IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PROTECTIVE INSURANCE COMPANY,

Plaintiff,

v.

DAIMLER TRUCKS NORTH AMERICA, LLC,

Defendant.

OPINION AND ORDER

11-cv-46-bbc

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This civil case for money damages is before the court on two motions: defendant Daimler Trucks North America, LLC's motion to dismiss plaintiff Protective Insurance Company's tort causes of action and the motion of Ronald Wilda and Connie Wilda to intervene. Both motions will be denied.

BACKGROUND

Plaintiff brought this action in the Circuit Court for Barron County, Wisconsin on December 20, 2010, alleging that on December 8, 2008, a 2007 Freightliner truck belonging to Ron and Connie Wilda had caught on fire and burned, causing damages to the truck of

approximately $127,000. Plaintiff alleged that the fire was caused by the truck's defective design, manufacture, assembly or installation of the battery cable to the starter and that the fire rendered the 2007 Freightliner a total loss and "result[ed] in further damages." Cpt., dkt. #1-1, at ¶ 3. Plaintiff alleged four causes of action: (1) negligence; (2) strict liability; (3) failure to warn; and (4) breach of warranty.

On January 21, 2011, defendant removed the case to this court, alleging that federal jurisdiction existed because the parties are of diverse citizenship. Plaintiff is an Indiana corporation with its principal place of business in Indiana and defendant is a Delaware limited liability company with only one constituent member, a Delaware corporation with its principal place of business in New Jersey.

On October 14, 2011, defendant filed its motion for judgment on the pleadings to dismiss plaintiff's tort claims. On October 31, 2011, Ron and Connie Wilda moved under Fed. R. Civ. P. 24 to intervene in the lawsuit. The Wildas sought an award of damages for loss of property in addition to the truck, as well as loss of past and future earning capacity.

OPINION

A. Defendant's Motion to Dismiss Plaintiff's Tort Claims

In its motion for judgment on the pleadings under Fed. R. Civ. P. 12(c), defendant argues that Wisconsin's economic loss doctrine applies to the claims. Under that doctrine,

a party may not recover in tort for purely economic damages. Sunnyslope Grading v. Miller, Bradford & Risberg Inc., 148 Wis. 2d 910, 915, 437 N.W.2d 213, 215 (1991). In other words, a party seeking damages for the destruction of allegedly defective property cannot sue in tort.

> The economic loss doctrine is a judicially created doctrine intended to preserve the boundary between tort and contract. . . . In Wisconsin, the economic loss doctrine is based on three fundamental premises. It seeks "(1) to maintain the fundamental distinction between tort law and contract law; (2) to protect commercial parties' freedom to allocate economic risk by contract; and (3) to encourage the party best situated to assess the risk of economic loss, [that is] the commercial purchaser, to assume, allocate or insure against that risk."

Grams v. Milk Products, Inc., 2005 WI 112, ¶ 13, 283 Wis. 2d 511, 520, 699 N.W.2d 167, 171 (2005) (quoting Daanen & Janssen, Inc. v. Cedarapids, Inc., 216 Wis. 2d 395, 403, 573 N.W.2d 842, 846 (1998)). Only if the defect in the property caused physical injury to persons or to property other than the product can the injured party sue in tort. Daanen, 216 Wis. 2d at 402, 573 N.W.2d at 846. Determining whether damaged property is "other property" is not always easy, particularly when a system is involved. Wisconsin incorporates the "integrated system" concept, so that it treats all of the components in a system as one system. If one of the components proves defective and causes damages to another component, the resulting damage is not treated as damage to "other property." Grams, 2005 WI 112, ¶¶ 27-28, 283 Wis. 2d at 526-527, 699 N.W.2d at 174-75. Wisconsin does not limit the doctrine to systems that are physically combined, but applies it in situations

in which "a product is expected and intended to interact with other products and property" so that "it naturally follows that the product could adversely affect and even damage that property." Id. at ¶ 47, 283 Wis. 2d at 535, 699 N.W.2d at 179.

Defendant believes that it is entitled to judgment on the pleadings dismissing plaintiff's three tort claims because plaintiff has not alleged that any other property was damaged or any person injured. It is true that plaintiff said nothing in its complaint that would support tort claims. It said only that the fire to the truck "result[ed] in further damages," without giving any indication of what those damages might be. It was not until plaintiff filed its brief in opposition to defendant's motion, dkt. #33, that it identified six items that were damaged by the fire and reimbursed by plaintiff under its policy with the Wildas. Id. at 3. These include a flat screen TV, a refrigerator and freezer, DVD player, a microwave, space heater and removable C-Link owned by Fed Ex Custom Critical. Id. Plaintiff does not say where these items were located or why it deemed them covered under the Wildas's insurance policy, which makes it impossible to determine whether they might be considered part of the truck "system." If they were, the "integrated system test" might come into play. In that instance, plaintiff would have no reason to pursue tort claims against defendant.

Ordinarily, claims such as defendant's would be brought by way of a motion for summary judgment, which would give plaintiff an opportunity to submit proposed facts

fleshing out the details of its damages claims. Under Fed. R. Civ. P. 12(c), however, a defendant is permitted to move for judgment on the pleadings after the complaint and answer have been filed, so long as the motion comes early enough not to delay the trial. Such a motion is to be granted only if it appears beyond dispute that the plaintiff cannot prove any facts to support its claims for relief. I cannot say that defendant has met that standard. Although plaintiff could have done a better job of pleading if it wanted to assert tort claims for damage to other property, I agree with plaintiff that it would be premature to dismiss the tort claims at this point.

2. Motion to Intervene

To intervene as of right under Fed. R. Civ. P. 24(a)(2), the proposed intervenor must meet the following requirements: (1) the application must be timely; (2) the applicant must have an interest in the property or transaction that is the subject of the action; (3) disposition of the action as a practical matter may impede or impair the applicant's ability to protect that interest; and (4) no existing party adequately represents the applicant's interest. Rule 24(a). In moving for intervention as of right, the Wildas assert that they meet each of these requirements.

The biggest obstacle for the Wildas is that of timeliness. This case is set for trial in March 2012, only three months from now. The Wildas waited to file their motion for

almost three years from the date of the fire and 11 months after their insurer began this action. They do not explain why they did not file earlier and they have not alleged any specific damages that they suffered, despite having had three years in which to identify and calculate them. Thus, even if the Wildas could show they have a protected interest in the outcome of a case alleging that defendant has a duty to make plaintiff whole for the insurance proceeds it paid, it is too late for them to file.

Moreover, the outcome of this case will not impede the Wildas from seeking to recover damages from defendant even if they are not permitted to intervene in this action. They will not lose any rights. It is true that if the Wildas are not allowed to intervene in this case they will have to pursue their own suit against defendant in order to recover the additional amounts they are seeking as damages over and above the amount paid them by plaintiff under their insurance policy, but they will not be precluded from suing or limited with respect to the damages they can seek.

ORDER

IT IS ORDERED that the motion for judgment on the pleadings filed by defendant Daimler Trucks North America LLC, dkt. #27, is DENIED and the motion to intervene filed

by proposed intervenors Ron and Connie Wilda, dkt. #29, is DENIED as well.

Entered this 15th day of December, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge