

RENDERED: DECEMBER 13, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001935-MR

THOMAS A. POST

APPELLANT

v. APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 07-CI-00171

LEE MASONRY PRODUCTS, INC.;
AND LEE MASONRY PRODUCTS, LLC

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Thomas A. Post brings this appeal from an October 4, 2012,

Opinion and Order of the Woodford Circuit Court granting summary judgment in

favor of Lee Masonry Products, Inc., and Lee Masonry Products, LLC (collectively

referred to as Lee Masonry).¹ We affirm.

¹ The original complaint in this action named Lee Brick Company, LLC, d/b/a Lee Brick & Block as a defendant in this action. Lee Masonry subsequently appeared and litigated the case to

Thomas A. Post is the owner and developer of certain real property located on U.S. Highway 60 in Woodford County, Kentucky. Post purchased the property, commonly referred to as the Castle, from the estate of the original developer in November of 2003.² Post intended to complete construction on the Castle and to utilize it as a tourist site and inn. In early 2004, the structure was almost entirely destroyed by fire.

Following the fire, Post began rebuilding the Castle in early 2005. In conjunction with the rebuilding project, in November 2005, Post purchased a synthetic stone product for installation on the exterior of the structure from Lee Masonry. This product, known as “Mountain Stone,” was manufactured by a separate entity owned by the same principals who own Lee Masonry. The sales agent who negotiated the sale of the stone was Buddy Bennett. Post hired a third party, Ronald Goodlett of Goodlett Masonry, LLC, to install the stone. During the course of installation, Post became concerned that the synthetic stone was not being properly installed by Goodlett.

entry of a summary judgment on June 14, 2011. The trial court’s summary judgment referenced Lee Brick Company as the defendant, not Lee Masonry, and granted summary judgment accordingly. On appeal to this Court in 2011, Appeal No. 2011-CA-001476-MR, the summary judgment was vacated and remanded to the circuit court by Opinion rendered August 10, 2012, in light of the confusion and misidentification of the parties below. On remand, the circuit court entered an agreed order submitted by the parties substituting the Lee Masonry entities for Lee Brick Company, LLC. Summary judgment was thereafter entered again for Lee Masonry on October 4, 2012.

² The original developer of the property, Rex Martin, initially intended to construct the Castle as his residence. Due to a series of events, Martin was unable to complete construction. Thomas A. Post purchased the property from Martin’s Estate in 2003 for approximately 1.8 million dollars.

As the parties were unable to resolve the defective installation dispute, Post filed a complaint on May 17, 2007, in Woodford Circuit Court against Lee Brick Company, LLC, d/b/a Lee Brick & Block, Goodlett Masonry, LLC, and Ronald Goodlett, individually.³ In the complaint, Post claimed breach of contract, breach of warranty, negligent misrepresentation, and common law negligence. Post eventually abandoned the claims relating to breach of contract and common law negligence. On June 14, 2011, summary judgment was entered in favor of Lee Brick Company, LLC. Upon direct appeal to this Court, for the reasons stated in Footnote 1 of this Opinion, the summary judgment was vacated by another panel of this Court on August 10, 2012. Upon remand, on October 4, 2012, the circuit court granted summary judgment in favor of Lee Masonry upon the breach of warranty and negligent misrepresentation claims. This appeal follows.

Post contends that the circuit court erred by rendering summary judgment dismissing his claims for breach of warranty under the Uniform Commercial Code (U.C.C.) and for negligent misrepresentation. We address each claim seriatim.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). All facts and inferences therefrom are to be viewed in a light most

³ After this action was initiated in 2007, Ronald Goodlett filed a Chapter 7 bankruptcy in the United States Bankruptcy Court for the Eastern District of Kentucky on September 4, 2009. Goodlett was granted a discharge on January 27, 2010, in Case No. 09-52876-wsh.

favorable to the nonmoving party. *Steelvest, Inc.*, 807 S.W.2d 476. Our analysis shall proceed accordingly.

Post asserts that the circuit court erred by dismissing his breach of warranty claims under the U.C.C. Specifically, Post argues that Lee Masonry breached the implied warranty of fitness for a particular purpose as set forth in Kentucky Revised Statutes (KRS) 355.2-315 and the implied warranty of merchantability as set forth in KRS 355.2-314. In particular, Post maintains:

The provision of information and instructions concerning the proper use and application of the synthetic stone was an essential part of the transaction, though, in the words of *Riffe v. Black*, 548 S.W.2d 175 (Ky. App. 1977)], “the sale is primarily one of goods and the services are necessary to insure that those goods are merchantable and fit for the ordinary purpose.” The sale of goods was obviously the primary aspect of the transaction between Lee [Masonry] and Post; however, Lee [Masonry] was required to provide any information necessary to properly install the product, and in particular, it had a duty to tell Post or his contractors how the product differed in application from the normal types of masonry materials used in construction. As *Riffe* noted, this type of negligence can have far-reaching consequences:

The examination of the facts which gave rise to the destruction of this pool, reveals a situation similar to that expressed in Poor Richard’s Almanac in 1758, under the heading, “A Little Neglect May Breed Great Mischief”. In that situation Benjamin Franklin discussed how the lack of a horseshoe nail eventually led to the downfall of a kingdom. The facts of the present case also reveal a situation where a little neglect did breed great mischief.

Riffe, supra at 177.

The facts of this case also reveal a situation where a little neglect did breed great mischief. Here, the “little neglect” was the neglect of Lee [Masonry] through his agent Bennett failing to explain to Goodlett or anyone else that the Mountain Stone product that it sold could not be applied using normal masonry techniques, but instead required special techniques that actions that were the exact opposite of those used in installing other forms of masonry.

Post’s Brief at 13.

It is undisputed that Post contracted with Lee Masonry only for the purchase of the synthetic stone product and did not contract with Lee Masonry for installation of the product. Rather, Post entered into a separate agreement with Ronald Goodlett of Goodlett Masonry, LLC, to install the stone product. Further, at the time of the sale, it is undisputed that the synthetic stone was merchantable and fit for its ordinary particular purpose for which it was purchased. These facts are pivotal.

In *Riffe v. Black*, 548 S.W.2d 175 (Ky. App. 1977), Riffe sold a pool to the Blacks, and as part of the sale, Riffe agreed to install the pool. Riffe did not install the pool properly, and the pool was ultimately rendered unusable. The Court held that the warranty provisions of KRS 355.2-314 and KRS 355.2-315 ordinarily apply only to the sale of goods; however, where the sale of goods are accompanied by contracted services, the warranty provisions of KRS 355.2-314 and KRS 355.2-315 are applicable.

Unlike the facts in *Riffe*, 548 S.W.2d 175, Post did not contract with Lee Masonry to install the synthetic stone at the Castle. If Lee Masonry had done so, *Riffe*, 548 S.W.175 would be applicable. As no contract existed between Post and Lee Masonry for installation of the synthetic stone, we view *Riffe* as inapposite.

KRS 355.2-102 clearly provides that the provisions of the U.C.C. are only applicable to the sale of goods. The synthetic stone delivered to Post satisfied both implied warranties under KRS 355.2-314 and KRS 355.2-315. And, it must be emphasized that Lee Masonry undertook no contractual duties to install the synthetic stone; Post independently hired a third party, Ronald Goodlett of Goodlett Masonry, LLC, to install the synthetic stone. Accordingly, we hold that Lee Masonry did not breach the warranty provisions of KRS 355.2-314 or KRS 355.2-315. Thus, the circuit court properly rendered summary judgment in favor of Lee Masonry on this claim.

Post next maintains that the circuit court erred by rendering summary judgment in favor of Lee Masonry on his claim for negligent misrepresentation. Post argues that Lee Masonry's sales agent, Buddy Bennett, visited the job site on several occasions during installation of the synthetic stone but failed to inform Post or Ronald Goodlett as to the correct installation procedures for the synthetic stone. By failing to do so, Post alleges that Lee Masonry committed the tort of negligent misrepresentation:

As Lee [Masonry's] employee, Bennett had the obligation on behalf of Lee [Masonry] to inform both Goodlett and Post of the eccentric and uncommon method for installing synthetic stone. Through Bennett, Lee [Masonry] was in a position of superior knowledge relating to the particular circumstances concerning the installation of the synthetic stone. THE RESTATEMENT (2D) OF TORTS § 289(b) states that "The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising . . . such superior attention, perception, memory, *knowledge*, intelligence, and judgment as the actor himself has." (Emphasis added.)

The Mountain Stone synthetic stone product supplied by Lee [Masonry] differed dramatically from normal masonry products in the manner in which it was to be applied. Normally, brick, block, or stone is laid from the bottom up, and muriatic acid or a similar acid product is used to clean any excess mortar from the stone or brick. However, Mountain Stone's own brochures, provided to Lee [Masonry] – whose principals owned Mountain Stone - - clearly show that the Mountain Stone product is to be applied in exactly the opposite manner: Installation is from the top down, not from the bottom up, in order to prevent the drippage and spatter of mortar onto the stones. This is important because, unlike normal masonry products, synthetic stone cannot be cleaned with muriatic acid, which will strip the finish off the synthetic stones.

Because of the unique installation requirements for synthetic stone and Lee [Masonry's] superior knowledge and printed specific instructions, Kentucky law imposes a duty on Lee [Masonry] to inform Post and his employees and contractors, including Goodlett, of the proper installation procedures for the synthetic stone. Additionally, it imposes a duty upon Lee [Masonry's] employees and agents (including Bennett) to inform Post and his employees and contractors that Lee [Masonry] has observed the manner of installation of the stone product, and that the stone was being installed improperly.

Post's Brief at 6-7.

The Kentucky Supreme Court has adopted the Restatement (Second) of Torts § 552 (1977) as setting forth the proper elements for the tort of misrepresentation:

- (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
- (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
 - (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
 - (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Presnell Const. Managers, Inc. v. EH Const., LLC, 134 S.W.3d 575, 580 (Ky. 2004). It is axiomatic that the tort of “negligent misrepresentation requires an affirmative false statement.” *Giddings & Lewis, Inc. v. Industrial Risk Insurers*, 348 S.W.3d 729, 746 (Ky. 2011). The Supreme Court has emphasized that “this tort requires an affirmative false statement; a mere omission will not do.” *Id.* at

746 (quoting *Republic Bank & Trust Co. v. Bear, Stearns & Co.*, 707 F. Supp. 2d 702, 714 (W.D. Ky. 2010)).

In the case *sub judice*, it is uncontroverted that Lee Masonry did not make an affirmative false statement regarding the installation of the product. The record reflects that Post relied exclusively upon Goodlett to install the stone. Post claims that Lee Masonry's omission or failure to inform Post or his installer as to the proper installation procedures constitutes negligent misrepresentation in the sales transaction between the parties. Our Supreme Court has clearly held that a mere omission of information in a sales transaction is insufficient to set forth a claim of negligent misrepresentation. *See Giddings*, 348 S.W.3d 729. Had Lee Masonry or its representatives given false or fraudulent information or instructions to Post or his contractor regarding the installation of the stone, a different result might be reached by this Court. However, those facts have not been established in the record before this Court. Following the law enunciated in *Giddings*, 348 S.W.3d 729, we conclude that the circuit court properly rendered summary judgment in favor of Lee Masonry on Post's claim of negligent misrepresentation.

We view Post's remaining contentions as moot or without merit.

In sum, we hold that the circuit court properly rendered summary judgment in favor of Lee Masonry in this action.

For the foregoing reasons, the Opinion and Order of the Woodford Circuit Court is affirmed.

LAMBERT, JUDGE, CONCURS.

JONES, JUDGE, CONCURS WITH SEPARATE OPINION.

JONES, JUDGE, CONCURRING: I concur with the majority's opinion with respect to Post's U.C.C. claim and with the result reached by majority with respect to the negligent misrepresentation claim. While I agree with the majority that Post's negligent misrepresentation claim fails for lack of an affirmative misrepresentation, I write separately to express my view that Post's negligent misrepresentation claim is barred by the economic loss rule adopted by the Supreme Court of Kentucky in *Giddings & Lewis, Inc., v. Industrial Risk Insurers*, 348 S.W.3d 729 (Ky. 2011), making a step-by-step analysis of the claim unnecessary.

"The economic loss rule recognizes that economic losses, in essence, deprive the purchaser of the benefit of his bargain and that such losses are best addressed by the parties' contract and relevant portions of Article 2 of the Uniform Commercial Code." *Id.* at 737. When a purchaser is seeking recovery for damages to the product itself, as opposed to damages for injuries to persons or other property caused by the product, the economic loss rule bars recovery in tort (negligence, strict liability, and negligent misrepresentation).⁴ Any damages for the product (costs for repair, replacement of the product, lost profits, and similar economic losses) must be recovered, if at all, under contract law. *Id.* at 738.

⁴ In *Giddings*, the Court observed that this outcome "is entirely consistent with the latest Restatement of Torts, which allows the buyer of a defective product to recover in tort for injuries to persons or other property but not for economic losses." *Id.* at 738.

In an ordinary commercial transaction, the seller has no independent duty to prevent a product from injuring itself. *Id.* at 738 (citing *East River Steamship v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 (1986)). Rather, the parties' duties are defined by the U.C.C. and the terms of their contract. The economic loss rule "marks the border between tort and contract law." *Id.* at 738. "Where tort law, primarily out of a concern for safety, fixes the responsibility for a defective product directly on the parties responsible for placing the product into the stream of commerce, contract law gives the parties to the venture the freedom to allocate risk as they see fit." *Id.* at 738-39.

In *Giddings*, the Kentucky Supreme Court rejected a "calamitous event" exception to the economic loss rule. *Id.* at 739. The Court held that the economic loss rule applies without consideration of how the buyer alleges the product was harmed. "Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of the bargain--traditionally the core concern of contract law." *Id.* at 739-40 (quoting *East River Steamship*, 476 U.S. at 870).

Post and Lee Masonry are two commercial entities that entered into an arm's length commercial transaction with one another. Post had the ability to negotiate for services beyond delivery of the synthetic stone product. However, it did not do so. A third party incorrectly installed the product, which is now damaged because of the installation. Post's allegations amount to a claim that the

product injured itself. Post cannot use tort law to rewrite the parties' contract.

Post's remedies are limited to recovery under contract law. Thus, I would dismiss

Post's negligent misrepresentation claim as barred by the economic loss doctrine.

Having concurred with the majority's conclusion that Post does not have an actionable claim under the U.C.C., I too would affirm the Circuit Court's summary judgment in favor of Lee Masonry.

BRIEF AND ORAL ARGUMENT
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BRIEF FOR APPELLEES LEE
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