and replacement costs was not barred by the Kansas Product Liability Act's definition of harm or the economic loss doctrine because Corvias sought damages for harm to other property in addition to recovery for the losses incurred in removing and replacing the 3,783 undamaged fans.

Contrary to Corvias' argument, Corvias has not asserted a viable claim for damage to other property with an accompanying claim for repair and replacement costs. The damage to the two homes caused by the two bathroom fans that allegedly malfunctioned does not qualify as damage to other property because those fans were component-parts that were integrated into the homes. Because all of the fire damage sustained by the two homes is damage to the property itself, Corvias' claim for the removal and replacement of the 3, 783 undamaged fans is precluded by the economic loss doctrine. Such removal and replacement costs are direct or consequential economic losses that are barred by both the Kansas Product Liability Act and the economic loss doctrine. *See* K.S.A. 60-3302(d).

II. THE DISTRICT COURT CORRECTLY FOUND THAT BATHROOM FANS ARE NOT INHERENTLY DANGEROUS.

The district court declined Corvias' invitation to adopt a public policy exception and find that privity was not required for Corvias to assert breach of warranty claims against Ventamatic because the bathroom fans were inherently dangerous.

> The declaration of public policy is primarily a legislative function though courts have authority to declare a public policy which already exists and to base its decisions upon that ground, but in absence of a legislative declaration before

> courts are justified in declaring existence of public policy it should be so thoroughly established as a state of public mind so united and so definite and fixed that its existence is not subject to any substantial doubt.

Noel v. Menninger Found., 175 Kan. 751, 760, 267 P.2d 934 (1954).

In Kansas, "absent privity, a corporate purchaser who has incurred only economic loss may not maintain a cause of action for breach of the implied warranty of merchantability against a manufacturer." *Koss Constr. v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 209 960 P.2d 255 (1998). As previously discussed, Corvias has suffered only economic losses because there has been no damage to other property such that Corvias' breach of warranty claims are subsumed into a claim under K.S.A. 60-3302(c). The bathroom fans were component-parts of the homes, and thus, the damage to the homes caused by the alleged malfunctioning of those fans was damage to the property itself.

Alternatively, Corvias also argues that its breach of warranty claims are not barred due to lack of privity with Ventamatic because Corvias contends that the bathroom fans are inherently dangerous. In *Prof'l Lens Plan, Inc. v. Polaris Leasing Corp.*, 234 Kan. 742, 754, 675 P.2d 887 (1984), our Supreme Court noted that "[p]ublic policy reasons are the basis on which implied warranties have been extended to non-privity manufacturers whose inherently dangerous products cause physical injuries to buyers." However, extending this principle "for a buyer's economic loss is a major step, not to be taken lightly." *Id.* Courts applying Kansas law have sparingly extended the inherently dangerous public policy exception in order to hold that privity is not required to maintain a breach of warranty action against a product manufacturer. *Fullerton Aircraft Sales and*

Rentals, Inc. v. Beech Aircraft Corp., 842 F.2d 717, 721-22 (4th Cir. 1988) (extending exception to airplanes); *B.F. Goodrich Co. v. Hammond*, 269 F.2d 501, 506 (10th Cir. 1959) (extending exception to automobile tires).

Here, public policy does not support taking the "major step" of concluding that bathroom fans are inherently dangerous. Corvias has failed to demonstrate that the inherent dangerousness of bathroom fans is so thoroughly established as a state of public mind and so united, fixed, and definite that this fact is not subject to any substantial doubt. Indeed, the district court correctly found that bathroom fans are not inherently dangerous because those devices are more akin to a computer and its component parts, which are not inherently dangerous objects.

The district court correctly found that Corvias' breach of warranty claims were barred because Corvias incurred only economic losses and lacked privity with Ventamatic. Accordingly, the district court's grant of summary judgment on the breach of warranty claims was appropriate, and the court should affirm those rulings.

CONCLUSION

For the foregoing reasons, Ventamatic respectfully requests that this court affirm the district court's grant of summary judgment in favor of Ventamatic.

Respectfully submitted,

/s/ James P. Nordstrom

James P. Nordstrom #06929
Seth A. Lowry #24292
FISHER, PATTERSON, SAYLER & SMITH, L.L.P.
3550 S.W. 5th St.
Topeka, KS 66606
Phone: (785) 232-7761 / Fax: (785) 232-6604
Email: jnordstrom@fisherpatterson.com
slowry@fisherpatterson.com

Attorneys for Defendant Ventamatic, Ltd.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by electronic mail on the 3rd day of February, 2017, on the following:

William J. Bahr
ARTHUR-GREEN LLP
801 Poyntz Avenue
Manhattan, KS 66502
bahr@arthur-green.com
Attorneys for Plaintiffs/Appellants

Charles L. Philbrick
RATHJE & WOODWARD, LLC
300 E. Rossevelt Road, Suite 300
Wheaton, IL 60187
cphilbrick@rathjewoodward.com
Attorney for Plaintiffs/Appellants

David E. Rogers
Daniel J. Buller
FOULSTON SIEFKIN, LLP
1551 N. Waterfront Pkwy, Ste. 100
Wichita, Kansas 67206
Attorneys for Defendant/Appellee Jakel, Inc.
n/k/a Jakel Motors Incorporated

/s/ James P. Nordstrom
James P. Nordstrom