RENDERED: October 29, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001542-MR

POAGE ENGINEERS & ASSOCIATES, INC.;
CHARLES CLARY; AND CHRIS KELLY — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 96-CI-001648

MONTAPLAST OF NORTH AMERICA, INC.,
AND GARY SCOTT — APPELLEES

TBHW:

NO. 1998-CA-001593-MR

RANGASWAMY & ASSOCIATES, INC.,
AND THANGAM RANGASWAMY — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 96-CI-1648

MONTAPLAST OF NORTH AMERICA, INC. — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KNOPF, MILLER, AND SCHRODER, JUDGES.

MILLER, JUDGE: These appeals spring from Ky. R. Civ. P. (CR) 54.02 orders of the Franklin Circuit Court entered on May 21, 1998, and May 28, 1998. We reverse and remand.

In 1995, Montaplast of North America, Inc. (Montaplast), undertook to construct an addition to its manufacturing facility in Frankfort, Kentucky. To this end, Montaplast contracted with Alliance Corporation (Alliance) to "design" and "build" the addition.

Alliance subcontracted "certain design services in connection with the foundation work" to Poage Engineers & Associates, Inc., of which Charles Clary and Chris Kelly (collectively referred to as "Poage") are "principals and/or officers." Alliance further subcontracted the steelwork design and construction to Southeast Steel Company, Inc. (Southeast), which, in turn, subcontracted its design obligation to Poage. It appears at this point, Poage had the responsibility for designing both the foundation and steelwork.

Montaplast contracted separately with Gary Scott, a local architect, to provide "project administration services" for the construction project. In doing so, Scott contracted with Rangaswamy & Associates, Inc., and Thangam Rangaswamy (collectively referred to as "Rangaswamy") to examine Poage's design calculations. Scott paid Rangaswamy, billing the costs through to Montaplast.

Upon examining Poage's calculations, after work had commenced, Rangaswamy rejected certain aspects of the design and of Southeast's and Alliance's work performance in accordance therewith. Montaplast, in turn, accused Alliance of being in

default of the general contract and demanded Alliance rectify the design and construction. Pursuant to Montaplast's dictate, Alliance contracted with Rangaswamy to correct Poage's design. Southeast modified its steelwork construction accordingly. Correction of the design and retrofitting of already completed construction resulted in extra costs to Alliance and Southeast of approximately $376,000.00.

On November 6, 1996, Alliance and Southeast filed the instant action in Franklin Circuit Court. The complaint set forth a variety of allegations seeking to recover the extra costs incurred together with lost profits. Southeast asserted claims against Montaplast, Scott, Rangaswamy, and Poage. Alliance asserted claims against all but Montaplast.

Poage cross-claimed against Montaplast and Gary Scott seeking indemnity, contribution, and/or apportionment. Relying upon the "Economic Loss Doctrine," on May 21, 1998, the circuit court dismissed said cross-claim.

Rangaswamy cross-claimed against Montaplast, alone, alleging "comparative negligence" and seeking "apportionment, contribution, and/or indemnity." On May 28, 1998, again relying on the Economic Loss Doctrine, the circuit court dismissed Rangaswamy's cross-claim. These appeals followed. Other claims of Alliance and Southeast remain in the circuit court.

1998-CA-001542-MR

Poage contends that the circuit court committed reversible error by dismissing its cross-claims against Montaplast and Scott. The circuit court concluded that Poage's

cross-claims were barred by the economic loss doctrine.[1] The economic loss doctrine has its genesis in products liability law and operates to bar tort recovery for economic loss emanating from a defective product. *Economic loss* has been defined as "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits--without any claim of personal injury or damage to other property, as well as the diminution in value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold." See Myrtle Beach Pipeline Corporation v. Emerson Electric Company, 843 F. Supp. 1027, 1049 (D.S.C. 1993). Economic loss does not include injury to a person or damage to property other than the product itself. See Miller v. United States Steel Corporation, 902 F.2d 573 (7th Cir. 1990). The doctrine bars products liability actions resting upon strict liability and negligence to recover purely economic losses. See East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986), and Rissler & McMurry Company v. Sheridan Area Water Supply Joint Powers Board, Wyo., 929 P.2d 1228 (1996).

In the case at hand, appellees urge this Court to utilize the economic loss doctrine so as to preclude recovery for economic loss occurring in a "commercial setting" outside of

[1]We note that the terms *economic loss doctrine* and *economic loss rule* are used interchangeably.

products liability actions.[2] It is contended that the equal bargaining power incident to commercial transactions eliminates the need for economic loss recovery. Most importantly, appellees seek to extend application of the economic loss doctrine beyond products liability law. In support thereof, appellees cite to a plethora of foreign cases. See National Steel Erection, Inc. v. J.A. Jones Construction Co., 899 F. Supp. 268 (N.D.W. Va. 1995); Berschauer/Phillips Construction Co. v. Seattle School District No. 1, Wash., 881 P.2d 986 (1994); and Blake Construction Co., Inc. v. Alley, Va., 353 S.E.2d 724 (1987). Appellees also cite this Court to Real Estate Marketing, Inc. v. Franz, Ky., 885 S.W.2d 921 (1994) for the proposition that Kentucky has adopted the economic loss doctrine in "commercial settings." Therein, the issue presented was "whether homeowners, when they are *not* the original purchasers, can assert a viable claim against the homebuilder for structural defects." Id. at 922. The homeowners' asserted theories of liability were as follows:

> (1) negligence and negligence *per se* in failing to comply with various provisions of the uniform state building code; (2) breach of implied warranties of merchantability, fitness for particular purpose, and habitability; and (3) a statutory cause of action because "First Lexington failed to comply with the provisions of KRS 198B, as well as the Uniform State Building Code, thereby giving rise to a private action by plaintiffs against defendant, First Lexington, for damages against it in accordance with KRS 198B.130."

Id. at 923.

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[2]At oral argument, the parties agreed that the instant action is not a products liability action.

In disposing of the negligence and negligence *per se* claims, the Supreme Court cited Saylor v. Hall, Ky., 497 S.W.2d 218 (1973) wherein a tort claim for personal injuries was recognized for negligent construction despite the absence of privity between tenant and builder. The archaic requirement of privity was overcome by reliance upon Restatement (Second) of Torts §385 (1965), which provides as follows:

> One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, **under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others**. [Emphasis added.]

Under this section, a builder's liability is determined by the "same rules as those determining the liability" of a "chattel"/product manufacturer. The "rules" ascertaining the liability of a product manufacturer are commonly referred to as products liability law; therefore, a builder's liability is also determined in accordance with products liability law. Applying the economic loss rule emanating from products liability law, the Franz court denied remote homeowners the right to recover from the original builder for structural defects in a house. The loss was viewed as economic, representing a mere diminution in value. The court intimated, however, that it would have looked favorably upon the homeowners' claim had their alleged damages emanated

from a "damaging event" or "destructive occurrence."[3] Franz, 885 S.W.2d at 926.

To properly interpret Franz, we believe it incumbent that Restatement (Second) of Torts §385 and its connoted application of products liability law be recognized. In assessing liability of the builder in Franz, the Supreme Court utilized "the same rules" as those relating to liability of a product manufacturer. Indeed, the Supreme Court cited to Dealers Transport Company, Inc. v. Battery Distributing Company, Ky., 402 S.W.2d 441 (1966) which adopted Restatement (Second) of Torts §402A (1965) in its holding.[4] Id. at 926. Simply stated, we

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[3]Some jurisdictions recognize an exception to the economic loss doctrine as in the case of a sudden accident, violent occurrence, or sudden calamitous event. 63B Am. Jur. 2d *Products Liability* §§ 1917-1928 (1997).

[4]Section 402A provides as follows:

> **Special Liability of Seller of Product for Physical Harm to User or Consumer**
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and

(continued...)

think Franz is properly interpreted as adopting the economic loss rule relative to products liability law with a "destructive occurrence" or "damaging event" exception.

Finally, we do not view the facts of Franz as involving a commercial setting:

> [Franz] is also easily distinguishable from cases that traditionally merit the application of the economic loss rule, in that **it does not involve a transaction between a commercial buyer and seller**. [Emphasis added.]

Bowling Green Municipal Utilities v. Thomasson Lumber Co., 902 F.Supp. 134, 138 n.2 (W.D. Ky. 1995). Upon the whole, we reject appellant's contention that Franz adopts the economic loss doctrine in a commercial setting outside of products liability.

While we recognize that other jurisdictions have expanded the economic loss doctrine beyond the products liability arena, we decline to do so. We view the economic loss doctrine as a judicial attempt to restrict the scope of products liability. We are simply unwilling to expand the economic loss doctrine beyond its genesis in products liability law. If the economic loss doctrine is to be so monumentally expanded, we believe it better left to our Supreme Court. In sum, we are of the opinion that the economic loss doctrine does not bar Poage's cross-claims against Montaplast and that the circuit court erred by dismissing same.

1998-CA-001593-MR

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[4](...continued)
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

For the reasons set forth above, we likewise believe that Rangaswamy's cross-claims against Montaplast are not barred by the economic loss doctrine and that summary judgment was inappropriate. See CR 56; Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). For the foregoing reasons, the orders of the Franklin Circuit Court are reversed, and this cause is remanded on both appeals for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS POAGE, CLARY, AND KELLY:

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