IN THE COURT OF APPEALS OF MARYLAND

No. 63

September Term, 1994

PATTY MORRIS et al.

v.

OSMOSE WOOD PRESERVING et al.

Murphy, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker,

JJ.

Dissenting Opinion by Eldridge, J.,
in which Bell and Raker, JJ., join.

Filed: November 14, l995

Eldridge, J., dissenting:

I disagree with the majority's decision to affirm the dismissal of the plaintiffs' tort claims and Consumer Protection Act claims.

I.

In my view, the only way the Court could determine that the economic loss rule bars tort recovery in this case is to draw doubtful inferences favoring the defendants. The plaintiffs' allegations were sufficient to withstand a motion to dismiss.

In considering whether the complaint was properly dismissed for failure to state a claim, we should be guided by the following principle (*Decoster v. Westinghouse,* 333 Md. 245, 249, 634 A.2d 1330, 1332 (1994)):

> "In determining whether the trial court erred in granting the motion to dismiss for failure to state a claim pursuant to Md.Rule 2-322(b), we must assume the truth of all well-pleaded relevant and material facts as well as all inferences that reasonably can be drawn therefrom. Dismissal is proper only if the facts alleged fail to state a cause of action. *Faya v. Almaraz,* 329 Md. 435, 443, 620 A.2d 327 (1993); *Sharrow v. State Farm Mutual,* 306 Md. 754, 768, 511 A.2d 492 (1968)."

Moreover, not only must we assume the truth of all well-pleaded facts and inferences, but we must view them in the light most favorable to the plaintiff. As Chief Judge Murphy recently stated for the Court in *Board of Education v. Browning*, 333 Md. 281, 286, 635 A.2d 373, 376 (1994),

> "Dismissal is only proper if the facts and allegations viewed in the light most favorable to the plaintiff fail to afford the plaintiff relief if proven."

See, e.g., *Berman v. Karvounis*, 308 Md. 259, 264, 518 A.2d 726, 728 (1987) ("Since we are dealing with a motion to dismiss, we consider appellants' well-pleaded allegations in the light most favorable to them"). *See also Stone v. Chicago Title Ins.,* 330 Md. 329, 333-334, 624 A.2d 496, 498 (1993), and cases cited therein.

In Maryland, a plaintiff may recover in tort for an economic injury resulting from a defective product if there is a substantial and unreasonable risk of death or personal injury. *U.S. Gypsum v. Baltimore,* 336 Md. 145, 647 A.2d 405 (1994); *Council of Co-Owners v. Whiting-Turner,* 308 Md. 18, 517 A.2d 336 (1986). Here, the plaintiffs have alleged in their complaint that there is an immediate threat of personal injury if weight is applied to their roofs which are constructed with FRT plywood. The plaintiffs have further alleged that this weight could be in the form of snow on the roofs or persons on the roofs.

Instead of accepting these assertions on their face and

drawing reasonable inferences from the assertions favorable to the plaintiffs, which is the correct approach in reviewing the dismissal of a complaint for failure to state a claim, the majority holds that the plaintiffs have not met the required legal threshold of pleading. In so doing, the majority draws inferences in the light most favorable to the defendants and departs from our prior cases.

In analyzing the complaint, the majority first notes that the plaintiffs failed to allege that any personal injuries have occurred since the roofs were installed.[1] The majority then reasons that because no actual injuries were alleged, the plaintiffs have pled "mere `possibilities' of injury" and thus have failed to sufficiently allege a cause of action. It is true that conditions which "fall short of presenting a clear danger of death or personal injury will not suffice to permit a tort recovery for economic loss." *Council of Co-Owners v. Whiting-Turner, supra,* 308 Md. at 35 n.5, 517 A.2d at 345 n.5. The majority, however, appears to be saying that in order to plead a legally sufficient economic loss cause of action in tort, the plaintiffs or others must first be injured. This clearly is not the law.

The majority's reasoning contradicts the holdings in our previous cases and the rationale that prompted this Court to

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[1] Although this is technically correct, the majority points out in footnote 3 of its opinion that, in an earlier version of the complaint, the plaintiffs had alleged that homeowners and others had fallen through the roofs.

recognize a cause of action in tort for economic loss absent an actual injury. The very holding of *Council of Co-Owners v. Whiting-Turner*, *supra*, 308 Md. at 22, 517 A.2d at 338, is as follows: "we hold that where a dangerous condition is discovered *before it results in injury*, an action in negligence will lie for the recovery of the reasonable cost of correcting the condition." (Emphasis added). The rationale underlying Maryland's exception to the economic loss rule is that one should not "`have to wait for a personal tragedy to occur in order to recover damages to remedy or repair defects.'" *Council of Co-Owners v. Whiting-Turner, supra,* 308 Md. at 35, 517 A.2d at 345. In neither *Whiting-Turner* nor *U.S. Gypsum v. Baltimore*, *supra*, had an actual injury occurred because of the defective condition. Accordingly, in reviewing a motion to dismiss, any analysis that draws negative inferences from the absence of an injury is entirely inappropriate.

It is common knowledge that homeowners or their agents often need to walk on their roofs to clear debris, to clean gutters, to clean downspouts, to replace shingles, to fix flashing, to clean chimneys, to mount television antennas, etc. In light of this, it is entirely reasonable to infer that there is a substantial risk of serious personal injury because of the defective roofs. Instead, the majority presumes that because no such injury has yet occurred, no injury will likely occur in the future. The message the majority sends to these homeowners is that they should attempt to

clean their downspouts, replace shingles, etc., and sue for economic loss only after the roofs give way and they fall, breaking their legs or their necks.

The majority also states "that it is the *serious* nature of the risk that compels recognition of a cause of action in tort for economic loss, absent actual injury." The majority then concludes that the risk of harm alleged here is not sufficiently serious, again drawing a doubtful inference most favorable to the defendants. The more appropriate inference here is that a serious injury or even death is a foreseeable result of weight being applied to a defective and deteriorating roof.

In evaluating whether the plaintiffs have alleged a sufficiently serious risk of injury, I find the two hypothetical situations discussed in the *Whiting-Turner* opinion to be instructive. In *Whiting-Turner*, the opinion at one point discussed two hypothetical situations, one of which was deemed to state a cognizable cause of action in tort for economic loss and one which was not. The Court in *Whiting-Turner*, *supra*, 308 Md. at 34-35, 517 A.2d at 345, quoting with approval from the opinion of the Supreme Court of Indiana in *Barnes v. Mac Brown and Company, Inc.*, 264 Ind. 227, 230, 342 N.E.2d 619, 621 (1976), first stated:

> "`If there is a defect in a stairway and the purchaser repairs the defect and suffers an economic loss, should he fail to recover because he did not wait until he or some member of his family fell down the stairs and

> broke his neck? Does the law penalize those who are alert and prevent injury? Should it not put those who prevent personal injury on the same level as those who fail to anticipate it?'"

We went on in *Whiting-Turner* to answer the above questions in the affirmative, upholding the right to recover for economic loss where there is a risk of death or personal injury, but we did note a situation where there should be no recovery. The Court explained (*ibid*.):

> "We conclude that the determination of whether a duty will be imposed in this type of case should depend upon the risk generated by the negligent conduct, rather than upon the fortuitous circumstance of the nature of the resultant damage. Where the risk is of death or personal injury[5] the action will lie for recovery of the reasonable cost of correcting the dangerous condition."
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> [5.] "It is the serious nature of the risk that persuades us to recognize the cause of action in the absence of actual injury. Accordingly, conditions that present a risk to general health, welfare, or comfort but fall short of presenting a clear danger of death or personal injury will not suffice. A claim that defective design or construction has produced a drafty condition that may lead to a cold or pneumonia would not be sufficient."

The allegation that defective and deteriorating roofs will lead to serious personal injury if persons get on them or if weight is applied, if proven, is more analogous to the defective stairway

than a draft-related cold. The danger that someone will be injured when a roof is constructed with defective materials is more of a probability than a possibility. To conclude otherwise requires a weighing of the parties' claims, *i.e.,* fact-finding. In reviewing the sufficiency of the plaintiffs' allegations, it is not the proper role of a court to determine the truth of those allegations. In my view, the plaintiffs have alleged enough. Further exploration concerning the extent of the risk presented by the defective roofs should await trial.

The majority also appears to alter the test for establishing a cause of action in tort for economic loss based on a defective product. The majority states that the plaintiff must plead "the existence of a clear and extreme danger of death or *serious* personal injury . . . ." As the previously quoted passage from the *Whiting-Turner* opinion discloses, the Court in *Whiting-Turner* simply required that there be a risk of death or serious personal injury as opposed to "a risk to general health, welfare, or comfort." 308 Md. at 35 n.5, 517 A.2d at 345 n.5. The *U.S. Gypsum* opinion worded the test as follows (336 Md. at 156-157, 647 A.2d at 410): "a plaintiff may still recover in tort [for economic loss] if the defect creates a substantial and unreasonable risk of death or personal injury." The majority today, in addition to requiring that there be a substantial risk of serious injury, requires that there be "a clear and extreme danger" of death or serious personal

injury. The basic principle reflected in the *Whiting-Turner* and *U.S. Gypsum* cases is that a person saddled with a defective product need not wait until someone is killed or injured before bringing a tort action to recover the cost of correcting the dangerous condition. The test enunciated and applied by the majority may largely undermine this principle. If the cause of action is limited to those who can show that the risk or danger of serious personal injury is "extreme," and if a defective and deteriorating roof that is unable to withstand weight does not present an "extreme" risk, the cause of action recognized in our prior cases may be illusory.

I would reverse the dismissal of the tort claims and permit the trier of facts to determine whether there is a sufficient risk of serious injury from the roofs constructed with FRT plywood.

II.

I believe that the plaintiffs' allegations were also sufficient to set forth claims under the Consumer Protection Act, Maryland Code (1975, 1990 Repl. Vol.), § 13-101, *et seq.*, of the Commercial Law Article.

The majority affirms the dismissal of the Consumer Protection Act claims on the ground that the defendants' alleged misrepresentations about their brand of plywood roofing material were made to the builders and not directly to the plaintiffs. The majority suggests that if the defendant manufacturers had, by

advertising, directly attempted to influence the plaintiffs to purchase homes containing the defendants' brand of plywood, the plaintiffs would have stated a cause of action under the Consumer Protection Act. Nevertheless, because the defendants' advertising was "targeted to builders that their products were suitable for roofing," the majority concludes that the effect on the sale of consumer realty is "remote" and that, therefore, the plaintiffs' allegations are insufficient. I disagree.

The distinction drawn by the majority between a manufacturer's advertising aimed directly at the ultimate consumers and a manufacturer's advertising aimed at intermediate sellers such as builders or building supply stores, is largely a distinction without a difference. In either situation, the representations in the manufacturer's advertising are intended to have the same effect, namely the purchase of the product or purchase of homes incorporating the product by the ultimate consumers. The intermediate seller will obviously re-sell or recommend to the consumer the product which the intermediate seller has been induced to buy because of the manufacturer's representations. Often the manufacturer's representations will be repeated by the intermediate seller, or the intermediate seller will show the manufacturer's advertising to the consumer. Whether a manufacturer's advertising is directly aimed at the ultimate consumers or indirectly aimed at them through intermediaries, the purpose is to induce the use of the product by the ultimate consumers.

The reality of the business and advertising world necessitates protecting consumers in both situations. Nothing in the language of the Consumer Protection Act requires the distinction drawn by the majority. On the contrary, the General Assembly foresaw the need to protect consumers who are injured indirectly by the unfair trade practices of remote merchants. The Consumer Protection Act, by its very language, contemplates this indirect involvement by defining a merchant as "a person who directly or *indirectly* either offers or makes available to consumers any consumer goods, consumer services, consumer realty, or consumer credit." § 13-101(g) of the Commercial Law Article, emphasis added.

The majority is correct in characterizing this issue as a "question of statutory construction, the goal of which is to determine the General Assembly's intent in enacting the legislation." To guide our statutory construction, the General Assembly has mandated that the Consumer Protection Act must "be construed and applied liberally to promote its purpose," § 13-105 of the Commercial Law Article. Rather than construe the Act liberally in order to protect consumers, the majority ignores the definition of "merchants" that would hold the defendants liable for their actions.

When a consumer is induced to purchase a defective product by the manufacturer's misrepresentations, it matters little whether

the misrepresentations were made directly to the consumer or passed through an intermediary. In either situation, the purpose of the Consumer Protection Act is implicated. As one court observed in holding that a consumer protection statute covered a misrepresentation made by a seller to an intermediary who in turn sold the product to the consumer, "to hold otherwise would create a loophole which would effectively undermine the Act." *State of Utah v. B & H Auto*, 701 F. Supp. 201, 205 (D. Utah 1988). *See also*, *e.g.*, *State v. Cottman Transmissions,* 86 Md. App. 714, 724 n.9, 587 A.2d 1190, 1195 n.9, *cert. denied*, 324 Md. 121, 596 A.2d 627 (1991) ("Cottman was found to be a `merchant.' In order to accept Cottman's theory, we would have to hold that a merchant company may insulate itself from the consequences of its deceptive practices by conducting them through intermediaries. We reject that theory"); *Kociemba v. G.D. Searle & Co.,* 680 F. Supp. 1293, 1305 (D. Minn. 1988) (consumer protection statute permits a consumer to sue an IUD manufacturer based on advertisements to doctors because statute covers direct as well as indirect advertisements); *Pack & Process, Inc. v. Celotex Corp.,* 503 A.2d 646, 658 (Del. Super. Ct. 1985) (a roof manufacturer's representation to an intermediate buyer may be the basis of a consumer action by the eventual consumer); *Jones v. Sportelli,* 166 N.J. Super. 383, 390, 399 A.2d 1047, 1050 (1979) ("The provision of an IUD to a gynecologist essentially constitutes, at the very least, an indirect attempt to sell the IUD to a

wanting patient with the concomitant expectation of monetary return").

I believe that by including the language "directly or indirectly" in the definition of merchant, the General Assembly of Maryland intended to protect consumers from sellers of products who insulate themselves from the consequences of their misrepresentations or deceptive practices by utilizing intermediaries.[2]

Judges Bell and Raker have authorized me to state that they concur with the views expressed herein.

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[2] Such a construction does not, as the majority fears, provide a cause of action to a consumer who sues "for misrepresentations made by any manufacturer of a component part to another manufacturer, so long as the component part was eventually included in the product purchased by the consumer." Majority's slip opinion at 21. My analysis here concerns the deceptions of a manufacturer of a final product, not a remote manufacturer of a component part. To presume that my position opens a "Pandora's box" of litigation by consumers against manufacturers of component parts is not accurate. The question of whether the statute encompasses suits by consumers against manufacturers of component parts is not before us in this case. I express no opinion on the matter. I do note, however, that under the majority's own standard, a consumer could sue a manufacturer of a component part so long as that manufacturer advertises directly to the consumer.