RENDERED: OCTOBER 10, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001449-MR

CATHOLIC MUTUAL GROUP AND
ROMAN CATHOLIC BISHOP OF LOUISVILLE,
D/B/A ARCHDIOCESE OF LOUISVILLE — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 05-CI-002705

TACO, INC. — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: ACREE, CLAYTON AND WINE, JUDGES.

ACREE, JUDGE: Catholic Mutual Group (the Group) and the Roman Catholic Bishop of Louisville, d/b/a Archdiocese of Louisville (the Archdiocese), appeal the

Jefferson Circuit Court's grant of summary judgment in favor of Taco, Inc.[1] Because the liability limitation language in Taco's warranty is not effective against the Appellants' negligence or strict liability claims, and because the economic loss rule does not apply, we reverse and remand for further proceedings.

Taco, Inc., manufactured a chiller pump installed as a component in the HVAC system of a church and school operated by the Archdiocese. Approximately two years after installation, the chiller pump malfunctioned causing a mixture of propylene glycol and water to flood the first and second floors of the school. The Archdiocese and the Group brought suit in Jefferson Circuit Court against Taco as well as against the installers of the chiller pump. The complaint sought recovery on theories of warranty, negligence and strict liability.

Taco moved for summary judgment. The crux of the argument was that its warranty stipulated the only circumstances under which it would be responsible for a defective or malfunctioning chiller pump and that warranty had lapsed. By its express language, the warranty was effective for one year from the time of start-up of the HVAC system or one year and six months from the date the chiller pump was shipped. Since the pump failure occurred two years after start-up, the circuit court found that the expired warranty precluded recovery under any of the three theories of liability.

The circuit court focused on the liability-limiting language of the warranty and held that "Taco cannot be held liable for any special, incidental or

[1] The Court previously granted Appellants' motion to dismiss all Appellees except Taco, Inc.

consequential damages." The trial court further noted that under Kentucky's Uniform Commercial Code, Kentucky Revised Statutes (KRS) Chapter 355, "a seller can limit warranty liability by disclaiming warranties or limit remedies available to the buyer for breach of warranty." The trial court did not address the negligence and strict liability claims except to state that Taco argued they "must be dismissed under the economic loss rule, which prohibits recovery where damages are solely due to the alleged defective product itself."

We believe the circuit court must be reversed because the warranty limitations have no impact on the tort claims.

Whether a product is defective requires proof of different elements under breach of warranty, under negligence, and under strict liability in tort; the "liability as defined under each is different and each carries different implications." *Williams v. Fulmer*, 695 S.W.2d 411, 414 (Ky. 1985)(setting forth the elements of each cause of action at 413). The liability limitations and remedy limitations made available pursuant to the UCC, specifically KRS 355.2-719, and those contained in the warranty before us cannot be extended beyond the contractual undertaking of the parties. Article 2 of the UCC limits its scope to the establishment of such parameters to contractual undertakings. The Kentucky Supreme Court made it clear that tort liability, including strict liability, stands apart from contract liability.

> The opinion of our [Kentucky Supreme] Court in *Dealers Transport Co.* [*v. Battery Distributing Company*, 402 S.W.2d 441, 446-47 (Ky. 1965)], *supra*, adopted the theory of strict liability in tort as set out in Section 402A of the Restatement (Second) of Torts. This states a cause

> of action for physical harm (to person or property) caused by a product defect against the manufacturer or commercial seller of a product, *not to be confused with the cause of action for breach of warranty against a commercial seller as set out in the U.C.C.*

Compex Intern. Co., Ltd. v. Taylor, 209 S.W.3d 462, 464 (Ky. 2006)(emphasis supplied), *quoting Williams* at 413. Because our highest court has held that RESTATEMENT (SECOND) OF TORTS § 402A (1965) best articulates Kentucky jurisprudence on this issue, it is appropriate to consider the comments to that section as well. Comment m plainly says:

> The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to 'buyer' and 'seller' in those statutes.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1965).

Therefore, the circuit court's apparent interpretation of the UCC and the subject warranty as precluding recovery in tort was error. Such an interpretation converts a warranty limitation into an exculpatory contract for exemption from future liability for negligence. *See Hargis v. Baize*, 168 S.W.3d 36, 47 (Ky.2005). The warranty's liability-limiting language does not satisfy the requirements of such an exculpatory contract. *See id.* (setting out necessary elements). If we were to affirm the circuit court, we would have to ignore the requirements given us by the Supreme Court in *Hargis*.

Because the warranty limitations do not preclude the Archdiocese's pursuit of the tort claims (or the Group's subrogation claim), we must reverse the circuit court's grant of summary judgment in favor of Taco as to the tort claims only.

While the parties to this appeal address the economic loss rule at length in their briefs, we believe the circuit court properly declined to address the rule because it has no relevance here. The Archdiocese and the Group are not seeking damages for any economic loss as that term is applied in the context of the economic loss rule. *Mt. Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 848 (6th Cir. 2002)(applying Kentucky law)("Economic loss is both loss in the value of a product caused by a defect in that product (direct economic loss) and consequential loss flowing from the defect, such as lost profits (consequential economic loss)."). They seek recovery for damages caused to the Archdiocese's property by Taco's defective product. The economic loss rule does not prohibit "recovery for damages to property other than the product purchased." *Mt. Lebanon* at 849; *see also, East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866-67, 106 S.Ct. 2295, 2300 (1986)(economic loss rule not applicable where "the defective product damages other property.").

For the foregoing reasons, the summary judgment of the Jefferson Circuit Court in favor of Taco is affirmed with regard to the Archdiocese's warranty claims, reversed with regard to the Archdiocese's tort claims, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

ORAL ARGUMENT FOR APPELLANTS:

William S. Bowman
Louisville, Kentucky

BRIEFS FOR APPELLANTS:

William S. Bowman
John G. Crutchfield
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEES, TACO, INC.:

Patrick Shane O'Bryan
Louisville, Kentucky

BRIEF FOR APPELLEES, TACO, INC.:

Alice Barns Herrington
Patrick Shane O'Bryan
Louisville, Kentucky

NO BRIEF FOR R.B. BANTA COMPANY, INC., R & R INC., OR RADEMAKER CORPORATION