STATE OF WISCONSIN
SUPREME COURT

THOMAS WASCHER and PAMELA WASCHER,
Plaintiffs-Appellants-Cross-Respondents-Petitioners,

vs.

ABC INSURANCE COMPANY,
CONTINENTAL WESTERN INSURANCE COMPANY,
NATURAL SURFACES, LLC, and
WILSON MUTUAL INSURANCE COMPANY,
Defendants-Respondents-Respondents,

District III Appeal No. 2020AP001961

Circuit Court Case No. 2018CV001112

CARVED STONE CREATIONS,
Defendant-Respondent-Cross-Appellant-Respondent.

An Appeal from a Judgment Entered November 19, 2020
In the Circuit Court for Outagamie County,
The Honorable Carrie A. Schneider, Presiding
(Circuit Court Case No. 2018CV001112)

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

STATEMENT OF ISSUES FOR REVIEW

1. Did a 10-year statute of repose under Wis. Stat. §893.89(2) bar tort claims when the failure to install flashing that the architectural plans required concealed the deficiency, or did the flashing's absence mean "substantial completion" had not occurred?

2. Did the 6-year breach of contract statute of limitations under Wis. Stat. §893.43 start to expire before damage occurred?

3. a. Did either the repair doctrine or the continuous treatment rule extend the statutes of limitation and repose when the parties worked collaboratively to discover the reason for stones falling off the house, the full cause went unidentified until 2014, and the Waschers followed the Defendants' advice about repairs?

b. Did the lower courts possess an obligation to address this issue, or can they abdicate responsibility simply because higher courts had not addressed the question?

4. Did providing Defendants the statutorily required notice under Wis. Stat. §895.07(2) extend the statutes of limitations and repose?

5. Did the statute of repose bar the Waschers' claim for an injunction requiring the Defendants to remediate the installation to eliminate the future hazard of heavy stones falling, when the statute applies only to actions for "damages" and laches governs time limits for obtaining injunctions?

6. Did Wisconsin's products liability law (Wis. Stat. §895.047) and the 15-year statute of repose it imposed apply when Natural Surfaces sold an inadequate mortar mix and supplied, made and installed mortar too weak to hold the stones in place?

7. Did the Waschers' complaint state tort claims that avoided the economic loss doctrine when the complaint alleged damage had

occurred to other property the Waschers owned, large stones falling from great heights without warning presented a public safety risk, and the stone cladding was not integral to the home's function, as overlay sheathing protected it?

The circuit court found against the Waschers on each of these issues and dismissed all claims against Natural Stone and Continental Western and those claims against Carved Stone deriving from original construction. (R. 84; P.App.036-050). Tort and contract claims against Carved Stone for damages as a result of its work in 2012 and thereafter remained. (R. 84:13-15; P.App.051-053). The Court of Appeals affirmed on largely the same grounds. (P.App.008).

STATEMENT OF REASONS FOR REVIEW

The case presents novel and important questions requiring clarification from this Court, plus the decision contradicts this Court's precedent, (*infra* pp.15-17), other Court of Appeals' holdings, (*infra* pp.11-13), and several basic legal principles. The case merits this Court's review because the lower courts added words to one statute (§893.89(4), Stats.) and subtracted terms from another (§893.89(2), Stats.). (*Infra* pp.16-19, 27). The decision ignores case law from this Court directly contradicting its conclusions (*infra* pp.16, 20, 28-9) and even adds holdings prior appellate decisions it cites never included. (*infra* pp.11-12, 12-14).

This case, therefore, presents questions of first impression or ongoing importance in serious need of clarification. For example, what constitutes "substantial completion" under the statute of repose is a novel question justifying review, a point recent correspondence from a prominent lawyer seeking publication underscores. (P.App.112-113).[1] So, too, the mistaken notion that suits for breach of contract accrue before damage occurs seems so wrong that it should be beyond

[1] The court agreed, withdrawing its original opinion and reissuing an authored opinion on February 9, 2022. (P.App.114).

controversy, but the lower courts held that the Waschers' time to sue started when these contractors first committed mistakes, even before the house sustained damage. (P.App.017). (*Infra* pp.19-21). That ruling contradicts the rule that causes of action first accrue only when all elements supporting a judgment exist. The Court of Appeals refused to address the repair doctrine or continuous negligent treatment rule on the theory that they involve new law, supposedly beyond the court's power to implement. (P.App.022-023). But lower courts possess the constitutional obligation to rule even when higher courts have not spoken, and neither doctrine is new law, for Wisconsin courts have applied the continuous negligent treatment rule before, and other states' courts have applied the repair doctrine for years.

Early in this case, the circuit court applied the economic loss doctrine to preclude most tort claims. (P.App.052-055). The discovery rule controls tort statute of limitations rules, so misapplying the doctrine deprived the Waschers of critical rights. *Hansen v. A.H. Robins, Inc.*, 113 Wis.2d 550, 560, 335 N.W.2d 578 (1983).

The doctrine's importance for this case aside, the economic loss doctrine needs comprehensive review. The doctrine is a mass of technicalities, inconsistencies, and contradictions, and, as this case demonstrates, its perplexing dilemmas only multiply. A "confoundingly expanding legal doctrine," it requires a "critical analysis of the rule's place and application, rather than the trivial invocation of the rule to stem the tide of commercial tort litigation, in an apparent attempt at judicial tort reform." *Grams v. Milk Prod., Inc.*, 2005 WI 112, ¶57, 283 Wis.2d 511, 539 (Abrahamson, C. J., dissenting) (quotation omitted). A similar dissent likened the doctrine to an "ever-expanding, all-consuming alien life form" and called it "a swelling globule on the legal landscape of this state." *Wisconsin Pharmacal Co., LLC v. Nebraska Cultures of California, Inc.*, 2016 WI 14, ¶87, 367 Wis.2d 221, 263.

The doctrine provides a profound example of the hazards of judicial policymaking. Courts created the doctrine, despite extensive

legislation about commercial relationships in the Uniform Commercial Code and the Wisconsin Consumer Act, and on products liability, §895.047, Stats., construction claims, Wis. Stat. §895.07, and trade practices in Chapters 133 and 134, and elsewhere. No statute adopts the economic loss doctrine, yet Wisconsin courts impose it by edict. The doctrine rewrites contracts between the parties, negating tort remedies even when no one agreed to that limitation. Wisconsin Constitution Article I, Section 12, forbids impairing contract rights, yet adding unbargained terms by judicial decree threatens that principle. Courts compound the problem because they create these rules case by case, principle by principle. This type of judicial legislating inevitably produces flaws, contradictions, and confusion, because courts addressing a single case cannot consider widespread implications, as legislatures do, or address the subject comprehensively. Nowadays, commercial parties must wait for judicial decisions to learn their ever changing rights under the doctrine.

Two examples of the doctrine's many contradictions: *Linden v. Cascade Stone Co., Inc.*, 2005 WI 113, ¶6, 283 Wis.2d 606, concluded the *Cease Electric* rule—that providing services rather than goods falls outside the doctrine—failed to apply when the defendant provided services through a subcontract to a general contract that involved goods. Thus, under *Cease Electric*, a property owner contracting directly with the service provider possessed tort claims, but under *Linden*, no tort claims existed despite the absence of a contract altogether. That is a perplexing rule for a doctrine intended to prevent litigants from circumventing existing contracts by invoking the law of tort.

Mechanical, Inc. v. Venture Electrical Contractors, Inc., 2020 WI App 23, 392 Wis.2d 319, again applied the doctrine, this time to bar one subcontractor's claim against another, when those two companies lacked a contract between them and neither contracted with the general contractor. *Venture* claimed that Mechanical's unwarranted delays caused it large financial losses. The court concluded that even

though no contract existed and one solely supplied services, the economic loss doctrine applied simply because they were associated on the same project. The court reasoned that *Venture* had the opportunity to address the risk of economic loss but never answered the obvious question: With whom? The parties lacked privity, and why a general contractor would agree to indemnify one subcontractor for losses experienced due to another subcontractor's neglect defies common sense. *Mechanical* claimed that its holding was "a natural progression from *Sunnyslope*," where the economic loss doctrine originated, ironically reasoning that precluding all remedies against a wrongdoer with whom no agreement existed somehow protects the integrity of contracts.

Many similar contradictions have developed over the years since *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis.2d 395, 573 N.W.2d 842 (1998), which held that the economic loss doctrine barred tort claims against even those lacking privity based on the inaccurate notion that parties allocate all risks by contract, though they have no agreement between them. Confining the economic loss doctrine to its true purpose—a contract existing between two parties limits remedies to the contract, and tort remedies cannot circumvent that agreement—eliminates the complicated and endless patchwork of rules, exceptions to rules, and exceptions to exceptions that the economic loss doctrine has evolved into.

STATEMENT OF THE CASE

In 2005, the Waschers hired Mathwig Builders (now defunct) to construct their home in Greenville, Wisconsin. (R. 1:7). Continental Western insured Mathwig. (R. 1:4). Mathwig, in turn, hired Carved Stone to provide stone for the home's exterior stone cladding and decking, and Natural Surfaces to install that stone. (R. 1:7-9).

The Defendants' misjudgments in adhering the stone to the home caused its failure. They used mortar too weak to support the stones' weight and omitted flashing the architect's drawings required.

(R. 59:1-2; R. 60:4, 15-17). This led water to accumulate behind the stone, and freeze/thaw cycles weakened the attachment. (*Id.*). Inexperienced in construction, the Waschers relied on these construction professionals only to learn at deposition that the thinset mortar Carved Stone recommended and Natural Surfaces applied violated the building codes. (R. 46:146).

Carved Stone and Natural Surfaces personnel were unqualified to make these critical engineering judgments about attaching vertical stones. Neither was an architect or engineer, or even a stone mason. Each inaccurately estimated the stones' weight, (R. 65:5), and confused the thinset's capacity. (R. 65:4-5; R. 64:3; R. 46:146). One discussed the mortar's warranty but not its capacity with the manufacturer. (R. 64:6). The other never knew building code requirements existed. (R. 65:3). Carved Stone knew requirements existed but incorrectly guessed this method complied. (R. 46:146; R. 64:6).

Stones began falling, and in 2012 through 2017, the Waschers independently contracted with Carved Stone to remedy these problems after the Defendants' collective repair efforts failed. (R. 1:14). Carved Stone's service work was equally deficient and even enhanced problems. (R. 59:1-2; R. 60:4, 15-17).

The Waschers sued Continental Western, Mathwig's insurer; Natural Surfaces for the faulty mortar and installation; and Carved Stone, which sold the stone, provided extensive advice about its installation and then eventually contracted with the Waschers directly to rectify problems. Each failed in its initial responsibilities, and Carved Stone's solutions exacerbated damage.

The Defendants moved to dismiss the complaint and then for summary judgment.

On the motion to dismiss, the court barred tort claims derived from the original construction based on the economic loss doctrine, (R. 31:2-5; P.App.052-055), and, after pertinent discovery, denied

Carved Stone's dismissal in tort and contract for work performed under its direct contract, (R. 84:15; P.App.050). The court dismissed the balance of all claims. (*Id.*).

The Waschers and Carved Stone appealed. The Court of Appeals affirmed. For brevity, a full explanation of the decision appears below, but review here on all motions would be *de novo*. *Grams v. Boss*, 97 Wis.2d 331, 337-8 (1980); *Kohlbeck v. Reliance Const. Co., Inc.*, 2002 WI App 142, ¶9, 256 Wis.2d 235.

ARGUMENT

I. The statute of repose requires substantial completion, and concealing deficiencies creates an exception.

A. No substantial completion without flashing.

The courts concluded that the statute of repose under §893.89(1), Stats., barred this claim because the home was substantially completed when township officials authorized occupancy on November 3, 2008, and the deadline to sue expired 10 years later. (P.App.010-014).

The statute starts to run upon "substantial completion." *Id.* The court speculated that granting occupancy signaled substantial completion based on a township record no witness explained. (P.App.011). In fact, the town's inspection report shows important items went unapproved. (R. 43:7; R. 46:15; 84:6). The inspector refused access to the attic and noted "temporary" interior handrails needed replacement. (*Id.*). The record never mentioned "substantial completion," and no court may speculate that record supplied information it never contained.

Even so, an occupancy permit carries no certification that a building is substantially complete, especially when, as here, design drawings required flashing at the exterior walls, which the builders omitted. (R. 64:8-9, 18; R. 69:1-2; R. 70:1-3; R. 59:1-2). Certainly, nothing suggests that the absence of flashing was visible, much less that the building inspector observed it. (R. 43:7; R. 46:15). Carved

Stone and Natural Surfaces principals called the flashing essential; Carved Stone considered the home incomplete without it. (R. 65:6; R. 64:8, 10, 18).

And for good reason—this lack of flashing caused the problems the Waschers experienced. (R. 64:8-9, 11). No building is substantially complete when a missing component permits the infiltration of water so as to lead the mortar's failure and large stones to spall and fall, especially when architectural plans required it.

The lower courts nevertheless concluded the statute of repose begins when an occupancy certificate issues under *Holy Family v. Steubenrach Associates*, 136 Wis.2d 515 (Ct. App. 1987). (P.App.010). Yet *Holy Family* actually rejected that conclusion and determined substantial completion occurred later when people first occupied the building. *Id.* at 522-4. The Court of Appeals responded that an architect's certificate counts for nothing and asserted courts, not architects, declare substantial completion. (P.App.012). Yet, the same court declared the municipality's occupancy permit determined completion. (P.App.012). Thus, courts should ignore the highly trained professionals most familiar with the project in favor of determinations from far less sophisticated building inspectors who may have been on site sporadically. The courts' struggle to distinguish *Holy Family* was, at best, unconvincing, especially considering *Holy Family* found the term "substantially complete" ambiguous, (P.App.010), and ambiguity commands a narrow construction—"that no person's cause of action will be barred unless clearly mandated by the legislature," *Saunders v. DEC International Inc.*, 85 Wis.2d 70, 74 (1978), not the expansive one the courts adopted.

The Court of Appeals bypassed all this by adding both cases involved "poor construction quality," (P.App.014), but critical differences exist between improperly installing construction materials and omitting them altogether. Had this contractor failed to install a fire suppression system the plans and code required, would the building be

"substantially complete" simply because construction was poor? Elsewhere, the circuit court inadvertently disagreed when it observed, "If the stone cladding is not present, the house is incomplete." (R. 31:4; P.App.054). That is the Waschers' point. The absence of key components—whether cladding or flashing—makes the house substantially incomplete. The Waschers moved in in late November, and therefore, the Defendants failed to factually prove this affirmative defense.

B. Concealment and misrepresentation are exceptions.

But under Wis. Stat. §893.89(4), the statute of repose does not apply under circumstances of "fraud, concealment or misrepresentation." While fraud involves intent to deceive, concealment and misrepresentation do not.[2] Indeed, misrepresentation can be intentional, negligent, or entirely innocent. *Stuart v. Weisflog's Showroom*, 2008 WI 86, ¶35, 311 Wis.2d 492. Concealment goes undefined in the statute, but the word means "to keep from being seen, found, observed or discovered; hide." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed.). Concealment and misrepresentation do not require, or even connote, intentional deception, though the Court of Appeals required it. (P.App.020). It is enough that the builders deviated from the design drawings without revealing it.

This case stands squarely with *Wosinski v. Advance Cast Stone Co.*, 377 Wis.2d 596, 631-32 (Ct. App. 2017), where a contractor installing concrete panels deviated from design plans without telling the owner. As here, the contractor invoked the statute of repose when Milwaukee County sought repair costs after a loosened panel fell long after installation. The Court of Appeals concluded that this latent deficiency and the County's lack of knowledge about it triggered the concealment and misrepresentation exceptions to the statute of repose.

[2] The Court of Appeals incorrectly noted Waschers offered no legal support for these arguments. (P.App.020). (*See* Court of Appeals Reply Brief p.5).

Wosinski is especially pertinent here, because Waschers also learned much later that construction deviated from plans and lacked both flashing and "a house wrap as detailed" and the builder "added an insulation board" instead. (R. 73:12). In fact, deposition testimony revealed the thinset mortar adhering the stone supported stones weighing far less than those installed. (R. 46:146). The Waschers occupied no different position than Milwaukee County occupied in *Wosinski*. Both relied on contractors to follow construction drawings and building codes when neither could verify that occurred; that concealed the deficiencies, and severe consequences erupted only later.

The Court of Appeals struggled to distinguish *Wosinski*, since each case involved deviating from construction drawings which created a dangerous, but undetected, deficiency. So the court confined *Wosinski* to cases involving "active concealment", (P.App.020), but *Wosinski* never so limited its holding, and the distinction contradicts its conclusion that "proof of actual fraud is not required" by the statute of repose. *Id.* ¶40. The statute requires only "concealment," not "active concealment", so the court possessed no right to add a statutory term. And, no meaningful difference exists between concealing defects by deviating from construction drawings and codes without disclosure versus "active" concealment, anyway. Either way, the property owner learns nothing until it is too late.

Each act of concealment and misrepresentation separately eliminates the statute of repose.[3] (R. 65:5; R. 64:3; R. 46:146). When the Waschers learned of the flashing's omission is unimportant, because, once concealed, the statute of repose fails to apply by its terms. The Defendants omitted flashing the construction drawings required and,

[3] According to Mathwig, Natural Surfaces failed to install flashing and told no one. (R. 69:1-2). According to Carved Stone, Roger Mathwig directed its omission against Ripley's advice after assuring Pamela Wascher no water would infiltrate the stone. (R. 64:9-10). Konitzer (Natural Surfaces) says discussions occurred without Pamela Wascher. (R. 65:6). If Konitzer or Mathwig are believed, Pamela Wascher did not know about the omission. If Ripley is believed, Mathwig's misrepresentation stands at the center of this case and eliminates the statute of repose.

violating building codes, utilized a mortar too weak to support the stones' weight, but told no one.

II. The statute of repose replaced the contract statute of limitations.

The Court of Appeals denied the statute of repose superceded the contract statute of limitations, despite contrary statutory terms. Wis. Stat. §893.43(1) requires commencing contract actions within six years "after the cause of action accrues or be barred." But Wis. Stat. §893.89(2), eliminates that rule for cases like this one. In pertinent part, that statute provides:

> (2) Except as provided in sub. (3), no cause of action may accrue . . . against any person involved in the improvement to real property [10 years after substantial completion] . . . .
>
> (3)(a) Except as provided in pars. (b) . . . if a person sustains damages . . . in an improvement to real property, and the statute of limitations applicable to the damages bars commencement of the cause of action before [10 years from substantial completion], the statute of limitations . . . applies.
>
> (b) If . . . a person sustains damages during the period beginning on the first day of the 8th year and ending on the last day of the 10th year after the substantial completion . . . , the time for commencing the action for the damages is extended for 3 years after the date on which the damages occurred.

This statute, then, yields three rules. First, subpart (2) requires initiating lawsuits within 10 years of substantial completion unless subpart (3)(b) of the statute extends that deadline. Second, subpart (3)(a) preserves a contract statute of limitations unless subpart (3)(b) applies; if subpart (3)(b) applies, then no contract statute of limitations exists. Lastly, subpart (3)(b) extends the time to sue by three years when damage occurs between years 8 and 10. Pam Wascher's description of damage established the statute of repose had not expired when the Waschers sued but, rather, ended in November 2021. (R. 72:1-4; R. 66:9, 11).

Courts read statutes like these which impede access to the courts and exonerate wrongdoing on technical grounds narrowly. *Saunders*, 85 Wis.2d at 74. Despite that requirement, the lower courts considered Wis. Stat. §893.89(3)(b) a discovery provision, (R. 84:7; P.App.042), even though nothing there indicates that Waschers must first discover damage between years 8 and 10. Rather, by the statute's terms, the period extends for three years once Waschers sustain damage in that three-year period. *Id.*

Kalahari Development, LLC v. Iconica, Inc., 2012 WI App 34, ¶¶15-22, 340 Wis.2d 454, acknowledged that reading as correct but rejected it anyway, even as it recognized §893.82(2), (3) contains no ambiguities. Yet, courts may not refuse to apply clear statutes by whim and craft a substitute. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶44-52, 271 Wis.2d 633. The lower courts implied that the Legislature never meant what it wrote. However, courts may not invoke legislative intent to replace clear statutory terms either, for it is the enacted law, and not the unenacted intent, that binds the public. *Id.* Moreover, the lower courts misjudged the legislative purpose. Sound reason supports extending limitations for ongoing damages, whether latent or not. That damage frequently evolves, as this did, from insignificant into significant problems. Requiring suit early undermines collaborative resolution without litigation. The Legislature wrote a law that promotes that sound objective.

III. The breach of contract statute of limitation did not bar suit.

A. The cause of action accrued only after damages occurred.

No litigant can sue for breach of contract without damages, yet the lower courts contested that universal truth. The courts concluded a cause of action accrues upon breach—here, upon faulty installation of the stone. (R. 84:4; P.App.017). However, Wis. Stat. §893.43(1) requires not that the plaintiff commence suit within six years of *breach*, as the

courts concluded, but rather "within six years after the cause of action *accrues*."

The distinction between breaching a contract and a cause of action accruing—as the statute requires—is an important one. It is "well settled that a cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it." *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis.2d 302, 315, 533 N.W.2d 780 (1995). Breach of contract claims accrue upon (1) an agreement, (2) failure to perform that agreement, and (3) damages. *Brew City Redevelopment Group, LLC v. The Ferchill Group*, 2006 WI App 39, ¶11, 714 N.W.2d 582. And while many cases hold that a breach of contract action accrues at the time of breach, regardless of whether the plaintiff knows of the breach and loss, no case holds that a breach of contract claim accrues before damages exist.

The lower courts confused contractual breach with deficient performance, when deficient performance that produces no damage is not actionable. Omitting flashing was deficient performance, because architectural drawings required it, but no claim for contractual breach accrued until water infiltrated and stones delaminated. The Waschers had no legal grievance against contractors who did less than promised, until they experienced loss. Without loss, people lack a right to sue. This is so basic that it should be beyond debate.

The decisions contradict *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 26, 270 Wis.2d 55, which holds that latent defects that have not yet caused damage are inactionable. There, motorcycle owners sued Harley-Davidson claiming their vehicles carried a reduced value because design flaws had created a propensity to fail prematurely. The Wisconsin Supreme Court held no claim accrued until the motorcycles malfunctioned, *id.* ¶21, invoking nationwide examples of tort and contract "no injury" cases, as it called them.

The circuit court dismissed *Tietsworth* as a tort claim, (R. 84:5; P.App.040), but missed the point: The rule is universal. It applies to tort and breach of contract claims alike. Sometimes the issue presents as a question of whether a case or controversy exists. *Thole v. U. S. Bank N.A.*, 140 S.Ct. 1615 (2020). Other times it involves a deviation from the terms of a contract that yields no appreciable loss. *Plante v. Jacobs*, 10 Wis.2d 567, 571 (1960). Still other times it materializes in the principle that causes of action first accrue only when all elements of the claim—here, agreement, breach of that agreement, cause, and damages—exist. *Jicha v. DILHR*, 169 Wis.2d 284, 294 (1992). Nothing Defendants cited contradicted these bedrock principles.

To circumvent all this, Continental Western claimed that breach of contract actually involves loss of the benefit of a bargain. But as *Tietsworth* demonstrates, lawsuits for disappointed expectations without actual consequences do not lie, even against contractors who broke promises.

Thus, the deadline for suit depended on when the Waschers' case accrued, which depended on when damage occurred. The Defendants might have constructed the home without flashing (1) but without producing damage, or (2) with damage occurring immediately, albeit undetected by the Waschers for a time, or (3) with damage occurring later, sometime after construction ended. In each scenario the statute of limitations begins on different dates, even as the construction mistake producing the damage occurred on the same date. That is because breach of contract claims only accrue for claims capable of present enforcement—when all elements of the claim, including damages and loss, exist. *Effert v. Heritage Mut. Ins. Co.*, 160 Wis.2d 520, 524-5 (Ct. App. 1990); *Brew City Redevelopment Group*, 2006 WI App 39, ¶11.

Finally, the Court of Appeals compounded the confusion by conflating experiencing damage with discovering damage. (P.App.017). Wisconsin courts confine the discovery rule to tort cases, but that only

means that undetected damages fail to extend a statute of limitations for contractual breach. *CLL Associates Ltd. Partnership v. Arrowhead Pacific Corp.*, 174 Wis.2d 604 (1993). The discovery rule has nothing to do with the absolute requirement that no right to judicial relief exists until a breach produces meaningful consequences.

B. The defense failed in its burden to prove when damage occurred.

The statute of limitations is an affirmative defense, so the Defendants must prove when this damage occurred, but they failed to do so. *Robinson v. Mt. Sinai Med. Ctr.*, 137 Wis.2d 1, 17 (1987).

Only when water infiltrated the substrate, freezing and expansion occurred, and stones fell off the wall did the Waschers experience damage that justified a lawsuit. The court suggested that white effervescence on the exterior granite deck first noticed in 2009 required this lawsuit, (P.App.018), but a significant difference exists between white effervescence oozing through one stone and vertical stones loosening and falling, which this lawsuit addresses. Continental Western settled with the Waschers for the effervescence and repair and issued a release that excused Continental Western's liability only for that event. (R. 43:4). After that, in 2012, one base stone fell off below the lanai, and Mathwig addressed the problem. (R. 72:1-4; R. 66:3-5).

In 2014, an engineering firm's investigation first discerned that the vertical stones found on the building well exceeded the 15-pound-per-square-foot building code maximum for adhered veneer units. (R. 46:146). The engineer explained that, in addition to the stones' weight, the mortar bond failed from water exposure. (*Id.*). He attributed the problem "to the failure to install a weather resistant barrier that was specified by the architectural drawings." (*Id.* at p.143). He ultimately concluded that the stones were too heavy and required structural support, a gutter system should be placed along the terrace and balcony, the sand layer beneath the exterior stone tiles on the terrace walkway removed for better drainage, and flashing placed, as

the architectural documents required originally. Nothing shows that this extensive damage existed before 2014. The fact that one stone fell in 2012 did not mean that the damage that the engineer described in 2014 existed or could be corrected by obtaining compensatory damages sooner. In short, according to the lower courts, the statute of limitations required the Waschers to file *this lawsuit* earlier, but this lawsuit seeks far different remedy than the damages recoverable in 2008, 2009, or even 2012.

C. The interpretation contradicts the statute of repose.

The courts construed the statute of limitations to require suit for all damages starting in 2008 when the construction mistakes occurred. (P.App.017). As late as 2016, new structures began failing when stone from the gate delaminated and required repair. (R. 72:3). Those costs would go uncompensated if the courts' hypothesis that the statute of limitations expired in 2014 was accurate. The theory transforms a contract statute of limitations into a statute of repose. But the legislature already enacted a statute of repose that matured much later. *Johnson v. Masters*, 2013 WI 43, ¶13, 347 Wis.2d 238, requires that "[w]hen two statutes conflict, a court is to harmonize them," so the courts' construction of the statute of limitations cannot be correct.

IV. The repair doctrine and/or the continuous negligent treatment doctrine extend the statutes of limitations and repose.

The court suggested that the Waschers learned of the absence of flashing early. (P.App.021). The fact that the Plaintiffs detected damage to the deck and tried rectifying it in 2010 did not require the Waschers to sue for damage to walls, which had not yet occurred. The Defendants must establish when the damage to the wall happened in order to succeed on a statute of limitations defense. They have failed to carry that burden, so the motion should have been denied given the absence of that critical proof.

The Waschers did nothing wrong and worked collaboratively but unsuccessfully with the Defendants to correct these problems, spending large sums and rigorously following the advice experts gave them. (R. 72:1-4; R. 66:2-6, 8). They tried Carved Stones' solutions and hired sophisticated engineers and masons, all without success. (R. 72:2-3). Beginning in 2012, when the Waschers hired Carved Stone directly to undertake repairs and again paid it in full, Carved Stone failed to correct the original deficiencies, and its fix exacerbated the problem. (R. 59:1-2; R. 60:4, 15-17). It dammed drainage, which ensured that the substrate behind the stone deteriorated more rapidly. (*Id.*). Until approximately 2014, the problems' source was obscure, requiring two engineering firms to identify it. Delaying suit was reasonable given the latent and uncertain cause of the problems, the stealth omission of key building materials during construction, and how the staggering breadth of the damage has unfolded. Now the Waschers supposedly forfeit much of their claim because they believed and collaborated with the Defendants.

Defendants claim no prejudice or surprise from this supposedly stale claim. And, promoting early litigation and penalizing genuine cooperation is hardly something that the law encourages. Regardless of when the Waschers initially sustained damage, their claims are timely because some Defendants continued to work on the home, extending the statute of limitations. (R. 72:1-4; R. 66:2-7, 9-10). The repair doctrine, the legal principle that postpones a statute of limitations while the parties jointly address construction defects, applies here. As the court explained in *Lake Superior Center Authority v. Hammel, Green & Abrahamson*, 715 N.W.2d 458 (Minn. App. 2006), "When a party allegedly responsible for remedying a defect in real property makes assurances or representations that the defect will be repaired, that party may be estopped from asserting a statute-of-limitations defense if the injured party reasonably and detrimentally relied on the assurances or representations." Other courts recognize the doctrine, as well. *See, e.g., Highway Sales, Inc. v. Blue Bird Corp.*, 559 F.3d 782, 789 (8th Cir. 2009) (Minnesota law applied); *Senior Housing, Inc. v.*

Nakawatase Rutkowski, Wyns & Yi, Inc., 549 N.E.2d 604, 608 (Ill. App. 1990); *Axia Inc. v. I.C. Harbour Const. Co.*, 501 N.E.2d 339 (Ill. App. 1986); *Amodeo v. Ryan Homes, Inc.*, 595 A.2d 1232, 1237 (Pa. Super. 1991). Courts in Wisconsin have never formally addressed the doctrine, but good reason exists to adopt it, especially as to Carved Stone. Carved Stone performed work near continuously on the Waschers' home after the construction once problems developed. (R. 72:3; R. 1:6-7).

Similarly, under *Tamminen v. Aetna Cas. And Sur. Co.*, 109 Wis.2d 536, 539, 552, 327 N.W.2d 55 (1982), and the continuous negligent treatment doctrine, the statute of limitations did not accrue, at a minimum, until Defendants stopped working on the Waschers' home. For patients who physicians treat for ongoing problems, the limitations period begins when treatment ends, even if an error occurred sooner. *Greater Johnstown City School Dist. v. Cataldo & Waters, Architects*, 159 A.D.2d 784, 786-87, 551 N.Y.S.2d 1003 (N.Y. App. Div. 1990), applied the rule in a construction case. Why treat patients and homeowners differently? The circuit court never explained when it summarily rejected the doctrine here. (R. 31:7-8); P.App.057-058).

The Court of Appeals refused to address either theory, ostensibly because they present novel legal questions in Wisconsin. (P.App.022-023). But abdicating that basic responsibility and refusing to decide the case was not an option. (Wis. Stat. §752.01; Wis. Const. Art. VII, Sec. 5(3)). And, the abdication requires this Court to accept review automatically so as to preserve the Waschers' due process opportunity to be heard. Litigants have no meaningful right to be heard when lower courts refuse to listen.

V. The statutory notice extended the time to sue.

A prerequisite to filing suit, notices Waschers served on August 29 and 30, 2018, (R. 71:1-9), provided each contractor (or insurer) 90 days to repair these problems under §895.07(2), Stats. The Waschers received no affirmative responses and sued once time expired. Those

notices suspended the statutes under subpart (9), which provided, "If, during the pendency of the notice . . . process, an applicable limitation period would otherwise expire, the limitation period is tolled pending completion of the notice . . . ."

VI. The Waschers possessed a claim for an injunction which the statute of repose did not eliminate.

A. The statute does not apply by its terms.

The Waschers sought an injunction compelling the Defendants to address the danger they created. The Defendants created a nuisance that they possessed a duty to abate. In nuisance "liability is predicated upon the defendant's failure to remove the harmful condition after he has notice of its existence." *Bostco LLC v. Milwaukee Metropolitan Sewerage District*, 2013 WI 78, ¶32, 350 Wis.2d 554. Equity enforces that duty to abate.

The lower courts nonetheless concluded that seeking injunctions camouflaged a damage claim and, therefore, statutes of limitations and repose, not laches, governed the claims. (P.App.025-026).

Yet the injunctions sought prevent future harm—here the prospect of heavy stones falling randomly causing severe, probably lethal injury. Injunctions are "designed to prevent injury, not compensate for past wrongs, and an injunction may issue merely upon proof of a sufficient threat of future irreparable injury. . . . [I]t is not necessary for the plaintiff to wait until some injury has been done; equity will prevent, if possible, an injury." *Pure Milk Products v. National Farmers Organization*, 90 Wis.2d 781, 802 (1979).

These stones weigh, on average, 29 pounds per square foot, loosen unpredictably, and fall from great height without warning. (R. 64:12; R. 59:1-2; R. 60:16; R. 46:146). They present an ongoing safety hazard to the Waschers, their guests, family, and visitors that even the Defendants acknowledge. (*Id.*). An injunction compelling the Defendants to address the future danger that they created is a classic

use of equity. That remediation involves spending money is unimportant, and seeking both damages and equity in a single lawsuit is sound anyway, since these remedies serve different purposes. *Benson v. City of Madison*, 2017 WI 65, ¶60, 376 Wis.2d 35. The Plaintiffs may seek alternative remedies and need not elect one at the outset of litigation. Wis. Stat. §802.02(5)(b); *Mohns v. BMO Harris*, 2021 WI 8, ¶¶50-2, 295 Wis.2d 421.

The amounts involved with either remedy differ. The measure of damages is the lesser of the cost of repairing property or its diminished value, *Laska v. Steinpreis*, 69 Wis.2d 307, 313 (1975), so no assurance exists that damages will repair the home, if remediation and abatement costs exceed the home's reduced value.

Finally, the statute of repose only limits actions seeking "damages." *See, e.g.*, Wis. Stat. §893.89(2) (barring certain actions "to recover damages for any injury . . ."); it has no effect in equity, but the lower courts amended the statute to include injunctions. Yet, the term "damages" does not include equitable injunctive relief. *Pure Milk Prods. Co-op v. Nat'l Farmers Org.*, 90 Wis.2d 781, 800, 280 N.W.2d 691 (1979), and *Bostco*, *supra*, refused to extend a statute limited to damage actions to injunctions. Once again, the lower courts ignored clear, contrary statutory terms and rewrote a statute.

B. Laches, a defense the Defendants did not raise, governs claims for injunctions.

Limiting the statute's application to "damages" confirms the equitable doctrine of laches preempts the statute of repose. As the court explained in *Knox v. Milwaukee County Bd. Of Elections Com'rs*, 581 F. Supp. 399, 402 (E.D. Wis. 1984), "a statute of limitations ordinarily applicable to a legal right [does] not apply to an equitable remedy."

In *Sawyer v. Midelfort*, 227 Wis.2d 124, ¶74, 595 N.W.2d 423 (1999), the Wisconsin Supreme Court required inexcusable delay in filing suit, prejudice and surprise as to the claim before laches prevented suit. Thus, the considerations applicable to the statute of

repose fail to apply to laches, where courts consider equity—things like the Waschers' efforts to rectify this problem in cooperation with the Defendants so as to avoid bringing suit, the false hope the Waschers received that the renovations Defendants performed would cure the problems, the facts that the source and severity of the issue was long concealed, and the Defendants learned about the problems as soon as Waschers discovered them. The danger that randomly falling stones will maim or kill someone should be an especially serious consideration for any court, but the lower courts ignored it.

C. Insurance policies address injunctions.

Continental Western asserts its policy excludes this claim, but it never invoked the policy's terms, a mandatory first step in any coverage dispute. And, *Johnson Controls v. Employers Ins.*, 2003 WI 108, ¶36, 45-6, 264 Wis.2d 60, held that if at least one purpose behind a remediation order repairs damaged property, something insurance policies cover, it did not matter that another purpose prevents future harm, something policies may not cover. *Johnson Controls* discredited *School Dist. Of Shorewood v. Wausau Ins. Companies*, 170 Wis.2d 347, 488 N.W.2d 82 (1992), and its conclusion that insurance never covers injunctions. *Id.* ¶36.

Continental Western argued that none of this applied because it is not a contractor and did nothing wrong. Still, Wisconsin's direct action statute imposes responsibility on Continental Western to remediate Mathwig's past wrongs, whether Mathwig is a litigant or not. Wis. Stat. §632.24. *Bowman v. Rural Mut. Ins. Co.*, 53 Wis.2d 260, 263-4, 191 N.W.2d 881 (1971).

VII. Natural Surfaces sold and applied a defective product.

Natural Surfaces selected and sold thinset mortar inappropriate for this project. (R. 65:4; R. 74). The mortar was grossly under strength, yet Konitzer sold the product to Mathwig and installed it when building codes required mechanical attachment. (R. 59:1-2; R. 60:15; R. 46:148; R. 65:4; R. 74:1-33). As a defective component unfit for the building

where Natural Surfaces installed it, the product leaves Natural Surfaces, as the product's seller, strictly liable for the ensuing damage. *City of Franklin v. Badger Ford Truck Sales, Inc.*, 58 Wis.2d 641, 649, 207 N.W.2d 866 (1973); *Mulhern v. Outboard Marine Corp.*, 146 Wis.2d 604, 619, 432 N.W.2d 130 (Ct. App. 1988).

Expert sellers designating materials are strictly liable for the consequences when they choose poorly. *See* Wis. Stat. §402.315; *Grunwald v. Halron*, 33 Wis.2d 433, 147 N.W.2d 543 (1967). As the Restatement explains:

> When the component seller is substantially involved in the integration of the component into the design of the integrated product, the component seller is subject to liability when the integration results in a defective product and the defect causes harm to the plaintiff. . . . [T]he component seller may play a substantial role in deciding which component best serves the requirements of the integrated product. When the component seller substantially participates in the design of the integrated product, it is fair and reasonable to hold the component seller responsible for harm caused by the defective, integrated product.

RESTATEMENT (THIRD) OF TORTS—PRODUCTS LIABILITY §5, COMMENT(E) (AM. LAW INST. 1998); s*ee generally*, *Smith v. Atco Co.*, 6 Wis.2d 371, 382-4, 94 N.W.2d 697 (1959).[4]

The lower courts contended that because the mortar mix works in other settings, somehow it was not a defective product here, and added Natural Surfaces evades responsibility because it was not the product's manufacturer. (P.App.027). The argument depends on what the terms 'manufacturer' and 'product' mean, though §895.047 defines neither. Natural Surfaces selected and sold a component—the mortar mix—to blend with water and apply to permanently hold the stone in place. It then made a slurry too weak to accomplish that, not because of the component's manufacturer's mistakes, but because of Natural Surfaces' errors. Natural Surfaces served as both seller of the inadequate mortar

[4] Neither the statute of limitations nor the economic loss doctrine are among the defenses the statute lists, so they do not apply to this statutory claim because the legislature never decreed it. Wis. Stat. §895.07(3); *Hinrichs v. DOW Chemical Co.*, 2020 WI 2, ¶¶55-6, 389 Wis.2d 669.

mix and manufacturer of the final mortar utilized. What Natural Surfaces installed, not the mortar mix it bought and changed, was the actual product. That final product was defective because, too weak to hold the stone, it violated the building code.

VIII. The economic loss doctrine does not bar the Waschers' tort claims against these Defendants.

The circuit court concluded the economic loss doctrine barred tort claims against all Defendants arising from the original construction but not Carved Stone's work in 2012 and thereafter. (R. 31:2-5; P.App.052-055). The economic loss doctrine does not preclude tort claims when damage to other property apart from the original product occurs, or when a safety risk exists. *Id.*; *Wausau Tile, Inc. v. Cty. Concrete Corp.*, 226 Wis.2d 235, 247, 259-60, 264-65, 593 N.W.2d 445 (1999). No Wisconsin court has extended the economic loss doctrine to injunctions, either, another novel question for this Court.

A. The other property exception applies.

The court reached its conclusions based solely on the complaint, despite well-known standards requiring its liberal construction and forbidding consideration of outside facts altogether and dismissal unless it was "quite clear that under no conditions can the plaintiff recover." *Anderson v. Continental Ins. Co.*, 85 Wis.2d 675, 683 (1978).

The complaint's allegations met the "other property" exception by charging that stones fell from the Waschers' home, damaging other property the Waschers owned. (R. 1:6). The court concluded that because the damage seemed inconsequential and the Waschers sought no compensation for it, the exception could not apply. (R. 31:4; P.App.054). But it is the fact of damage, not compensation sought, that forecloses the doctrine, since damage to other property, besides the product itself, removes the entire claim—economic and noneconomic losses together—from the scope of the doctrine. *Daanen & Janssen*, 216 Wis.2d at 402.

Moreover, courts must accept this allegation as true on motions to dismiss. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis.2d 665. The circuit court nevertheless refused to do so on the flawed theory that the allegation was too vague. (R. 31:4; P.App.054).

But complaints need not anticipate affirmative defenses like the economic loss doctrine, and no pleading rule required such specificity. *Robinson*, 137 Wis.2d at 16. Complaints must only contain "a short and plain statement of the claim, identifying the transaction or occurrence . . . out of which the claim arises and showing that the pleader is entitled to relief." Wis. Stat. §802.02. Averments "shall be simple, concise and direct" because "no technical forms of pleading . . . are required." *Id.* Plaintiffs need not plead detailed facts or legal theory; those come later, with discovery. *Strid v. Converse*, 111 Wis.2d 418, 422-3 (1983). Wis. Stat. §802.03 lists nine things to plead with specificity, but "other property damaged" is not among them.

Cattau v. National Insurance Services of Wisconsin, Inc., 2019 WI 46, 386 Wis.2d 515, reiterated much of this recently, emphasizing that under no circumstances may courts dismiss complaints unless, beyond doubt, the plaintiff can never recover. Nothing in this complaint established that the economic loss doctrine applied or the other property exception did not. The circuit court construed this complaint against the Waschers when *Cattau* mandated that its construction favor them.

The court also applied the doctrine on a theory that the stones were "integral" to the home's "function." *State Farm Fire and Cas. Co. v. Hague Quality Water, Intern.*, 2013 WI App 10, ¶¶8-9, 345 Wis.2d 741. Defective components are integral when the larger "system" could not function without them. *Id.*

While important to the aesthetics of the home, the stone cladding was not "integral." The complaint contains no contrary allegation, and the Waschers alleged that "significant portions of stone have been

manually removed . . . .” (R. 1:6). But the home continues to function, albeit with a diminished appearance. (*Id.*). The court concluded that the home would be “incomplete” without the stone veneer. (R. 31:4; P.App.054). But function, not completeness, is what the doctrine requires. *State Farm*, 2013 WI App 10, ¶11.

Natural Surfaces invoked *Bay Breeze Condominium Association v. Norco Windows*, 2002 WI App 205, 257 Wis.2d 511, and *Seltzer v. Brunnsell Brothers Ltd.*, 2002 WI App 232, 257 Wis.2d 809, as support. Each case involved tort claims about windows that permitted moisture infiltration which caused rotting. Each designated the windows as an integral part of the home, installed to keep the elements out, and therefore applied the economic loss doctrine. Contrasting this, *State Farm Fire and Casualty Co. v. Hague Quality Water Int'l.*, 2013 WI App 10, 345 Wis.2d 741, concluded that a defective water softener that leaked was not integral. Demonstrating the doctrine's idiosyncrasies, Wisconsin law supposedly permits tort claims for water-damaged walls and floors when water softeners leak, but not windows.

B. The public safety exception applies.

The public safety exception to the economic loss doctrine also precludes applying the economic loss doctrine to this case. Wisconsin's public safety exception originated in *Northridge Co. v. W.R. Grace and Co.*, 162 Wis.2d 918, 471 N.W.2d 479 (1991), and applies to cases involving inherently dangerous property conditions, such as the danger associated with falling stones on the Waschers' property. *See Wausau Tile*, 226 Wis.2d at 259-60, 264.

The circuit court declined to apply the exception, explaining that while large falling stones might be ultra-hazardous, large stationary stones are inherently safe. (R. 31:5; P.App.055). The observation that heavy stones falling from great heights are not inherently dangerous because, apparently, stones properly placed at low heights are safe seems irrelevant in a case involving heavy stones poorly secured. The court mentioned that *Northridge*, where the exception started,

underscored the distinction when it does not. *Northridge* held that asbestos falling from a ceiling after release was a safety hazard that foreclosed applying the doctrine. Millions of buildings contain asbestos, and properly encapsulated, it poses no harm; loosened, however, it poses grave danger. Properly encapsulated asbestos is no more inherently dangerous than large stones properly placed; both pose dangers only upon release. Yet in one setting, the economic loss doctrine applies; in the other it supposedly does not.

The court's invocation of *Rich Products Corp. v. Kemutec, Inc.*, 66 F.Supp.2d 937 (E.D. Wisconsin 1999), (R. 31:5; P.App.055), made even less sense, since, according to *Rich Products*, the public safety exception only applies when actual bodily injury occurs, no matter how serious the public safety risk posed. *Id.* at 976. But all that demonstrates is a poor understanding of the economic loss doctrine, since the doctrine never applies to personal injuries. *Daanen & Janssen*, 216 Wis.2d at 402. And no injury had occurred in *Northridge*, where the exception originated. Injuries had happened in *Wausau Tile*, where the court rejected the exception.

CONCLUSION

For these reasons, the Court should accept review and reverse.

Dated this 10th day of February, 2022.

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By: _____
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CERTIFICATION OF COMPLIANCE

I hereby certify that this petition was produced with a proportional serif font and conforms to the rules contained in Wis. Stat. §§809.50(1) and 809.51(1) for a petition with a proportional serif font. The length of this petition is 7,984 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this Petition for Review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12)

I further certify that:

This electronic Petition for Review is identical in content and format to the printed form of the Petition filed as of this date.

A copy of this certificate has been served with the paper copies of this Petition filed with the Court and served on all opposing parties.

Dated this 10th day of February, 2022.

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