No. COA 16-692 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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BRADLEY WOODCRAFT, INC. Plaintiff-Appellee, v. CHRISTINE DRYFUSS a/k/a CHRISTINE BODDEN, Defendant-Appellant.	)	From Wake County

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BRIEF OF PLAINTIFF-APPELLEE BRADLEY WOODCRAFT, INC.

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C. The Trial Court Correctly Directed A Verdict On Bodden's Fraud Claim When The Evidence Disclosed Only Mere Breach of Contract.

It is well-established that a "tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract." *Khaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 43, 587 S.E.2d 470, 476 (2003) (quoting *Spillman v. Am. Homes*, 108 N.C. App. 63, 65, 422 S.E.2d 740, 741-42 (1992)); *see also Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 111, 229 S.E.2d 297, 301 (1976) (recognizing the general rule in North Carolina that "punitive or exemplary damages are not allowed for breach of contract"). "Under general principles of the law of torts, a breach of contract does not in and of itself provide the basis for liability in tort. Ordinarily, an action in tort must be grounded on a violation of a duty imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties, rather than one based on an agreement between the parties." *Asheville Contracting Co. v. City of Wilson*, 62 N.C. App. 329, 342, 303 S.E.2d 365, 373 (1983). In this regard, mere breach of contract does not constitute a fraud claim; "[o]nly where a breach of contract

also constitutes an 'independent tort' may tort actions be pursued." *Strum v. Exxon Co., USA*, 15 F.3d 327, 330 (4th Cir. 1994) (applying North Carolina law).

These principles—often referred to collectively as the "economic loss doctrine"—are regularly applied to bar attempted fraud claims based on conduct that is, at bottom, nothing more than a breach of contract. *See, e.g., Medfusion, Inc. v. Allscripts Healthcare Solutions, Inc.*, 2015 NCBC LEXIS 34, **23-25 (N.C. Bus. Ct. Mar. 31, 2015) (ruling that the economic loss doctrine confined plaintiff's relief to its breach of contract claim and barred plaintiff's claim for fraud and fraudulent inducement); *see also Forest2Market, Inc. v. Arcogent, Inc.*, 2016 NCBC LEXIS 3, *23 (N.C. Bus. Ct. Jan. 5, 2016) (dismissing fraud, negligent misrepresentation, and negligent supervision claims that were grounded on conduct that was a breach of contract). As has been reasoned, any attempt to "manufacture a tort dispute out of what is, at bottom, a simple breach of contract claim" is "inconsistent both with North Carolina law and sound commercial practice." *Forest2Market,* 2016 NCBC LEXIS *23 (quoting *Strum*); *see also Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 346-47 (4th Cir. 1998) (applying North Carolina law and recognizing that it is "unlikely that an independent tort could arise in the course of contractual performance,

since those sorts of claims are most appropriately addressed by asking simply whether a party adequately fulfilled its contractual obligations") (citation omitted)).

Here, the trial court properly applied the economic loss doctrine, and the principles underlying it, by granting Woodcraft's motion for a directed verdict. Bodden admitted that her claims of misrepresentations were based solely on the provision and installation of goods and materials performed pursuant to the parties' contract. (T p 300) Because the only duty between Bodden and Woodcraft arose from the agreement between the parties for the home improvement construction work, Bodden's claim against Woodcraft is, at its heart, a breach of contract claim. Thus, the trial court correctly directed a verdict on Bodden's fraud claim and confined her action to a breach of contract claim. *See Mecklenburg Cnty. v. Nortel Gov't Solutions, Inc.*, 2008 U.S. Dist. LEXIS 110381, at **12-13 (W.D.N.C. Apr. 1, 2008) (recognizing that, even though plaintiff "ma[de] a compelling argument that Nortel tortiously made representations to the County which induced the County to continue the contract, make payments, and sign the addendum," because the "heart of [the plaintiff's] allegation [was] the performance of the contract," the economic loss rule barred the tort claims based on those fraudulent statements).

D. Bodden's Cited Cases Are Inapposite As No Evidence Supports A Reasonable Inference That There Was No Intent To Perform.

Bodden's reliance on cases that allow a fraud claim to proceed in the presence of a contract also misses the mark as those cases all involved dramatically different factual circumstances than those present here. While Bodden admitted that all of the misrepresentations about which she complains related to the materials supplied and installation done pursuant to the contract (T p 300), the cases cited by Bodden involve independent, tortious conduct. *See, e.g., Dailey v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 331 S.E.2d 148 (1985) (involving insurer's bad faith refusal to settle a claim) (*See* Appellant Brief at 16).

Bodden relies on *Jones v. Harrelson & Smith Contractors, LLC*, 194 N.C. App. 203, 670 S.E.2d 242 (2008), without recognizing that it illustrates exactly how Bodden's fraud case is not viable. (*See* Appellant Brief at 16, 20) In *Jones*, after Hurricane Floyd, the local county entered a contract with the defendant company to, among other things, sell salvaged houses at a subsidized, low price and move them to a buyer's property. *Id.* at 205, 678 S.E.2d at 245. That contract prohibited the salvaged houses from being moved to a location in the flood plain. *Id.* The defendant nevertheless sold a home to plaintiff Jones with the knowledge that she intended to locate it in the flood plain without disclosing the prohibition on the flood plain, while