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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001431-MR

NATHAN HACK AND KRISTIE HACK — APPELLANTS

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 05-CI-00125

LONE OAK DEVELOPMENT, INC. AND
CENTRAL PAVING COMPANY OF PADUCAH — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: This is a claim for negligence filed by homeowners Nathan Hack and Kristie Hack against a subdivision developer and the contractor who installed a drain pipe. The McCracken Circuit Court granted summary

judgment to the developer and installer. We conclude that the homeowners presented a material issue of fact that precluded summary judgment and, therefore, reverse.

As alleged in the complaint, the facts are as follows: On April 29, 2002, Nathan and Kristie Hack purchased a subdivision lot from Jimmy and Candy Varble. The Varbles had purchased the lot from Lone Oak Development, Inc. (Lone Oak), the developer of the Coleman Place Subdivision where it is located. Prior to the purchase of the property by the Hacks, Lone Oak contracted with Central Paving Company of Paducah (Central Paving) for the installation of a drainage pipe on the property.

After the Hacks constructed a residence on the property, in February 2004, the driveway and a portion of the yard collapsed. When the area was excavated, the Hacks discovered that the drainage pipe had collapsed because a variety of fill materials, including tree stumps and other vegetation, had been placed there by Central Paving, and the underground drainage pipe was placed directly on top of the tree stumps. The cost to repair the sinkholes, driveway, and yard was in excess of $50,000. The Hacks maintain that Lone Oak and Central Paving negligently installed the drainage pipe and were further negligent when the area surrounding the pipe was filled with vegetation.

The issue presented is whether absent privity of contract, the Hacks can pursue a negligence action against Lone Oak and Central Paving for the damage caused by their negligence.

The standard of review applicable to summary judgment is whether the trial court properly found that there was no genuine issue as to any material fact and that Lone Oak and Central Paving were entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky.App. 1996). We review the case *de novo* giving no deference to the conclusions of the trial court. *Baker v. Coombs*, 219 S.W.3d 204 (Ky.App. 2007).

The Hacks admit that there was no privity of contract among them, Lone Oak, and Central Paving. They assert their claims in negligence.

Unlike actions based on contract, negligence does not require privity between the parties. *Tabler v. Wallace*, 704 S.W.2d 179, 186 (Ky. 1985). In *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973), the Court recognized that a builder had a legal obligation to respond for personal injuries caused by its negligent construction despite the fact that there was no privity between it and the injured plaintiffs. When the damage is limited to property, however, the legal remedy is not as easily discernible.

When the damage is exclusive to property, the plaintiffs seeking to recover under a theory of negligent construction have encountered a legal quagmire.

> Although privity is no longer required to maintain a tort action, "one who is not a party to the contract or in privity thereto may not maintain an action for negligence which consists merely in the breach of the contract."

Presnell Const. Managers, Inc. v. EH Const., LLC, 134 S.W.3d 575, 579 (Ky. 2004) (citations omitted). In the case of negligent homebuilders, the resulting damage is most often damage caused by the builders' failure to fulfill its contractual obligations to the original owner of the property. In such cases, there is a trend to deny a subsequent purchaser compensation for losses caused by the negligent construction under the theory of what is commonly referred to as the "economic loss rule."

The economic loss rule is relatively new in American jurisprudence and its genesis is found in *Seely v. White Motor Co.*, 63 Cal.2d 9, 403 P.2d 145 (1965). In this Commonwealth, little has been written concerning the rule, and although references have been made that it is applicable to negligence actions against homebuilders and sellers, it has never been explicitly adopted by our courts. However, in *Real Estate Marketing, Inc. v. Franz*, 885 S.W.2d 921 (Ky. 1994), the Kentucky Supreme Court's implicit adoption of the economic loss rule is found in the following passage:

> In *Saylor v. Hall,* Ky., 497 S.W.2d 218 (1973), we recognize a legal obligation to respond in damages for negligent construction despite the absence of privity. The case involved two children of tenants, one injured and one killed, crushed by a fireplace and mantle that collapsed due to defective construction. The argument made in the present case, as recited in the Court of Appeals' Opinion, is that "it seems capricious to deny recovery to a vigilant property owner who discovers a latent defect, which 'only' diminishes the value of his property, and allow recovery if he had 'waited' for a member of his family to be injured as a result of the defect." Nevertheless, this Court recognizes that tort

> recovery is contingent upon damage from a destructive occurrence as contrasted with economic loss related solely to diminution in value, even though, as to property damage, both may be measured by the cost of repair. *See Dealers Transport Company, Inc. v. Battery Distributing Company,* Ky., 402 S.W.2d 441 (1966), adopting Section 402A of the *Restatement (Second) of Torts* in defective products cases.

Id. at 926. The Court concluded the homeowner could not recover in tort against the home's builder after water leaked into the home's foyer, the floor warped, and mold and mildew accumulated. The loss suffered, the Court reasoned, was solely diminution in value.

Other than the passage quoted, there was no historical basis for the rule given nor was it explained how the rule was to be applied in future cases. The most informative explanation of the rule is found in Justice Keller's concurring opinion in *Presnell Const. Managers, Inc.*, 134 S.W.3d at 583. As noted in that opinion, the economic loss rule evolved as part of American product liability jurisprudence. *Id*. at 585. Its purpose is essentially to draw a line of demarcation between contract and tort law, limiting consumers of products to damages other than those sustained merely because the product failed to meet economic expectations. *Id*. Supported by a thorough citation to authorities from other jurisdictions, Justice Keller summarized the rule as follows:

> The "economic loss rule" is a judicially created doctrine that "marks the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others. The crux of the

> doctrine is not privity but the premise that economic interests are protected, if at all, by contract principles, rather than tort principles. Although originally rooted primarily in product liability cases to protect manufacturers from tort liability for damage that is limited to the product itself, the economic loss rule has evolved into a modern, general prohibition against tort recovery for economic loss. In its broadest formulation, the economic loss rule prohibits tort recovery in negligence or products liability absent physical injury to a proprietary interest. Under this sweeping rule, recovery of economic loss is foreclosed when a product or service falls short of an expected level of quality yet causes no personal injury or property damage. (internal quotations and citations omitted).

Id. at 583-584.

Justice Keller observed that although the rule has been adopted by the majority of jurisdictions, its parameters remain unclear. *Id*. at 584. One jurist has analogized it to the "all-consuming alien life form portrayed in the 1958 B-movie classic *The Blob*," and observed that the economic loss doctrine "seems to be a swelling globule on the legal landscape . . . ." *Grams v. Milk Products, Inc.*, 283 Wis.2d. 511, 539, 699 N.W.2d 167, 180 (2005), Justice Abrahamson, Chief Justice, dissenting. Most recently, the Oregon Supreme Court expressed its displeasure with the potential expansion of the economic loss rule into the traditional legal concept of compensation for damages caused by the negligence of others.

> Every physical injury to property can be characterized as a species of "economic loss" for the property owner, because every injury diminishes the financial value of the property owner's assets. Damage to a car reduces the value of the car-one of the owner's assets. A tree falling

> on a person's residence is damage to property, but also can be characterized as a financial loss because it reduces the value of the residence, which the owner may properly view as an asset or financial investment as well as a residence. Yet the law ordinarily allows the owner of the damaged car or residence to recover in negligence from the person who caused the damage.

Harris v. Suniga, 344 Or. 301, 310, 180 P.3d 12, 16 (2008).

We concur with the Oregon court's observance that left without exception, the economic loss rule could be interpreted to abolish a massive wedge of traditional tort law on the premise of a doctrine rooted in contract law. Applied originally to product liability cases, it has spread into the realm of building construction cases which, unlike the manufacturing of a product destined to reach the mass consumer market, is essentially the rendering of a service to a specific property. Nevertheless, by virtue of *Franz*, in this Commonwealth, the rule has been swept into the realm of construction litigation.

In *Franz*, the Supreme Court briefly addressed the limitations on the economic loss rule. It stated:

> We do not go so far as the Court of Appeals' opinion in *Falcon Coal Co. v. Clark Equipment Co.,* Ky.App., 802 S.W.2d 947 (1990), limiting recovery under a products liability theory to damage or destruction of property "other" than the product itself. But we do recognize that to recover in tort one cannot prove only that a defect exists; one must further prove a damaging event.

Franz, 885 S.W.2d at 926. In our present analysis, we find the Court's use of the language "damaging event" pivotal.

In *Franz*, there was no damaging event. The alleged negligent construction caused defects only to the structure, including water leaking into the front hallway, warping of the flooring, and mold and mildew. The alleged defects could, and presumably were, part of the negotiations for the purchase of the home by the subsequent purchaser. Although the Court held the plaintiffs' claims for negligence were precluded by the economic loss rule, had there been a "damaging event," the plaintiffs could pursue a negligence claim.

The facts now alleged are quite distinguishable from those in *Franz*. The Hacks purchased an undeveloped lot. As alleged in the complaint, unbeknownst to them, the underground drainage pipe was supported by tree stumps destined to rot and cause a collapse of the system. Ultimately, not only did the pipe collapse, but also the driveway and the landscaping were destroyed. The "damaging event" was not isolated to the drainage pipe. In this case, the alleged damaging event was the collapse and destruction of the landscaping and driveway, neither of which was integrated into the drainage system. We do not believe that such damages are precluded by the economic loss rule.

Certainly, under basic negligence principles, had the Hacks' car been demolished by the collapse of the driveway, the rule would not bar recovery. It would be but a legal fiction unsupported by reason to preclude such damages attributable to the collapse of the driveway and landscaping based on the economic loss rule.

The circuit court suggested that the Hacks could have obtained a warranty from their predecessor in title or insurance to protect against the improper installation of the drainage pipe. While both are options to procure coverage for a structure, we cannot reach the similar conclusion that as a matter of law, damage to a driveway or landscaping from the use of vegetation as landfill is encompassed within the reasonable expectation of either the traditional homeowners insurance or warranties. The issue of whether the collapse of the drainage pipe was a damaging event caused by its negligent installation is properly left for a jury to determine.

Lone Oak raises as a defense the rule of caveat emptor. Although it correctly recites that rule as applicable to real estate contracts, it is a defense to an action brought by the purchaser against the vendor. In that context, it is a general rule prohibiting actions based on breach of implied warranties. It is an ancient rule derived from common law and applies unless the vendor does something to prevent the prospective purchaser from making a thorough examination of the premises to ascertain its nature and value. *Osborne v. Howard*, 195 Ky. 533, 242 S.W. 852 (1922). The action brought by the Hacks sounds in tort and is not against the vendor but against Lone Oak for its alleged negligence. The caveat emptor rule is simply not applicable.

For the purpose of our review of the summary judgment, the final issue is whether, as a matter of law, neither Lone Oak nor Central Paving owed a duty to the Hacks. Actionable negligence consists of "a duty on the defendant, a breach of the duty, and a causal connection between the breach of the duty and an

injury suffered by the plaintiff." *Lewis v. B & R Corporation*, 56 S.W.3d 432 (Ky.App. 2001). Included in the concept of duty is whether the risk of injury was reasonably foreseeable. *Id*. at 437. Whether a duty exists is generally a legal question. *Id*. at 438.

The circuit court found that neither Lone Oak nor Central Paving owed a duty to the Hacks. Relying heavily on public policy considerations and the corresponding need to protect purchasers of real property, the court in *Smith v. Frandsen*, 94 P.3d 919 (Utah 2004), held that a developer, subdivider or person performing similar tasks has "a duty to exercise reasonable care to insure that the subdivided lots are suitable for construction of some type of ordinary, average dwelling house, and he must disclose to his purchaser any condition which he knows or reasonably ought to know makes the subdivided lots unsuitable for such residential building." *Id*. at 924.

Reaching the same legal conclusion as did the Utah Court, the Supreme Court of South Dakota held that a cause of action for negligent construction was not limited to the original purchaser. *Brown v. Fowler*, 279 N.W.2d 907 (S.D. 1979). It was foreseeable that the house would be sold to a subsequent purchaser and structural defects could harm the subsequent purchaser as the first. *Id*. at 909.

In *Floraday v. Don Galloway Homes, Inc.*, 114 N.C.App. 214, 441 S.E.2d 610 (1994), the court held that the subsequent purchasers could pursue a negligence action against the builder of a defective retaining wall. It distinguished

the purchase of a residence from other consumer purchases noting that it is often the consumer's largest single investment. "The need for special protection of these investments justifies extending the duty of reasonable care to subsequent purchasers." *Id*. at 216, 441 S.E.2d at 612. *See also*, *Coburn v. Lenox Homes, Inc.*, 173 Conn. 567, 378 A.2d 599 (1977); *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979).

Under the circumstances of this case, we conclude that Lone Oak and Central Paving owed the purchasers of the lot, including the Hacks, the duty to use reasonable care when the drainage pipe was installed. It was foreseeable that the lot would be sold to subsequent purchasers for the construction of a residence and that within a relatively brief time, damage would be caused by a negligently installed drainage pipe.

We have not addressed the sufficiency of the evidence to support the merit of the Hacks' negligence claim against either Lone Oak or Central Paving. We merely hold that the circuit court erred in holding that Lone Oak and Central Paving were entitled to summary judgment based on the rules of economic loss and caveat emptor, and its finding that Lone Oak and Central Paving did not owe a duty to the Hacks.

Based on the foregoing, the summary judgment is reversed and the case remanded for further proceedings.

COMBS, CHIEF JUDGE, CONCURS.

ACREE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

ACREE, JUDGE, CONCURRING: Respectfully, I disagree with too much of the analysis in the majority opinion to concur in more than the result. Therefore, I write separately regarding the issues presented.

I believe Central Paving Company's liability is governed by Restatement (Second) of Torts § 385 (1965).

> 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.

Restatement (Second) of Torts § 385 (1965). Our Supreme Court first recognized this articulation of such a duty in *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973). A cursory reading of that case might lead one to the erroneous conclusion that "physical harm" and "personal injury" are the same. They are not. "The words 'physical harm' are used throughout the Restatement of this Subject to denote the physical impairment of the human body, *or of land* or chattels." Restatement (Second) of Torts § 7 (1965)(emphasis supplied).

According to the allegations of the complaint, Central Paving Company, on behalf of Lone Oak (the possessor of the land), created a condition

on the land resulting in physical harm to the Hacks' real property. Upon the proper proof, Central Paving Company is liable for that physical harm.

Still, Central Paving Company tempts us to consider the economic loss rule as a defense to its liability. As the majority noted, our appellate courts have hardly touched upon the doctrine and have never explicitly adopted it. However, federal courts applying Kentucky law have had an awful lot to say.[1]

> The economic loss rule bars recovery in tort for economic loss. 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). [Citation omitted] The economic loss rule marks the border between tort and contract law. 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 a venture the freedom to allocate risk as they see fit.

[1] The following cases predict whether and how the Kentucky Supreme Court would adopt and apply the economic loss rule: *Mt. Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc.,* 276 F.3d 845 (6th Cir. 2002); *Miller's Bottled Gas, Inc. v. Borg-Warner Corp.*, 955 F.2d 1043 (6th Cir.1992); *Barton Brands, Ltd. v. O'Brien & Gere, Inc. of North America,* --- F.Supp.2d ----, 2008 WL 819068 (W.D.Ky. March 25, 2008); *Brewer Mach. & Conveyor Mfg. Co., Inc. v. Old National Bank*, --- F.R.D. ----, 2008 WL 490587 (W.D.Ky. February 20, 2008); *Westlake Vinyls, Inc. v. Goodrich Corp.,* 518 F.Supp.2d 955 (W.D.Ky. 2007); *General Cable Corp. v. Highlander,* 447 F.Supp.2d 879 (S.D.Ohio 2006); *Davis v. Siemens Medical Solutions USA, Inc*., 399 F.Supp.2d 785, 801 (W.D.Ky. 2005); *Louisville Gas and Elec. Co. v. Continental Field Systems, Inc.,* 420 F.Supp.2d 764 (W.D.Ky. 2005); *Ohio Cas. Ins. Co. v. Vermeer Mfg. Co.,* 298 F.Supp.2d 575 (W.D.Ky. 2004); *Custom Products, Inc. v. Fluor Daniel Canada, Inc.,* 262 F.Supp.2d 767 (W.D.Ky. 2003); *Gooch v. E.I. Du Pont de Nemours & Co.,* 40 F.Supp.2d 863 (W.D.Ky. 1999); *Bowling Green Mun. Utils. v. Thomasson Lumber Co*., 902 F.Supp. 134 (W.D.Ky. 1995); *see also*, *Pioneer Resources Corp. v. Nami Resources Co., LLC,* 2006 WL 1778318 (E.D.Ky. 2006); *Highland Stud Intern. v. Baffert,* 2002 WL 34403141 (E.D.Ky. May 16, 2002); *Strathmore Web Graphics v. Sanden Machine, Ltd.,* 2000 WL 33975406 (W.D.Ky. May 16, 2000); *McCracken County School Bd. of McCracken County Kentucky v. Hoover Universal, Inc.*, 1994 WL 1251233 (W.D.Ky. April 1, 1994). At least one of our sister state courts has also predicted whether and how Kentucky would eventually address the economic loss rule. *Teledyne Technologies Inc. v. Freedom Forge Corp*., 2002 WL 748898 (Pa.Com.Pl. April 19, 2002).

Mt. Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc., 276 F.3d 845, 848 (6th Cir. 2002)(applying Kentucky law).

While the majority fears the economic loss rule will move across Kentucky's jurisprudential landscape like "The Blob," consuming too many valid tort claims that happen to get in its path, I view the rule differently. I agree with Justice Keller's approbation of

> the economic loss rule's underlying rationale – *i.e*., the need to establish a boundary between contract law and tort law so that "parties to a contract may allocate their risks by agreement and [will] not need the special protections of tort law to recover for damages caused by breach of contract."

Presnell Const. Managers, Inc. v. EH Const., LLC, 134 S.W.3d 575, 589 (Ky. 2004)(Keller, J., concurring). I share the concern of the United States Supreme Court that, were there no economic loss rule, "contract law [might] drown in a sea of tort." *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866, 106 S.Ct. 2295, 2300, 90 L.Ed.2d 865 (1986).

Nearly every discussion of Kentucky's development of the rule (albeit unlabeled) has included consideration of *Real Estate Marketing v. Franz,* 885 S.W.2d 921 (Ky. 1994). The case *sub judice* is no exception. However, different courts read *Franz* in different ways. The majority here sees in *Franz* the implicit adoption of the economic loss rule. The Sixth Circuit interpreted *Franz* in a contrary manner and rejected the view that it signifies application of the rule.

> While the Kentucky Supreme Court agreed with the trial court that the Franzes could not sustain a negligence claim, it did so because there was no "damaging event," *not because their claim was barred by the economic loss doctrine*. [citation omitted] Indeed, in its decision, the *Kentucky Supreme Court expressly refused to extend Franz to a Kentucky Court of Appeals decision which had adopted the economic loss doctrine*.

Mt. Lebanon, supra, at 849 (emphasis supplied), *see also Barton Brands, Ltd. v. O'Brien & Gere, Inc. of North America,* --- F.Supp.2d ----, 2008 WL 819068 p.6 (W.D.Ky. 2008)("Kentucky has declined to extend the economic loss rule to consumer purchases, *see, e.g. Real Estate Mktg., Inc. v. Franz*").

The confusion is understandable but the conflicting views can, perhaps, be reconciled. Though *Franz* does not mention § 385 of the Restatement (Second) of Torts, the case cites and clearly relies on *Saylor v. Hall, supra,* which found that section to be consistent with Kentucky common law. While the only claim in *Saylor* was for personal injury, *Franz* involved no personal injury, only property damage. It was consistent with *Saylor* and with § 385 for the Supreme Court to treat the construction of the subject dwelling as equivalent to the manufacture of a chattel. *Compare* Restatement (Second) of Torts § 385 (1965)(calling for application of "the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others"), *and* Restatement (Second) of Torts § 395 (1965)(with particular attention to Comments d and g, and Illustration 1, indicating the breadth of liability, though not beyond reasonable foreseeability).

Also consistent with the language and intent of § 385, *Franz* applied a limitation on liability borrowed from product liability law that had already been utilized by other courts – the "sudden and dangerous" test. *See* Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: a Critical Analysis*, 40 S.C. L. REV. 891, 914-19 (1989)(an economic loss rule test thoroughly criticized before *Franz* was decided). Using slightly different wording, *Franz* held that before a claim can be brought in tort for negligent construction of a residence, there must be a "destructive occurrence" or "damaging event" that causes physical harm (to use § 385's term) to something other than "the product", *i.e.*, the dwelling. The practical effect is that when *Franz* was rendered, construction cases joined product liability cases and business purchases cases as those in which Kentucky recognizes a limitation on tort liability – *i.e.*, Kentucky's unlabeled economic loss rule. *See, Davis v. Siemens Medical Solutions USA, Inc.,* 399 F.Supp.2d 785, 801 (W.D.Ky. 2005)(In Kentucky, "the economic loss rule has been limited to apply to products liability cases . . . to business purchases . . . and to construction cases").

But we need not delve any more into this analysis of Kentucky's unlabeled economic loss rule. We have already gone further than necessary to decide the issue in this case. "Economic loss," as that term is used in the literature and cases discussing the rule, is simply not a category of damage suffered by the Hacks. "'Economic loss' is defined generally 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 [and] also encompasses the diminution in the 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." Barrett, *supra*, at 892 fn.1 (Citations and quotation marks omitted). No matter where it has made an appearance, the economic loss rule has never prohibited "recovery for damages to property other than the product purchased." *Mt. Lebanon* at 849. Because the Hacks experienced damages to their property other than "the product" itself, the economic loss rule is not implicated at all.

Central Paving Company's liability, if any, is simply governed by Restatement (Second) of Torts § 385. *See*, *Gilbert v. Murray Paving Co., Inc.,* 147 S.W.3d 736, 742-43 (Ky.App. 2003)(tort liability under Restatement (Second) of Torts § 385 (1965) where contractor negligently resurfaced road).

I also agree that the summary judgment in favor of Lone Oak should be reversed, but for different reasons. Lone Oak's liability, if any, is governed by traditional tort and property law concepts. *See Real Estate Marketing* at 926 ("if this were simply a matter of real estate law, rather than of defective construction, this case would be governed by [o]the[r] principles").

The majority's analysis of the claims against Lone Oak relies heavily on cases addressing a home builder's liability for defective residential construction. I believe this reliance is misplaced.

Our Supreme Court has carved out special tort liability rules for those who construct dwellings. While some rules expand a home builder's liability,

Crawley v. Terhune, 437 S.W.2d 743, 745 (Ky. 1969)("*caveat emptor* rule is completely unrealistic and inequitable as applied in the case of the ordinarily inexperienced buyer of a new house from the professional builder-seller"), others limit that liability. *Real Estate Marketing, Inc. v. Franz*, 885 S.W.2d 921, 926 (Ky. 1994)("[t]ort recovery is contingent upon damage from a destructive occurrence"). Neither the expansion nor the limitation of tort liability for home builders, however, comes into play in this case.

The four cases from foreign jurisdictions relied upon by the majority, beginning with *Brown v. Fowler*, are particularly unpersuasive. Each was an action brought against a home builder. Lone Oak is a developer. Even if home builder liability concepts were applicable as between the Hacks and Lone Oak, or Central Paving for that matter, none of these cases would be persuasive because not one of them involved a "damaging event" or "destructive occurrence." If this Court were presented with these same fact patterns, *Franz* would compel us to exonerate the home builder in each case.

The case against Lone Oak is governed by Kentucky's doctrine of *caveat emptor,* including its exceptions, which is consistent with the expression of that doctrine contained in Restatement (Second) of Torts § 352 (1965).

> Except as stated in § 353, a vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time that the vendee took possession.

Restatement (Second) of Torts § 352 (1965). Just as in § 385, the "others" referred to in this section include subsequent purchasers. *Saylor v. Hall, supra.* The doctrine, subject to its exceptions, should be available to remote sellers against subsequent purchasers. *See, Wooldridge v. Rowe,* 477 So.2d 296, 298 (Ala. 1985)(*Caveat emptor* barred claim of subsequent purchasers against remote seller).

The exception referenced in § 352 and stated in § 353 is where there is an undisclosed dangerous condition known to vendor, and the vendor either actively conceals or fails to disclose its existence. Here, presuming the installation of the culvert represents a dangerous condition, the Hacks' complaint, read liberally, alleges Lone Oak's knowledge of the existence of that dangerous condition, and the failure to disclose it to the Hacks. The circuit court made no specific finding whether Lone Oak was unaware of this condition but, instead, stated that Lone Oak "oversaw the work." Therefore, summary judgment in favor of Lone Oak was improper if § 352 is applied.

I, too, would reverse both grants of summary judgment but would do so on the basis of the principles set forth in the Restatement (Second) of Torts as cited herein.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:

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