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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002163-MR

INDUSTRIAL RISK INSURERS, an unincorporated association; ALLIANZ INSURANCE COMPANY, a California corporation; CIGNA PROPERTY AND CASUALTY INSURANCE COMPANY, a Connecticut corporation; THE CONTINENTAL INSURANCE COMPANY, a New Hampshire Corporation; THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a New Hampshire corporation; FIREMAN'S FUND INSURANCE COMPANY, a California corporation; FIREMAN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, a New Jersey corporation; THE GLENS FALLS INSURANCE COMPANY, a Delaware corporation; GREAT AMERICAN INSURANCE CORPORATION, an Ohio Corporation; HARTFORD FIRE INSURANCE COMPANY, a Connecticut corporation; HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY, a Connecticut corporation; MOTORS INSURANCE CORPORATION, a New York corporation; SUMITOMO MARINE AND FIRE INSURANCE COMPANY, LTD, a New York corporation; TOKIO MARINE AND FIRE INSURANCE COMPANY, LTD, a New York corporation; YASUDA FIRE & MARINE INSURANCE COMPANY OF AMERICA, a New York corporation; ZURICH AMERICAN INSURANCE COMPANY, a New York corporation, as subrogees of Ingersoll-Rand Company; AND INGERSOLL-RAND COMPANY — APPELLANTS

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 99-CI-00240

GIDDINGS & LEWIS, INC., a Wisconsin corporation;
UNITED DOMINION INDUSTRIES, INC.,
a Delaware corporation; d/b/a AMERICAN CANADIAN
INTERNATIONAL CORPORATION; d/b/a AMCA
INTERNATIONAL; d/b/a GIDDINGS & LEWIS, INC. APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: The Appellants (hereinafter collectively referred to as Industrial Risk) appeal from the circuit court's order granting summary judgment to the Appellees (hereinafter collectively referred to as Giddings & Lewis) based on the "Economic Loss Rule."[1] Industrial Risk argues on appeal that the circuit court erred because: (1) Kentucky has not adopted the Economic Loss Rule; (2) to the extent the Economic Loss Rule does apply, the "Destructive or Calamitous Occurrence Exception" to that Rule applies; (3) adopting the Economic Loss Rule without recognizing the destructive or calamitous occurrence exception would undermine products liability law; (4) the Economic Loss Rule does not bar claims for negligent misrepresentation and fraud; (5) there are material issues of fact

[1] Ingersoll- Rand refers to the legal theory at issue as the "Economic Loss Doctrine" and/or the "economic loss rule." Because the circuit court used the term "Economic Loss Rule" and we discern no significant difference between the terms, we will refer to the theory as the Economic Loss Rule.

regarding Industrial Risk's negligence and fraud claims; and (6) it extended the Economic Loss Rule to bar recovery for damages to other property. Giddings & Lewis argues to the contrary. For the reasons set forth below, we affirm in part and reverse in part, vacate in part, and remand.

FACTS

Because the court disposed of this matter prior to trial, we have derived the facts from the briefs and pleadings of the parties and the depositions that were filed. In 1990, Ingersoll-Rand Company (Ingersoll-Rand) purchased a vertical turning lathe (the lathe), two vertical machining centers, and a material handling system from Giddings & Lewis for use in its Mayfield, Kentucky, facility. All of the machines were covered by Giddings & Lewis's standard warranty.

Ingersoll-Rand contended before the trial court that these machines were separate and should be treated as different machines. Giddings & Lewis contended they were parts of a "flexible manufacturing cell" that should be considered as one machine. Regardless of how the machinery is treated, the parties do not dispute that Giddings & Lewis manufactured the lathe, the vertical machining centers, and the material handling system to meet specifications provided to it by Ingersoll-Rand. The most pertinent specification was that the lathe turn at a rate of up to 690 revolutions per minute, which was more than sixty percent faster than any other lathe manufactured by Giddings & Lewis.

The lathe was designed to shape large blocks of metal into a machine part. The metal was situated on a pallet and held in place by a chuck or clamp. The pallet was then loaded into the lathe where the metal block would spin at up to 690 revolutions per minute while being shaped. The chuck weighed 1,500 pounds and the blocks of metal weighed up to several hundred pounds. The vertical machining centers were used to finish the product after it was taken from the lathe, and the material handling system was used to move the pallet into and out of the lathe and into and out of the vertical machining centers.

On June 7, 1997, the chuck and/or pallet apparently failed to hold the piece of metal being machined and that piece and the chuck broke free, causing considerable damage to the lathe, the material handling system, and the vertical machining centers. The two men who were operating the lathe at the time of this failure were able to escape without being injured.

Following the accident, Industrial Risk paid to Ingersoll-Rand a total of $2,798,742.00, representing replacement and repair of the damaged machinery, overtime pay to employees, and other related expenses. Giddings & Lewis contended that the failure occurred because Ingersoll-Rand did not adequately maintain or service the lathe or the chuck. Industrial Risk contended that the failure occurred because the lathe was not designed to handle the centrifugal force created by the spinning metal. Furthermore, Industrial Risk contended that Giddings & Lewis knew that the lathe would not be able to handle the force generated and failed to advise Ingersoll-Rand accordingly.

On June 7, 1999, Industrial Risk filed suit against Giddings & Lewis, alleging that Giddings & Lewis: (1) negligently and carelessly designed, manufactured, assembled, programmed, distributed, sold, installed, started up, calibrated, inspected, serviced, maintained, upgraded, and/or modified the lathe; (2) negligently failed to warn Ingersoll-Rand of a defect in the lathe; (3) the lathe failed as a result of that negligence and carelessness, and Ingersoll-Rand suffered damages; (4) the lathe was unreasonably dangerous or defective, rendering Giddings & Lewis strictly liable; and (5) the lathe was not of merchantable quality, thus rendering Giddings & Lewis liable for breach of contract and warranty.

Following some initial discovery, Giddings & Lewis filed a motion for summary judgment on November 9, 2006. In its motion, Giddings & Lewis argued that no warranty of merchantability existed and, if it did, Industrial Risk's warranty claims were barred by the applicable statute of limitations; and that Industrial Risk's tort claims were barred by the Economic Loss Rule, which essentially limits recovery to the value of the damaged machine and any collateral damage. Approximately two weeks later, Industrial Risk filed a motion to amend its complaint to add allegations of breach of express warranty, negligent misrepresentation, and fraud by omission. Giddings & Lewis then amended its motion for summary judgment.

On June 28, 2007, the circuit court entered an order denying Giddings & Lewis's motion. The court found that Industrial Risk's implied warranty of merchantability claim was barred by the statute of limitations. The court then

found that Industrial Risk's claims under negligence, product liability, negligent misrepresentation, and fraud by omission theories would likely fall within the types of claims generally barred by the Economic Loss Rule. The court stated that the Economic Loss Rule

> has three principle elements. First, it maintains the distinction between tort and contract law. Second, it allows the parties freedom to allocate risks by contract provisions. Third, the commercial purchaser, being deemed best situated to assess the the [sic] risk is encouraged to assume, allocate or insure against that risk.

Although the court noted that the Supreme Court of Kentucky has never specifically stated that it was adopting the Economic Loss Rule, it found that the Court of Appeals had adopted the rule by implication in *Falcon Coal Co. v. Clark Equipment Co.*, 802 S.W.2d 947 (Ky. App. 1990). The court then noted that there is an exception to the Economic Loss Rule involving damages resulting from a calamitous or destructive event. Although the court freely admitted that it did not understand the logic behind the exception, it found that the exception applied. Therefore, the court found that the Economic Loss Rule would not bar Industrial Risk's claims.

Finally, the court found that, although Industrial Risk argued to the contrary, the lathe, the vertical machining centers, and the material handling system were one product for purposes of the Economic Loss Rule. Therefore, recovery for damage to the vertical machining centers and the material handling system by the failure of the lathe would be barred by the Economic Loss Rule.

Giddings & Lewis then filed a motion for reconsideration arguing that Kentucky had not adopted the calamitous or destructive event exception to the Economic Loss Rule and that a majority of jurisdictions had rejected the exception. After considering that motion and Industrial Risk's response, the court granted summary judgment to Giddings & Lewis. In doing so, the court found that the "destructive occurrence" exception to the Economic Loss Rule "is a minority position." The court reconsidered the application of that exception and determined that "the Defendants' Motion for Summary Judgment upon reconsideration should have been granted." Industrial Risk filed a motion for reconsideration, which the court denied on September 26, 2007. In that order, the court stated that it was not clear whether the calamitous or destructive occurrence exception had been rejected by a majority of jurisdictions or not. Regardless, the court determined not to adopt that exception and denied Industrial Risk's motion. It is from this order that Industrial Risk appeals.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when "it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor." *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In ruling

on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Id.* at 480. In *Steelvest* the word "'impossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

When reviewing a question of law, such as whether the Economic Loss Rule applies in Kentucky, the standard of review is *de novo*. *See Carroll v. Meredith,* 59 S.W.3d 484, 489 (Ky. App. 2001); *A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.,* 998 S.W.2d 505, 509 (Ky. App. 1999); *Aubrey v. Office of Attorney General,* 994 S.W.2d 516, 518-19 (Ky. App. 1998); *and Cinelli v. Ward,* 997 S.W.2d 474, 476 (Ky. App. 1998). With these standards in mind, we will analyze the issues raised by Industrial Risk.

ANALYSIS

Although Industrial Risk may have couched the issues differently, we deem that the four issues before us are: (1) whether the Economic Loss Rule applies in Kentucky; (2) if so, whether the destructive or calamitous exception to the rule applies in Kentucky; (3) whether claims of negligent misrepresentation and fraud are exempt from the rule; and (4) whether the lathe, the vertical machining centers, and the material handling system were one piece of property for purposes of the Economic Loss Rule. We will address each issue in the order set forth above; however, before doing so, we will set forth a summary of the Economic Loss Rule.

The United States Supreme Court discussed, at length, the Economic Loss Rule in *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986). As the Court indicated, the Economic Loss Rule exists on the fine line that separates products liability law from contract law.

> Products liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty. See *Seely v. White Motor Co.,* 63 Cal.2d 9, 15, 45 Cal.Rptr. 17, 21, 403 P.2d 145, 149 (1965). It is clear, however, that if this development were allowed to progress too far, contract law would drown in a sea of tort. See G. Gilmore, The Death of Contract 87-94 (1974).

Id. 476 U.S. 858, 866, 106 S.Ct. 2295, 2299 – 2300. The Court noted that the

> tort concern with safety is reduced when an injury is only to the product itself. When a person is injured, the "cost of an injury and the loss of time or health may be an overwhelming misfortune," and one the person is not prepared to meet. *Escola v. Coca Cola Bottling Co.,* 24 Cal.2d, at 462, 150 P.2d, at 441 (opinion concurring in judgment). In contrast, when a product injures itself, the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or . . . experiences increased costs in performing a service. Losses like these can be insured. See 10A G. Couch, Cyclopedia of Insurance Law §§ 42:385-42:401, 42:414-417 (2d ed. 1982); 7 E. Benedict, Admiralty, Form No. 1.16-7, p. 1-239 (7th ed. 1985); 5A J. Appleman & J. Appleman, Insurance Law and Practice § 3252 (1970). Society need not presume that a customer needs special protection. The increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified. Cf. *United States v. Carroll Towing Co.,* 159 F.2d 169, 173 (CA2 1947).

Id. 476 U.S. at 871-72, 106 S.Ct. at 2302. Furthermore, the Court noted that

> [c]ontract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements. The manufacturer can restrict its liability, within limits, by disclaiming warranties or limiting remedies. See UCC §§ 2-316, 2-719. In exchange, the purchaser pays less for the product. Since a commercial situation generally does not involve large disparities in bargaining power, cf. *Henningsen v. Bloomfield Motors, Inc.,* 32 N.J. 358, 161 A.2d 69 (1960), we see no reason to intrude into the parties' allocation of the risk.

Id. 476 U.S. at 872-73, 106 S.Ct. at 2303. Therefore, the Court concluded that, when a product failed and only damaged itself, the purchaser of the product was limited to recovering for that damage.

In addition to addressing the Economic Loss Rule, the Court addressed the calamitous exception to that rule. The Court noted that some jurisdictions permit a claim in tort when a product only injures itself, "if the defective product creates a situation potentially dangerous to persons or other property, and loss occurs as a proximate result of that danger and under dangerous circumstances." *Id.* 476 U.S. at 870, 106 S.Ct. at 2301. The Court rejected that theory finding that it is

> too indeterminate to enable manufacturers easily to structure their business behavior. Nor do we find persuasive a distinction that rests on the manner in which the product is injured. We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous. Compare *Morrow v. New Moon Homes, Inc.,* 548 P.2d 279 (Alaska 1976), with *Cloud v. Kit Mfg. Co.,* 563 P.2d 248, 251

> (Alaska 1977). But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. 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 its bargain-traditionally the core concern of contract law. See E. Farnsworth, Contracts § 12.8, pp. 839-840 (1982).

Id. 476 U.S. at 870, 106 S.Ct. 2301-2302.

With the preceding in mind, we will address the issues raised by Industrial Risk on appeal.

1. Whether the Economic Loss Rule Applies in Kentucky

The parties agree that the Supreme Court of Kentucky has never explicitly adopted the Economic Loss Rule. However, in *Falcon Coal Co. v. Clark Equipment Co.*, 802 S.W.2d 947 (Ky. App. 1990), this Court, while not using the term "Economic Loss Rule", addressed the concept. In that case, Falcon Coal Co. purchased a front end loader from Clark Equipment Co. Approximately eight months after the purchase, the front end loader caught fire causing significant damage to itself, but no other property damage or personal injury. Falcon Coal Co. alleged that the fire was the result of a manufacturing defect and brought suit on a strict liability/products liability theory. The issue on appeal was whether Falcon Coal Co. could recover under that theory when the "damage is limited to the product itself." *Id.* at 948.

Based on the above and after reviewing several federal district court cases and Kentucky Supreme Court cases, this Court noted that Kentucky had

adopted the Restatement (Second) of Torts § 402A, which provides that "[o]ne who sells *any product* in a defective condition unreasonably dangerous to the user or consumer or *to his propert*y is subject to liability for physical harm thereby caused to the ultimate user or consumer, or *to his property . . . .*" *Id*. at 948, *citing* Restatement (Second) of Torts §402A(1). (Emphasis in original.) Based on that language, this Court held that §402A does not provide for recovery "for harm caused only to the product itself."

Four years later, the Supreme Court of Kentucky addressed the concept of the Economic Loss Rule in *Real Estate Marketing, Inc. v. Franz*, 885 S.W.2d 921 (Ky. 1994). In that case, Real Estate Marketing, Inc. built a house for the Careys. The Careys experienced a number of problems with the house which they attempted to repair or to have repaired. When the repairs proved to be insufficient, the Careys sold the house to the Franzes. The Franzes also experienced problems because of allegedly faulty construction, and they sued the Careys and Real Estate Marketing, Inc. The Court rejected the Franzes's contract and warranty claims and, in addressing the Franzes' negligence and negligence *per se* claims, the Court stated it would "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." *Id.* at 926.

We believe that *Real Estate Marketing, Inc.* can be distinguished from this matter. In *Real Estate Marketing, Inc.*, the Franzes were not the initial

purchasers of the property; therefore, they had no contract or warranty remedies against the builder. Thus, one of the underpinnings of the Economic Loss Rule, the ability of sellers and buyers to contract for and address through insurance or warranty possible defects with the product, was not present.

In *Presnell Const. Managers v. EH Const. LLC*, 134 S.W.3d 575 (Ky. 2004), DeLor Design Group (DeLor) contracted with Presnell Construction Managers (Presnell) to perform renovations in a DeLor owned building. The contract provided that it did not create a relationship or cause of action in favor of any third party against either Presnell or DeLor. Approximately one year later, DeLor contracted with EH Construction (EH) to perform work on the project. Their contract also provided that it did not create any relationship or cause of action by EH against any potential third party beneficiary. EH did not get paid for its work and ultimately sued Presnell, DeLor, and others involved in the project. In pertinent part, EH alleged that Presnell made negligent misrepresentations and negligently managed the project, causing EH damages. The Court, after indicating that it had not previously done so, announced that it was adopting § 552 of the Restatement (Second) of Torts. That section of the Restatement indicates that privity of contract is not necessary to pursue a negligent misrepresentation claim, permitting EH's claim to proceed on that theory.

In his concurring opinion, Justice Keller, joined by Justice Graves, undertook an analysis of the Economic Loss Rule and its application in Kentucky. He noted that no appellate court had specifically adopted the rule, although the

Court of Appeals and the Supreme Court had discussed it and partially adopted it in concept. Justice Keller noted that the rule, although fairly simple to explain, proved difficult to put into practice because of a number of exceptions. He noted that the focus should not be on the type of loss, *i.e.,* economic loss vs. personal injury, but rather on the "source of duty." *Id*. at 589. According to Justice Keller, who cited to Colorado's version of the Economic Loss Rule, the rule would apply if damages arose from the breach of a contractual obligation but it would not apply if damages arose from an independent non-contractual duty of care.

Applying that theory to the facts in *Presnell*, Justice Keller stated that EH's claim based on negligent management would be barred by the Economic Loss Rule because that claim arose from the parties' contractual relationship. However, the claim based on negligent misrepresentation would not be barred because that claim arose from the common law duty to make accurate representations, a duty that is independent from the contract. *Id.* at 590.

Based on our review of the above, we hold that the circuit court correctly determined that the Economic Loss Rule does apply in Kentucky. Therefore, we affirm that portion of the circuit court's summary judgment.

2. Whether the Destructive or Calamitous Exception to the Economic Loss Rule Applies in Kentucky

Having reviewed the above, and finding Justice Keller's reasoning in *Presnell* to be persuasive, we hold that the destructive or calamitous exception to the Economic Loss Rule does not apply in Kentucky. As the Supreme Court of the United States noted in *East River S.S. Corp.* and as the Graves Circuit Court noted herein, there is no logical reason to determine the amount of damages available based on whether a product failed by small increments or suddenly. The end result is the same, the product failed. However, we are also cognizant of Industrial Risk's argument that applying the Economic Loss Rule unchecked could "unjustly undermine the protections of products liability law." We believe application of Justice Keller's analysis in *Presnell* will preserve that protection because looking to the source of the duty, rather than to the damages, maintains the line between tort liability and contract liability.

Applying Justice Keller's analysis to this case, we affirm the circuit court in part and reverse and remand in part. As Justice Keller did in *Presnell,* we hold that Industrial Risk's claims arising out of negligence and breach of warranty are contractual in nature and fall within the Economic Loss Rule. However, Industrial Risk's claims arising out of negligent misrepresentation and fraud arise out of common law tort theories and do not fall within the Economic Loss Rule. Therefore, we affirm the circuit court's dismissal of Industrial Risk's negligence and warranty claims but reverse and remand as to the court's dismissal of Industrial Risk's negligent misrepresentation and fraud claims.

We are not saying that these claims will ultimately withstand appropriate motions for summary judgment or a directed verdict. However, the parties should be permitted to make their arguments regarding the validity of those claims, and the court should analyze those arguments setting aside any application of the Economic Loss Rule.

(3) Whether Claims of Negligent Misrepresentation and Fraud Are Exempt from the Rule

We addressed this issue above. However, for the sake of clarity, we hold that the claims of negligent misrepresentation and fraud do not arise from the contract and, therefore, do not fall within the Economic Loss Rule.

(4) Whether the Lathe, the Vertical Machining Centers, and the Material Handling System Were One Piece of Property for Purposes of the Economic Loss Rule

Industrial Risk argues that the lathe, the vertical machining centers, and material handling system are separate pieces of equipment. In support of that argument, Industrial Risk notes that each piece of equipment has a separate serial number and invoice price, and that each machine can be purchased and used as a stand alone machine. Giddings & Lewis argues that the machines were sold as a cell, or group of machines, warranted as a cell, and insured as a cell. The circuit court, found that

> although the manufacturing cell included separate components, it was one piece of equipment for purposes of application of the Economic Loss Rule. It does not appear determinative to this Court that the items were priced separately. In purchasing a new automobile, the options on the "sticker" are each priced separately, but

> the automobile is one piece of equipment. The cell was purchased at one time, it is one system, and the Court feels that for purposes of [the] Economic Loss Rule it should be treated as one piece of property.

We understand the circuit court's analogy; however, we find fault with it. Items listed separately on an automobile's sticker, such as air conditioning, an automatic transmission, or a CD/MP3 player, generally cannot operate independently; whereas the machines in question can do so. Furthermore, separate pricing is not the only factor that could lead to the conclusion that the machines are separate and should not be treated as one. As noted above, separate serial numbers and the fact that the machines can be and are sold and operated separately must be considered. Taking all of the factors into consideration, and viewing them in a light most favorable to Industrial Risk, we cannot conclude that the lathe, the vertical machining centers, and the material handling system were one product as a matter of law. We believe that is a question of fact for the jury to determine. Therefore, we reverse that finding by the circuit court.

5. Breach of Terms of Service Contract

During oral arguments, counsel for Industrial Risk argued that Giddings & Lewis breached contractual obligations with regard to servicing the machinery at issue. Counsel stated that the record contains numerous "contracts" to service the machine. We have reviewed the record before us and note the following. Giddings & Lewis propounded interrogatories to Industrial Risk asking

for information regarding repairs, service, and/or modifications made to the VTL by Ingersoll-Rand. In response, Industrial Risk stated as follows:

> Only routine work and planned maintenance had been performed on this VTL prior to June 7, 1997. . . . Original maintenance program records were stored in a computer system and were not saved when the system was replaced near the time of this loss. Giddings & Lewis performed the work on the machine at installation and shortly thereafter to get the machine working. The exact dates of this service and maintenance are not known at this time. (See attached).

Additionally, Perry Hilton (Hilton), maintenance manager for Ingersoll-Rand at the time, testified that minor problems with the machinery were repaired by in-house maintenance personnel; however, major problems were handled by personnel from Giddings & Lewis. Hilton also testified that both paper and computer records regarding maintenance were destroyed when Ingersoll-Rand closed the Mayfield, Kentucky plant.

Giddings & Lewis attached a number of work order forms to the deposition of David Fowler (Fowler), machine operator for Ingersoll-Rand. Fowler was not familiar with the forms; however, he testified that they appeared to show when maintenance was requested and performed. The forms, as far as we can discern, do not indicate whether the work was performed by Giddings & Lewis employees or Ingersoll-Rand employees.

Finally, as noted by Giddings & Lewis in various pleadings, although Industrial Risk referred to a service contract, no such contract is in the record before us.

Because we do not have clear evidence of the existence of a service contract, the terms of any such contract, or how any such contract may have been violated, we cannot address this issue. However, to the extent any service contract existed, any claims by Industrial Risk related to misrepresentation or fraud arising from any such contract may be addressed in conformity with this opinion.

6. Damage to Other Property

Industrial Risk stated during oral arguments that Ingersoll-Rand suffered damage to property other than the lathe, the material handling centers, and the vertical machining center. The primary evidence of damages we have in the record is a stipulation by the parties regarding the total amount of damages. The stipulation refers to the "reasonable costs to rebuild the VTL, to repair other equipment, costs associated with contracting work which was to be performed by the VTL to outside companies, purchase of temporary equipment, in-house overtime and other miscellaneous costs." The stipulation does not list what "other equipment" is involved. Should a jury find that the material handling centers and vertical machining center are "other equipment" then Industrial Risk may be able to recover damages related to those pieces of machinery. Furthermore, Industrial Risk may be able to recover damages related to any other equipment or to its facility to the extent it can prove such damages.

CONCLUSION

For the reasons set forth above, we affirm the circuit court's summary judgment disposing of Industrial Risk's contract claims. However, we reverse and

vacate the circuit court's summary judgment disposing of Industrial Risk's negligent misrepresentation and fraud claims. Furthermore, we reverse and vacate the circuit court's finding that the lathe, the vertical machining centers, and the material handling system were one product for purposes of the Economic Loss Rule. Finally, we remand this matter to the circuit court for additional proceedings consistent with this opinion.

ALL CONCUR.

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