[Cite as *Potts v. Safeco Ins. Co.*, 2010-Ohio-2042.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
MARK POTTS, et al.,	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
Plaintiffs-Appellants	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2009 CA 0083
	:	
	:	
SAFECO INSURANCE CO., et al.,	:	O P I N I O N
Defendants-Appellees		

CHARACTER OF PROCEEDING:	Civil Appeal from Richland County Court of Common Pleas Case No. 08 CV 1319 D
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 3, 2010

APPEARANCES:

For Plaintiffs-Appellants

ROBERT GOLDBERGER
13 Park Avenue West, Ste. #300
Mansfield, Ohio 44902

For Defendants-Appellees

PATRICK McCAFFREY
AUDREY E. VARWIG
GOLIAN & McCAFFREY, LLC
2109 Stella Court
Columbus, Ohio 43215

Edwards, P.J.

{¶1} Plaintiffs-appellants, Mark Potts and Paula Potts, appeal from the May 22, 2009, Order from the Richland County Court of Common Pleas granting the Motion for Summary Judgment filed by defendants-appellees, Norbert Welker and Welker & Oyster Insurance.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellants Mark and Paula Potts own property located in Richland County, Ohio. Appellee Norbert Welker is an insurance agent with appellee Welker & Oyster Insurance.

{¶3} In 1998, appellants contacted appellees to obtain homeowner's insurance on their property. Appellees obtained an insurance policy for appellants through Safeco Insurance Company of America (hereinafter "Safeco Insurance Company"). The policy provided coverage for overflowing or discharges due to a failed sump pump.

{¶4} Appellants contend that, sometime after receiving their policy, appellee Welker advised them that the terms of some policies issued by Safeco Insurance Company had changed, but that appellants' policy remained unchanged.

{¶5} On June 3, 2002, appellants' basement flooded after their sump pump, due to a power outage, became inoperable. As a result, appellants' basement and personal property were damaged. On June 6, 2002, Safeco Insurance Company denied coverage to appellants for the damage.

{¶6} Subsequently, on July 3, 2008, appellants filed a complaint[1] against Safeco Insurance Company and appellees in the Richland County Court of Common

[1] The complaint was a refiled complaint.

Pleas, seeking $18,753.06 in damages for loss of personal property and damages to the premises. Appellants, in their complaint, alleged, in relevant part, as follows:

{¶7} "13. Safeco breached its contract of insurance with plaintiffs by failing to pay the above described claim for damages to personal property and premises inasmuch as such damages were covered by the policy in question.

{¶8} "14. In the alternative, Defendants Welker & Oyster and Welker negligently obtained and/or negligently failed to monitor the insurance they had obtained for plaintiffs.

{¶9} "15. As a result of the negligence of defendants described in paragraph 14, Plaintiffs were not provided with insurance that covered the hazards for which plaintiffs asked to be insured, including water damage resulting from sump pump failure."

{¶10} Appellees filed a cross-claim against Safeco Insurance Company.

{¶11} On November 20, 2008, Safeco Insurance Company filed a Motion for Summary Judgment, arguing that appellants' complaint against Safeco Insurance Company was not filed within one year after appellants' loss as required by the terms of the policy issued by Safeco Insurance Company to appellants.

{¶12} Thereafter, on April 7, 2009, appellees filed a Motion for Summary Judgment, arguing that appellants' "negligence claim for solely economic damages is barred by the economic loss doctrine."

{¶13} Pursuant to an Order filed on April 21, 2009, the trial court granted the Motion for Summary Judgment filed by Safeco Insurance Company.

{¶14} Thereafter, as memorialized in an Order filed on May 22, 2009, the trial court granted appellees' Motion for Summary Judgment. The trial court, in its Order, found that appellants' "cannot recover under their negligence claims for their economic loss." The trial court, in its Order, also dismissed the cross-claim against Safeco Insurance Company as moot.

{¶15} Appellants now raise the following assignment of error on appeal:

{¶16} "THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT."

I

{¶17} Appellants, in their sole assignment of error, argue that the trial court erred in granting appellees' Motion for Summary Judgment. Appellants specifically argue that the trial court erred in holding that appellants' claim against appellees for damages is barred by the economic loss doctrine. We disagree.

{¶18} The Ohio Supreme Court, in *Corporex Dev. & Constr. Mgmt., Inc. v. Shook, Inc.,* 106 Ohio St.3d 412, 2005-Ohio-5409, 835 N.E.2d 701, stated, in relevant part, as follows: "The economic-loss rule generally prevents recovery in tort of damages for purely economic loss. See *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St.3d 40, 45, 537 N.E.2d 624; *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Assn.* (1990), 54 Ohio St.3d 1, 3, 560 N.E.2d 206. " '[T]he well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable.' " *Chemtrol,* 42 Ohio St.3d at 44, 537 N.E.2d 624, quoting *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.* (Iowa 1984), 345 N.W.2d 124, 126.

See, also, *Floor Craft,* 54 Ohio St.3d at 3, 560 N.E.2d 206. This rule stems from the recognition of a balance between tort law, designed to redress losses suffered by breach of a duty imposed by law to protect societal interests, and contract law, which holds that 'parties to a commercial transaction should remain free to govern their own affairs.' *Chemtrol,* 42 Ohio St.3d at 42, 537 N.E.2d 624. See, also, *Floor Craft,* 54 Ohio St.3d at 7, 560 N.E.2d 206, quoting *Sensenbrenner v. Rust, Orling & Neale Architects, Inc.* (1988), 236 Va. 419, 425, 374 S.E.2d 55. "'Tort law is not designed * * * to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. That type of compensation necessitates an analysis of the damages which were within the contemplation of the parties when framing their agreement. It remains the particular province of the law of contracts.' " *Floor Craft,* 54 Ohio St.3d at 7, 560 N.E.2d 206, quoting *Sensenbrenner,* 236 Va. at 425, 374 S.E.2d 55." Id at paragraph 6.

{¶19} The economic-loss rule is based on the principle that, "[i]n the absence of privity of contract between two disputing parties the general rule is 'there is no * * * duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things.'" *Floor Craft* at 3, 560 N.E.2d 206, quoting Prosser & Keeton, Law of Torts (5th Ed.1984) 657, Section 92.

{¶20} As noted by the trial court, "inability to recover under an insurance policy for injury or damage is an economic loss… [E]nding up with an insufficient insurance policy cannot be considered personal injury or property damage and must, therefore, be characterized as an economic loss." See *Long v. Time Ins. Co.* (S.D. Ohio 2008), 572

F. Supp.2d 907, which was cited by the trial court. In such case, the court held that the economic loss doctrine barred negligence claims arising from an insurer's rescission of a short-term medical insurance policy. The court noted that the insured did not allege that he suffered damages to persons or property as a result of the rescission.

{¶21} However, the economic loss rule does not apply to claims for negligent misrepresentation. *See McCarthy, Lebit, Crystal & Haiman Co. v. First Union Mgmt., Inc.* (1993), 87 Ohio App.3d 613, 622 N.E.2d 1093, 1105-06. See also *Ferro Corp. v. Blaw Knox Food & Chem. Equip. Co.* (1997), 121 Ohio App.3d 434, 440-41, 700 N.E.2d 94 (1997) and *Corporex*, supra.

{¶22} The Ohio Supreme Court, in *Corporex*, while not explicitly stating that the economic loss doctrine did not apply to claims of negligent misrepresentation, implicitly so held. In such case, a project owner and general contractor sued a subcontractor for breach of contract, breach of express and implied warranties, negligence and failure to perform in a workmanlike manner. The two sought purely economic damages allegedly occasioned by the subcontractor's failure to perform under the subcontract.

{¶23} After the trial court granted the subcontractor judgment on the pleadings on all of the project owner's claims based on the economic loss rule, the project owner appealed. The Tenth District Court of Appeals reversed with respect to the negligence and implied warranty claims, finding that such claims fell within the exception to the economic loss rule set out in *Haddon View Invest. Co. v. Coopers & Lybrand* (1982), 70 Ohio St.2d 154, 436 N.E.2d 212. In *Haddon*, the Ohio Supreme Court held that an accountant could be liable for purely economic damages based on negligent misrepresentation to third parties in limited circumstances.

{¶24} In reversing the judgment of the Tenth District Court of Appeals, the Ohio Supreme Court, in *Corporex,* stated, in relevant part, as follows*:* "DSI [the project owner] misconstrues our holding in *Haddon View.* In *Haddon View,* this Court discussed the liability of an accountant for professional negligence in accord with 3 Restatement of the Law 2d, Torts (1979), Section 552. *Haddon View,* 70 Ohio St.2d at 156, 24 O.O.3d 268, 436 N.E.2d 212. That section recognizes professional liability, and thus a duty in tort, only in those limited circumstances in which a person, in the course of business, negligently supplies false information, knowing that the recipient either intends to rely on it in business, or knowing that the recipient intends to pass the information on to a foreseen third party or limited class of third persons who intend to rely on it in business. Restatement of Torts 2d, 126-127, Section 552. Liability in *Haddon View* was based exclusively upon this discrete, preexisting duty in tort and not upon any terms of a contract or rights accompanying privity. *Haddon View,* 70 Ohio St.2d at 156-157, 24 O.O.3d 268, 436 N.E.2d 212. DSI fails to identify any duty in tort analogous to the duty identified in *Haddon View.* Its reliance on *Haddon View,* therefore, is misplaced." Id at paragraph 9. The court noted that because the underlying duties were created by a contract to which DSI was not a party, that, therefore, no tort action existed in DSI's favor.

{¶25} As noted by the court in *J.F. Meskill Enterprises, LLC v. Acuity*, (N.D. Ohio April 7, 2006), 2006 WL 903207, "*Corporex* thus makes clear that although tort claims are generally barred by the economic loss doctrine, the discrete tort generally referred to as negligent misrepresentation is not." Id at 4. In *Meskill*, the court held that while negligence claims by insureds against their insurance brokers for failing to procure

coverage were barred by the economic loss doctrine, negligent misrepresentation claims against the broker were not. See also *Mafcote v*. *Genatt Assoc*. (S.D. Ohio Feb. 14, 2007), 2007 WL 527870 and *All Erection & Crane Rental Corp. v. Acordia Northwest, Inc.* (6th Cir. 2006), No. 04-3862, 162 Fed. Appx. 554,559. In *Mafcote*, the court recognized that while a negligence claim against an insurance broker for failing to procure insurance coverage was barred by the economic loss doctrine, a claim that the broker negligently misrepresented that it had procured insurance that would cover the loss was not. In *Acordia*, the court held that the economic loss rule barred an insured's negligence claim against a broker arising from the broker's alleged negligence in relation to the insurer's mid-term cancellation of the insured's insurance policy.

{¶26} Appellants, in the case sub judice, now appear to argue in their brief that their claim for negligent misrepresentation, as opposed to mere negligence, is not barred by the economic loss doctrine. However, in their response to appellees' Motion for Summary Judgment, appellants, in the trial court, never argued that their claim was a negligent misrepresentation claim rather than a simple negligence claim. Their failure to raise such issue in their response to appellees' Motion for Summary Judgment in the trial court results in a waiver of their right to raise such issue on appeal. *Gentile v. Ristas*, 160 Ohio App.3d 765, 2005-Ohio-2197, 828 N.E.2d 1021 at paragraph 74. See also *Ciccarelli v. Miller*, Mahoning App. No. 03 MA 60, 2004-Ohio-5123 at paragraph 20. ("[S]pecific issues that are not raised in rebuttal of a motion for summary judgment are generally waived as issues on appeal").

{¶27} For such reason, we concur with appellees that "this case can be analyzed only under a simple negligence theory of liability."

{¶28} Because, as is set forth above, simple negligence claims, including negligent procurement claims and negligent monitoring claims against insurance brokers, are barred by the economic loss doctrine, we find that the trial court did not err in granting summary judgment to appellees.

{¶29} Appellants' sole assignment of error is, therefore, overruled.

{¶30} Accordingly, the judgment of the Richland County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Gwin, J. and

Delaney, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/Patricia A. Delaney

JUDGES

JAE/d0201

[Cite as *Potts v. Safeco Ins. Co.*, 2010-Ohio-2042.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

MARK POTTS, et al.,	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
SAFECO INSURANCE CO., et al.,	:	
Defendants-Appellees	:	CASE NO. 2009 CA 0083

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to appellants.

s/Julie A. Edwards

s/W. Scott Gwin

s/Patricia A. Delaney

JUDGES