

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 3, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1068

Cir. Ct. No. 2003CV4067

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**THE ESTATE OF DRAGOMIR KRESOVIC BY ROCHELLE Y. KRESOVIC,
PERSONAL REPRESENTATIVE, AND BORISLAV KRESOVIC,
D/B/A CB INVESTMENTS,**

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

FLOORING BROKERS, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court
for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 FINE, J. The Estate of Dragomir Kresovic, d/b/a CB Investments, sued Flooring Brokers, Inc., Armstrong World Industries, Inc., and Florstar Sales, Inc., for breach of contract and misrepresentation. Armstrong World and Florstar Sales settled with CB Investments, and Flooring Brokers went to trial. A jury awarded CB Investments \$39,690 in damages on the breach-of-contract claim. The trial court dismissed the misrepresentation claim. Flooring Brokers claims that the trial court erred when it denied Flooring Brokers’s motion to reduce the damage award by settlement payments Armstrong World and Florstar Sales made to CB Investments before the trial. We affirm.

¶2 CB Investments cross-appeals, claiming that the trial court erred when it dismissed the misrepresentation claim under the economic-loss doctrine. See *Linden v. Cascade Stone Co.*, 2004 WI App 184, ¶7, 276 Wis. 2d 267, 276, 687 N.W.2d 823, 825 (“The economic loss doctrine is a judicially created doctrine under which a purchaser of a product cannot recover from a manufacturer on a tort theory for damages that are solely economic.”) (quoted source omitted). We accept CB Investments’s assertion that our rejection of Flooring Brokers’s challenge to the appealed judgment renders its cross-appeal moot.

I.

¶3 CB Investments owns the Cameo Care Center, a nursing home in Milwaukee. In June of 2002, CB Investments contracted with Flooring Brokers to install vinyl flooring in the hallways and common areas of Cameo for \$38,500. The flooring was manufactured by Armstrong World and distributed to Flooring Brokers by Florstar Sales.

¶4 In an amended complaint, CB Investments sued Flooring Brokers, Armstrong World, and Florstar Sales, alleging that the flooring was defective and

improperly installed. Specifically, CB Investments: (1) sued Flooring Brokers for breaching the installation contract; (2) sued Flooring Brokers, Armstrong World, and Florstar Sales for negligently misrepresenting the durability and strength of the flooring; and (3) sued Flooring Brokers and Armstrong World for: (a) breaching their respective one-year and five-year installation warranties, and (b) breaching an implied warranty that the flooring was fit for a particular purpose.¹ CB Investments's amended complaint requested damages it claimed to have sustained: (1) \$80,000 from Flooring Brokers for the defective flooring and improper installation; (2) \$75,000 from Flooring Brokers and Armstrong World for breaching their warranties; and (3) \$75,000 from Flooring Brokers, Armstrong World, and Florstar Sales in connection with the negligent-misrepresentation claim.

¶5 CB Investments settled its claims against Armstrong World and Florstar Sales for an amount that does not appear in the Record and, apparently has not been disclosed to Flooring Brokers. CB Investments also successfully moved *in limine* to preclude Flooring Brokers from introducing at the trial evidence of, or referring to, the claims against Armstrong World and Florstar Sales. Flooring Brokers does not challenge this ruling on appeal.

¶6 As we have seen, the claims against Flooring Brokers were tried to a jury.² The jury found that Flooring Brokers breached its contract and warranties,

¹ CB Investments also sued Florstar Sales for breaching an implied warranty that the flooring was fit for a particular purpose. Florstar Sales moved to dismiss the claims against it. The trial court dismissed the breach-of-implied-warranty claim. This matter is not before us.

² The jury-trial transcript is not in the Record. It is the duty of the appellant to ensure that the Record is sufficient for an appellate court to decide the issues presented by the appeal. *State Bank of Hartland v. Arndt*, 129 Wis. 2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986).

and awarded \$39,690 to CB Investments. As material, the special verdict returned by the jury reads:

Question 1: Did Flooring Brokers breach its agreement with Cameo Care Center by failing to properly install flooring at the Cameo Care Center?

Answer: Yes

Question 2: Did Flooring Brokers breach an express installation warranty to Cameo Care Center?

Answer: Yes

Question 3: Did Flooring Brokers breach an implied warranty of the flooring's fitness for a particular purpose?

Answer: Yes

Question 4: [*Only if you have answered "yes" to at least one of the preceding questions, then answer this question.*] What sum of money will fairly and reasonably compensate Cameo Care Center for Flooring Brokers' breach of the contract or breach of any express or implied warranty?

Answer: \$39,690.00

(Bolding, italics, and brackets in original.)³

¶7 Flooring Brokers filed post-verdict motions seeking, as material, to: (1) dismiss the misrepresentation claim, contending that it was barred by the economic-loss doctrine, and (2) reduce its damages on the contract claim by the

³ The jury also found that Flooring Brokers and Florstar Sales negligently misrepresented the "appropriateness" of the flooring for use at the nursing home, attributed forty percent of the negligence to Flooring Brokers and sixty percent of the negligence to Florstar Sales, and awarded CB Investments \$38,500 in damages in connection with the negligent-misrepresentation claim. As explained in the main body of this opinion, our resolution of Flooring Brokers's appeal moots CB Investments's cross-appeal challenging the trial court's ruling that CB Investments's misrepresentation claim was barred by the economic-loss doctrine.

amounts Armstrong World and Florstar Sales paid in settlement. As we have seen, the trial court granted Flooring Brokers's motion to dismiss the misrepresentation claim under the economic-loss doctrine, but denied the motion to offset Flooring Brokers's damages, explaining:

I've indicated my concern here that the plaintiffs ought not to get an easy windfall but I'm not aware of any authority that allows me to require the disclosure of this settlement and then try to find some equitable adjustment, decide who gets the money, if any, that ought to be returned. And I don't accept [Flooring Brokers's] argument that the jury's verdict ought to control the total damages. Otherwise we'd be putting the plaintiff in the position of adjusting their trial strategy, not just based on what they want to get out of that lawsuit between the plaintiff and that defendant but somehow anticipate a hearing down the road over who gets the money or what gets returned and have to prove a different damage case than they would otherwise prove.

The trial court then entered judgment in favor of CB Investments.

II.

¶8 On appeal, Flooring Brokers contends that it is entitled to have the \$39,690 damage award on the breach-of-contract claim reduced by the amounts Armstrong World and Florstar Sales paid in settlement. It argues that since the collateral-source rule, *see Koffman v. Leichtfuss*, 2001 WI 111, ¶29, 246 Wis. 2d 31, 47, 630 N.W.2d 201, 209 (“Under the collateral source rule a plaintiff's recovery cannot be reduced by payments or benefits from other sources.”), does not apply to contract actions and the damages were established by the jury, we should reverse and remand this case to the trial court so that it can review

in camera the settlement agreements and reduce the judgment by the amounts Armstrong World and Florstar Sales paid.⁴ We disagree.

¶9 Flooring Brokers's post-trial motion to have the trial court apportion damages between the three original defendants, Flooring Brokers, Armstrong World, and Florstar Sales, presents a legal issue that we review *de novo*. See, e.g., *Kailin v. Armstrong*, 2002 WI App 70, ¶18, 252 Wis. 2d 676, 693, 643 N.W.2d 132, 141 (appellate court reviews legal issues *de novo*). The critical flaw in Flooring Brokers's argument is that it did not cross-claim against Florstar Sales and Armstrong World to have them pay their fair share of CB Investments's damages resulting from the alleged breach by them of their contracts with CB Investments. If Flooring Brokers had done so, the jury would have been able to determine the extent to which the various alleged breaches of contract contributed to CB Investments's damages.⁵ Without that determination, there is no way, as the trial court recognized, to assess: (1) the total of CB Investments's damages caused by the alleged breaches of contracts by Flooring Brokers, Armstrong World, and Florstar Sales, or (2) how to apportion whose breach caused what aspect of those

⁴ There is nothing in the Record that indicates whether the settlements had clauses authorized by *Pierringer v. Hoger*, 21 Wis. 2d 182, 191–193, 124 N.W.2d 106, 111–112 (1963) (A *Pierringer* release operates to impute to the settling plaintiff whatever liability in contribution the settling defendant may have to non-settling defendants and to bar subsequent contribution actions the non-settling defendants might assert against the settling defendants.).

⁵ As we have already seen in footnote 1, the trial court dismissed CB Investments's breach-of-warranty claim against Florstar Sales, and did so before CB Investments settled with Florstar Sales. Thus, presumably Florstar Sales's settlement with CB Investments was for: (1) the then still extant misrepresentation claim against Florstar Sales, and (2) whatever risk Florstar Sales perceived that CB Investments could get the dismissal of the breach-of-warranty claim reversed on appeal. Flooring Brokers has not contended on this appeal that the trial court erred in dismissing CB Investments's breach-of-warranty claim against Florstar Sales. As we have also seen, the trial court granted CB Investments's motion *in limine* to prevent the jury from considering its claims against Armstrong World and Florstar Sales, and Flooring Brokers does not appeal that ruling either.

damages. See *Housing Auth. of City of Milwaukee v. Barrientos Designs & Consulting, L.L.C.*, 2006 WI App 203, ¶4, ___ Wis. 2d ___, ___, 724 N.W.2d 395, 397 (equal contribution between parties whose breach of contract causes damages to plaintiff is only available if the damages cannot be apportioned between the breaching parties).

III.

¶10 CB Investments cross-appeals, claiming that the trial court erred when it dismissed the misrepresentation claim against Flooring Brokers under the economic-loss doctrine. As we have noted, CB Investments concedes that “[i]f the Court affirms the trial court’s denial of Flooring Brokers’ motion to reduce the contract-based damages, this cross-appeal becomes moot.” Accordingly, we do not discuss or decide the cross-appeal. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.

