DIVISION ONE
FILED: 03/04/2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOSEPH PAINTING COMPANY, INC. dba JPCI SERVICES, an Arizona corporation, Plaintiff/Appellant, v. LARSON ENGINEERING, INC., a foreign corporation dba LARSON ENGINEERING OF ARIZONA, Defendant/Appellee.	1 CA-CV 09-0327 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2006-016783

The Honorable Joseph C. Kreamer, Judge

VACATED AND REMANDED

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W I N T H R O P, Judge

¶1 Joseph Painting Company, Inc. ("JPCI") appeals the trial court's grant of summary judgment in favor of Larson Engineering, Inc. ("Larson"). JPCI contends that the trial court erred in concluding that the economic loss doctrine bars its professional negligence claim against Larson. Relying on the instruction provided by our supreme court in its recent opinion in *Flagstaff Affordable Housing Limited Partnership v. Design Alliance, Inc.*, CV-09-0117-PR, 2010 WL 476683 (Ariz. Feb. 12, 2010), which the trial court did not have the benefit of at the time it granted summary judgment in favor of Larson, we vacate the judgment and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY[1]

¶2 This case involves a dispute between JPCI and the architect and engineer who designed its industrial facility in Mesa. JPCI entered a contract with Hitchens Associates Architects, Inc. ("Hitchens") for the design of the building on JPCI's property. In turn, Hitchens retained Larson for structural engineering services.

[1] In reviewing a grant of a motion for summary judgment, we construe the facts and reasonable inferences in the light most favorable to the opposing party. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, ¶ 13, 38 P.3d 12, 20 (2002); *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶3 A dispute exists about what JPCI required for the design and what Hitchens promised to deliver. JPCI contends that it demanded a crack-free, seamless, concrete floor capable of containing specific chemicals used by JPCI. JPCI further contends that Hitchens informed Larson of JPCI's requirements. Hitchens has denied that JPCI made these demands, and Larson has denied being advised of any requirement to design a crack-free, seamless, chemical-containing floor. Larson also maintains that no written document memorializes JPCI's alleged design criteria.[2]

¶4 JPCI alleges that, soon after the cement floor was poured, it began to crack, and the severity of the cracks caused the floor to be unsound and unfit for the purpose of avoiding contamination by the manufacturing chemicals JPCI uses. JPCI informed Hitchens and Larson of the cracks and demanded remediation, but no resolution was reached. Larson maintains the cracks are consistent with shrinkage and temperature change cracks that occur in concrete.

¶5 In November 2006, JPCI filed a complaint against Hitchens and Larson, asserting numerous claims against Hitchens (for breach of contract, breach of the implied covenant of good

[2] The record on appeal does not include the JPCI/Hitchens or Hitchens/Larson contracts. The terms of JPCI's contract with Hitchens, and Hitchens' contract with Larson, and whether Larson performed according to the terms of its contract with Hitchens, are issues that apparently were neither presented to nor decided by the trial court in the motion for summary judgment.

faith and fair dealing, breach of express warranties, breach of implied warranties, and professional negligence) and claims against Larson for professional negligence[3] and breach of implied warranties.[4] In October 2007, pursuant to stipulation, the trial court dismissed with prejudice JPCI's breach of implied warranties claim against Larson, leaving as between JPCI and Larson only JPCI's claim for professional negligence.

¶6 On March 7, 2008, Larson filed a motion for summary judgment, *see* Ariz. R. Civ. P. ("Rule") 56(b)-(c), arguing that the economic loss rule barred JPCI's professional negligence claim. Relying primarily on *Carstens v. City of Phoenix*, 206 Ariz. 123, 75 P.3d 1081 (App. 2003), *now rejected by Flagstaff*, CV-09-0117-PR, 2010 WL 476683, at *5, ¶ 23, Larson argued that because JPCI did not allege personal injury or secondary

[3] With regard to the professional negligence claim, JPCI alleged that Larson owed a duty to JPCI to act with reasonable care and to perform to industry standards for structural engineering, that Larson's conduct and performance fell below the applicable standard of care for a duly licensed engineer, that Larson was negligent in the performance of its responsibilities owed to JPCI and its conduct and performance breached its duty of care, that the damaged floor was caused by the negligence and sub-standard conduct of Larson, and that JPCI incurred damages as a proximate cause of Larson's negligence.

[4] Hitchens cross-claimed against Larson for express and implied indemnity, but pursuant to stipulation, the trial court dismissed with prejudice the express indemnity cross-claim, and Larson and Hitchens have filed a notice of settlement as to any remaining claims between them. Also pursuant to stipulation, the trial court has recently dismissed with prejudice all of JPCI's claims against Hitchens. Consequently, Hitchens is not a party to this appeal.

property damage, Arizona's economic loss doctrine precluded JPCI from recovering contract-based economic losses under a tort claim against Larson. *See id*. at 125, ¶ 10, 75 P.3d at 1083. JPCI filed a response opposing the motion for summary judgment and, relying primarily on *Donnelly Construction Co. v. Oberg/Hunt/Gilleland*, 139 Ariz. 184, 677 P.2d 1292 (1984), *rejected on other grounds by Gipson v. Kasey*, 214 Ariz. 141, 144, ¶¶ 14-17, 150 P.3d 228, 231 (2007), argued that the economic loss rule should not extend to its claim seeking economic damages for professional negligence against a design professional; namely, Larson. *See generally id*. at 188, 677 P.2d at 1296. Larson filed a reply supporting its motion for summary judgment, arguing that *Donnelly* was no longer good law and its analysis was inapplicable to the economic loss doctrine.

¶7 After hearing argument on Larson's motion for summary judgment, the trial court granted the motion. On March 26, 2009, the court issued its signed judgment, including Rule 54(b) language, in favor of Larson. We have jurisdiction over JPCI's timely appeal pursuant to Arizona Revised Statutes section 12-2101(B) (2003).

ANALYSIS

¶8 JPCI argues that the trial court erred in concluding that, because JPCI suffered no personal injury or secondary

property loss, the economic loss doctrine bars its professional negligence claim against Larson.

¶9 We review *de novo* the grant of a motion for summary judgment and will affirm only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Wells Fargo*, 201 Ariz. at 482, ¶¶ 13-14, 38 P.3d at 20; *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. We also review *de novo* the trial court's determination and application of the scope of the economic loss doctrine. *See Flagstaff*, CV-09-0117-PR, 2010 WL 476683, at *2, ¶ 9 (citation omitted).

¶10 The term "economic loss" "refers to pecuniary or commercial damage, including any decreased value or repair costs for a product or property that is itself the subject of a contract between the plaintiff and defendant, and consequential damages such as lost profits." *Id*. at *2, ¶ 11 (citing *Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.*, 143 Ariz. 368, 379-80, 694 P.2d 198, 209-10 (1984), *abrogated on other grounds by Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 410-11 n.5, ¶ 32, 111 P.3d 1003, 1010-11 n.5 (2005)).

¶11 Since the trial court rendered judgment in this case, our supreme court issued its opinion in *Flagstaff*. In *Flagstaff*, our supreme court applied the economic loss doctrine in a construction defect case, holding "that a property owner is

limited to its contractual remedies when an architect's negligent design causes economic loss but no physical injury to persons or other property." *Id*. at *1, ¶ 1; *see also id*. at *7, ¶ 33 (holding "that a plaintiff who contracts for construction cannot recover in tort for purely economic loss, unless the contract otherwise provides").

¶12 In so holding, the court warned against conflating "two distinct issues: (1) whether a contracting party should be limited to its contractual remedies for purely economic loss; and (2) whether a plaintiff may assert tort claims for economic damages against a defendant absent any contract between the parties." *Id*. at *3, ¶ 12. The court concluded that "the economic loss doctrine is best directed to the first of these issues" as a "rule limiting a contracting party to contractual remedies for the recovery of economic losses unaccompanied by physical injury to persons or other property." *Id*. at *3, ¶ 12.

¶13 Regarding the second issue, however, the court, relying in part on *Donnelly*, declined to apply the economic loss doctrine to preclude the tort claims of a plaintiff who lacks contractual privity with the defendant:

> Without discussing the economic loss doctrine, *Donnelly* correctly implied that it would not apply to negligence claims by a plaintiff who has no contractual relationship with the defendant.
>
> Although some courts have applied the doctrine in that context, *see, e.g, Carstens*, 206 Ariz. at 127[,]

> ¶ 17, 75 P.3d at 1085; *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 221 P.3d 234, 243 (Utah 2009), we decline to do so. The principal function of the economic loss doctrine, in our view, is to encourage private ordering of economic relationships and to uphold the expectations of the parties by limiting a plaintiff to contractual remedies for loss of the benefit of the bargain. These concerns are not implicated when the plaintiff lacks privity and cannot pursue contractual remedies. *See* Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 Wash. & Lee L.Rev. 523, 556 (2009) (concluding that when "established tort principles entitle a third party to protection under tort law for economic loss, an agreement to which the third party never assented should not be permitted to vitiate his or her right to tort remedies").
>
> Rather than rely on the economic loss doctrine to preclude tort claims by non-contracting parties, courts should instead focus on whether the applicable substantive law allows liability in the particular context. For example, whether a non-contracting party may recover economic losses for a defendant's negligent misrepresentation should depend on whether the elements of that tort are satisfied, including whether the plaintiff is within the limited class of persons to whom the defendant owes a duty. *Cf. Donnelly*, 139 Ariz. at 189, 677 P.2d at 1297 (recognizing that defendants may be liable for pecuniary losses incurred by certain third parties based on defendant's negligent misrepresentations); Restatement (Second) of Torts § 552 (1977) (same).

Flagstaff, CV-09-0117-PR, 2010 WL 476683, at *8-9, ¶¶ 37-39.[5]

[5] Our supreme court also rejected declining to apply the economic loss doctrine for various other reasons, including the professional status of the defendant architect or design professional, and whether the defendant breached duties imposed by law as opposed to those imposed by contract. *See generally Flagstaff*, CV-09-0117-PR, 2010 WL 476683, at *9-10, ¶¶ 40-46.

¶14 In ruling on the motion for summary judgment in this case, the trial court for obvious reasons did not apply the analysis of the economic loss doctrine now adopted by our supreme court in *Flagstaff*. To the extent the trial court relied on *Carstens* and found the economic loss doctrine applicable to bar JPCI's professional negligence tort claim against Larson, a party with whom JPCI was apparently not in contractual privity at the time of the events giving rise to JPCI's claim, the court's reasoning was in retrospect error based on *Flagstaff*. Accordingly, we vacate the judgment and remand this case to the trial court for further proceedings consistent with *Flagstaff*.[6] Because JPCI and Larson were apparently non-contracting parties before the events giving rise to JPCI's tort claim, rather than rely on the economic loss doctrine to preclude JPCI's tort claim for professional negligence, the trial court should on remand instead focus on

[6] We note that sometime after the JPCI/Hitchens and Hitchens/Larson contracts were entered, but apparently shortly before the concrete for the Mesa building was poured, JPCI and Larson entered a contract for Larson to provide structural inspection services. The record is not clear whether the parties entered that contract after the alleged events occurred giving rise to JPCI's claim for professional negligence. Further, the record apparently only includes a portion of that contract, and the parties have made no argument before the trial court or here that their contract in any way implicates JPCI's claim for professional negligence. Of course, on remand the trial court may consider the possibility that JPCI's contract with Larson might bar JPCI's professional negligence claim based on the economic loss doctrine as interpreted by our supreme court in *Flagstaff*.

whether all elements of the alleged tort are satisfied, including whether JPCI is within the class of persons to whom Larson owes a duty, and if so, the nature and extent of that duty, such that the applicable substantive law might allow for liability in this particular context. *See Flagstaff*, CV-09-0117-PR, 2010 WL 476683, at *9, ¶ 39.

CONCLUSION

¶15 For the aforementioned reasons, we vacate the trial court's judgment in favor of Larson and remand for further proceedings consistent with this decision. We award JPCI its costs on appeal upon compliance with Rule 21, ARCAP.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
MAURICE PORTLEY, Presiding Judge

_____/S/_____
MARGARET H. DOWNIE, Judge