STATE OF MICHIGAN

COURT OF APPEALS

AFFILIATED FM INSURANCE COMPANY, as Subrogee of Motor City Stamping, Inc.,

Plaintiff-Appellant,

v

ABOLITE LIGHTING, INC., and LSI INDUSTRIES, INC.,

Defendants/Third-Party Plaintiffs-Appellees,

and

CORNELL DUBILIER ELECTRONICS, INC.,

Defendant-Appellee,

and

ELECTREX COMPANY, INC.[1],

Defendant,

v

JONES METAL PRODUCTS COMPANY,[2]

Third-Party Defendant.

UNPUBLISHED
March 20, 1998

No. 193016
Macomb Circuit Court
LC No. 93-003503 CK

Before: Smolenski, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Plaintiff Affiliated FM Insurance Company, as subrogee of Motor City Stamping, Inc., appeals as of right the trial court's grant of summary disposition in favor of defendants Abolite Lighting, Inc., LSI Industries, Inc., and Cornell-Dubilier Electronics, Inc. We affirm.

This case concerns the applicability of the economic loss doctrine, "which bars tort recovery and limits remedies to those available under the Uniform Commercial Code where a claim for damages arises out of the commercial sale of goods and losses incurred are purely economic." *Neibarger v Universal Cooperative, Inc*, 439 Mich 512, 515; 486 NW2d 612 (1992).

We assume that in 1987, Motor City, a fabricator of small, automotive-related assemblies, purchased a manufacturing building from "Bob Kehrig/Structural Steel."[3] At the time Motor City purchased the building, certain thousand-watt mercury vapor (high bay) light fixtures were suspended from the building's ceiling. Plaintiff's brief on appeal explains that the high bay light fixtures

> are comprised of a reflector and bulb arrangement which is, in turn, attached to a ballast. The ballast supplies power for the fixture. The ballast contains a transformer and at least one capacitor to assist in charging the fixture.

Plaintiff's brief on appeal further explains that a capacitor

> is essentially comprised of tightly wound aluminum foil separated by a dielectric insulator. The aluminum foil package is inserted into a container which has two electric terminals. If the insulator and/or the foil is damaged or comes in contact with the grounded case, a fault is created which could result in either an electrical arc or a dielectric short. A dielectric short between the aluminum foil and the aluminum case will generate a significant amount of heat, sufficient to melt both the capacitor casing and the ballast housing.

On July, 21, 1990, a fire occurred at the building, causing extensive property damage but no personal injury. Plaintiff adjusted, paid and became subrogated to Motor City's property damage claims. After investigation, plaintiff theorized that the fire was allegedly caused when a capacitor in one of the high bay light fixtures failed, causing molten materials from the capacitor to either ignite other combustible materials inside the ballast or to melt through the ballast. Plaintiff theorized that molten metal and other related material dropped onto and ignited combustibles, including some cardboard boxes, located below the light fixture. Plaintiff theorized that the capacitor had been manufactured and sold by defendant Cornell-Dubilier and that the high bay light fixture containing the capacitor had been manufactured and sold by defendants Abolite and LSI.[4] Defendant Cornell-Dubilier has produced documentary evidence indicating that the capacitor was not sold to the general public and was not manufactured any later than 1976. A question of fact exists concerning whether defendant Cornell-Dubilier sold capacitors directly or through a distributor to defendants Abolite and LSI. Defendants Abolite and LSI have produced documentary evidence indicating that the high bay light fixture was manufactured and sold no later than 1979. According to plaintiff, Bob Kehrig installed the light fixtures when he built the building.[5]

On July, 21, 1993, plaintiff filed suit against defendants. In claims labeled, respectively, "Breach Of Express And Implied Warranties In Tort And/Or Contract" and "Negligence," plaintiff sought property damages for the injury to its property caused by defendants' alleged defective manufacture of the high bay light fixture and its component parts. Defendants subsequently moved for summary disposition pursuant to MCR 2.116(C)(7). Defendants contended that the sale of the allegedly defective high bay light fixture and its component parts was a commercial sale of goods and that all of the damages allegedly caused by the defective goods were economic in nature. Defendants contended that under *Neibarger*, the economic loss doctrine barred plaintiff's tort claims and limited plaintiff's remedies to those available under the UCC, MCL 440.1101 *et seq.*; MSA 29.1101 *et seq*. Defendants contended that plaintiff's UCC theories of implied warranty of fitness and merchantability were barred by the UCC's four-year statute of limitations, MCL 440.2725; MSA 19.2725. Defendants also contended that no express warranty was in effect when Motor City took delivery of the goods in August, 1987.

In reply, plaintiff set forth several grounds for its argument that summary disposition of its tort claims was unwarranted. Specifically, plaintiff contended that the UCC did not apply to this case because Motor City's purchase of the building, including the permanently attached light fixture, was not a transaction in goods,[6] but rather was a sale of realty. Alternatively, the UCC did not apply in this case because plaintiff was not in contractual privity with defendants. Plaintiff contended that if the UCC did not apply to this case, then the economic loss doctrine likewise did not apply to bar plaintiff's tort claims. Plaintiff also contended that regardless whether the UCC applied to this case, the economic loss doctrine did not bar plaintiff's tort claims because Motor City was a consumer. Finally, plaintiff contended that even if the economic loss doctrine applied in this case, the doctrine did not bar its tort claims for the damage sustained to property other than the defective product.

In response, defendants contended that the relevant transaction was not Motor City's purchase of the building in 1987, but rather was defendants' commercial sales of their products in the 1970s, at which time the products were movable and thus goods[7] subject to the UCC's four-year statute of limitation. Defendants also contended that application of the economic loss doctrine did not require privity of contract. Defendants further contended that application of the economic loss doctrine did not depend on whether Motor City was a consumer, but rather depended on whether Motor City suffered purely economic loss caused by a defective product purchased in a commercial setting. Finally, defendants contended that the economic loss doctrine barred plaintiff's tort claims for both damage to the defective products themselves and damage to property other than the defective products.

In reply, plaintiff contended that it had not made any UCC claims and that its claims sounded only in tort. Plaintiff again reiterated its previous arguments.

The trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) on the grounds that the economic loss doctrine barred plaintiff's tort claims and the UCC's four-year statute of limitations had run on plaintiff's UCC claims. The trial court reasoned that plaintiff's claims against defendant arose out of the commercial sale of goods where plaintiff was seeking to hold defendants responsible for furnishing defective lights and component parts and at the time defendants furnished these products they were movable and therefore goods subject to the UCC. The trial court

found that plaintiff's assertion that it was a consumer did not prevent application of the economic loss doctrine where plaintiff's claim arose out of the commercial sale of goods. The court found that if the light fixtures were realty, not goods, as contended by plaintiff, then the appropriate defendants might include the builder or seller of the building, but would not include the defendant manufacturers. The trial court found that privity of contract was not necessary for application of the economic loss doctrine. Finally, the trial court found that under *Neibarger* the economic loss doctrine barred plaintiff's tort claims for damages not only for injury to the defective products themselves but also to injury to plaintiff's other property.

On appeal, plaintiff raises no issue with respect to any contractual or UCC claims. Likewise, plaintiff, rightly we believe, does not argue that the lack of privity between Motor City and defendants precludes application of the economic loss doctrine. See *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333; 480 NW2d 623 (1991).[8] Rather, plaintiff challenges only the dismissal of what plaintiff characterizes as its "tort claims," i.e., breach of implied warranty in tort and negligence.[9] Before addressing plaintiff's arguments we briefly review *Neibarger* and a subsequent federal case applying *Neibarger* to facts similar to this case.

In the two consolidated cases considered by our Supreme Court in *Neibarger*, the plaintiff dairy farmers purchased milking systems designed or installed by the defendants. *Id.* at 516, 518. The milking systems ultimately proved to be defectively designed and installed, causing high cell and bacterial counts in the milk, a decline in milk production, and illness and death in plaintiff's cattle. *Id*. More than four years after the milking systems were delivered, the plaintiffs filed suit against the defendants, alleging negligence, breach of express warranty and breach of implied warranty. *Id*. at 517-518. The trial court granted summary disposition for the defendants on the grounds that the UCC controlled and that its four-year limitation period had expired. *Id*. at 517-519. This Court affirmed. *Id*.

Our Supreme Court affirmed this Court. *Id*. at 516. In affirming, our Supreme Court explained as follows:

> Since the plaintiffs' claims in each of these cases arose out of a sale of goods governed by the UCC, we must determine whether consequences of its strict limitation period may be avoided by pleading claims sounding in tort. Where, as here, the claims arise from a commercial transaction in goods and the plaintiff suffers only economic loss, our answer is "no"—such claims are barred by the economic loss doctrine. This position is consistent with a considerable body of law that has developed in this state as well as a majority of other jurisdictions.
>
> The economic loss doctrine, simply stated, provides that "'[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only "economic" losses.'" This doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective

products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts. [*Id*. at 520-521.]

The Court concluded by holding as follows:

> Accordingly, we hold that where a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC, including its statute of limitations.
>
> A contrary holding would not only serve to blur the distinction between tort and contract, but would undermine the purpose of the Legislature in adopting the UCC. The code represents a carefully considered approach to governing "the economic relations between suppliers and consumers of goods" If a commercial purchaser were allowed to sue in tort to recover economic loss, the UCC provisions designed to govern such disputes, which allow limitation or elimination of warranties and consequential damages, require notice to the seller, and limit the time in which such a suit must be filed, could be entirely avoided. In that event, Article 2 would be rendered meaningless and, as stated by the Supreme Court in [*East River Steamship Corp v Transamerica Delaval, Inc*, 476 US 858, 866; 106 S Ct 2295; 90 L Ed 2d 865 (1986)], "contract law would drown in a sea of tort."
>
> Rejection of the economic loss doctrine would, in effect, create a remedy not contemplated by the Legislature when it adopted the UCC by permitting a potentially large recovery in tort for what may be a minor defect in quality. On the other hand, adoption of the economic loss doctrine will allow sellers to predict with greater certainty their potential liability for product failure and to incorporate those predictions into the price or terms of the sale. [*Id*. 527-528.]

The Court rejected the plaintiffs' arguments that the economic loss doctrine did not bar their claims because they were asserting damage to property other than the milking systems:

> Although there is support for the view that the UCC does not bar a tort claim where the plaintiffs are seeking to recover for property other than the product itself, we find in these cases that, notwithstanding injury to the plaintiffs' dairy herds, the damages claimed are economic losses.
>
> At one end of the spectrum, the economic loss doctrine has been interpreted as permitting recovery in tort for injury to property other than the defective product itself. . . . Other courts have allowed tort recovery for physical damages to the product itself caused by a defect which is not merely a "disappointment," but also a safety hazard. . . . .
>
> * * *

> The proper approach requires consideration of the underlying policies of tort and contract law as well as the nature of the damages. The essence of a warranty action under the UCC is that the product was not of the quality expected by the buyer or promised by the seller. The standard of quality must be defined by the purpose of the product, the uses for which it was intended, and the agreement of the parties. In many cases, failure of the product to perform as expected will necessarily cause damage to other property, such damage is often not beyond the contemplation of the parties to the agreement. Damage to property where it is the result of a commercial transaction otherwise within the ambit of the UCC, should not preclude application of the economic loss doctrine where such property damage necessarily results from the delivery of a product of poor quality. [*Id*. at 529-531 (citations omitted).]

In *Michigan Mut Ins Co v Osram Sylvania, Inc*, 897 F Supp 992, 993 (WD Mich, 1995), the federal district court relied on *Neibarger* in considering the applicability of Michigan's economic loss doctrine to facts similar to this case. Specifically, in 1991, a four-hundred watt metal halide lamp manufactured by Sylvania exploded at the Center Manufacturing plant in Byron Center, Michigan. *Id*. The lamp's explosion showered white hot quartz particles onto a stack of cardboard cartons, setting them on fire. *Id*. The lamp had been manufactured in 1984 and was probably installed at Center's facility between mid-1984 and early 1985. *Id*. Center had not purchased the lamp directly from Sylvania but rather had purchased the lamp from another vendor, whose identity was disputed. *Id*. at 994.

Michigan Mutual paid Center over two million dollars in insurance benefits for damage to the building and its contents, Center's loss of earnings, and the other expenses incurred by Center as a result of the fire. *Id*. at 993. Michigan Mutual, as subrogee of Center's claims, then brought suit against Sylvania, asserting claims entitled "Breach of Express and Implied Warranties in Tort and/or Contract" and "Negligence." *Id*. Sylvania moved for summary judgment, contending that Michigan Mutual's tort claims were barred by the economic loss doctrine and that its UCC breach of warranty claims were time barred by the applicable four-year statute of limitations. *Id*.

In response, Michigan Mutual conceded that its UCC claims were barred by the UCC's four-year statute of limitations. *Id*. at 994. However, Michigan Mutual argued that the economic loss doctrine did not bar its tort claims against Sylvania because

> (1) Center was not in privity with Sylvania, (2) Center was a "consumer" which did not negotiate the terms of the lamp's sale or the specifications for its manufacture; and (3) at the time it purchased the lamp, Center could not have reasonably contemplated the possibility that the product could cause a catastrophic fire. [*Id*.]

The federal district court granted summary judgment in favor of Sylvania and dismissed Michigan Mutual's claims in their entirety. *Id*. The district court rejected Michigan Mutual's lack-of-privity argument on the ground that one of the defendants in *Neibarger* had apparently not been in privity with one of the plaintiffs.[10] *Id*. The district court rejected Michigan Mutual's consumer argument on the ground that Center's losses were commercial losses, Center had used the lamp in a commercial

setting, and Center had dealt with numerous vendors of electrical supplies throughout the years. *Id*. at 994-995. Finally, the district court rejected Michigan Mutual's foreseeability argument on the ground that "[f]ires caused by electrical products are simply not beyond the contemplation of commercial entities." *Id*. at 995.

With the preceding caselaw in mind, we now turn to a consideration of plaintiff's arguments. Plaintiff first argues that the economic loss doctrine does not apply in this case because the UCC does not apply in this case. Plaintiff reiterates its argument below that the UCC does not apply in this case because the UCC applies only to transactions in goods and in this case the transaction at issue is a sale of realty. Plaintiff reasons that the transaction at issue is a sale of realty because the light fixture was affixed to the building, thus losing its character as a movable good subject to the UCC, when Motor City purchased the building. Plaintiff concludes that because the UCC does not apply to claims arising out of defects in realty (the permanently attached light fixture), the economic loss doctrine likewise does not apply to bar plaintiff's tort claims.

Plaintiff's contention that the UCC did not apply to Motor City's purchase of the realty is accurate. *Bennett v Columbus Land Co*, 70 Mich App 403, 405; 246 NW2d 8 (1976). However, defendants were not involved with or parties to the sale of the building. And, as noted by the trial court, plaintiff did not bring suit against the seller or builder of the building for a building defect. Cf. *McCann v Brody-Built Construction Co, Inc*, 197 Mich App 512; 496 NW2d 349 (1992).[11] Rather, as evidenced by plaintiff's first amended complaint, plaintiff seeks to impose classic products liability on defendants arising out of defendants' defective manufacture of a product. See *Lagalo v Allied Corp*, 218 Mich App 490, 494-499; 554 NW2d 352 (1996). Specifically, in the claim labeled "Breach Of Express And Implied Warranties In Tort And/Or Contract," plaintiff alleged as follows:

> 24. In the course of the Defendants' design, manufacture, fabrication, production, distribution, installation, inspection, testing, service and/or sale of mercury vapor fixtures and/or their component parts, the Defendants, expressly and impliedly warranted in law and/or in contract to Plaintiff's subrogor and other foreseeable users of their products, that they were free from defects, were reasonably fit for the purposes and uses anticipated, intended or reasonably foreseeable and that the products were of merchantable quality and reasonably fit for their intended use.
>
> 25. Plaintiff's subrogor relied on Defendants' express and/or implied warranties, however, the Defendants breached the express and implied warranties, described herein in that they improperly and unreasonably designed, manufactured, fabricated, produced, distributed, installed, tested, inspected, serviced and/or sold, the products with numerous product defects so that the products were not reasonably fit for the purposes and uses anticipated, intended or reasonably foreseeable, were not of merchantable quality or fit for their intended use . . . .
>
> 26. The products left the care, custody and control of the Defendants in the aforementioned defective condition and remained in the same condition until July 21, 1990.

> 27. As a direct and proximate result of the foregoing breaches of warranty and product defect, on or about July 21, 1990, certain products failed and caused a fire which resulted in damage to Plaintiff and Plaintiff's subrogor, including but not limited to, fire damage to the property located at the business owned and operated by Plaintiff's subrogor.

Plaintiff's negligence claim asserted that defendants had breached their duty to use reasonable care in manufacturing and selling the high bay light fixture and its component parts, and that defendants' negligence caused the product failure that occurred in this case, which in turn caused the fire and subsequent property damage. Cf. *Lagalo, supra*.

Moreover, with respect to the issue of which transaction is the relevant transaction, i.e., defendants' sale of their products or Motor City's purchase of the building, we find two United States Supreme Court cases instructive. In *East River, supra*, the United States Supreme Court held that the economic loss doctrine, as applied in an admiralty case, precludes an admiralty tort plaintiff from recovering for the physical damage a defective product causes to the "product itself," but does not preclude such a plaintiff from recovering for physical damage the product causes to "other property." In a subsequent admiralty case, *Saratoga Fishing Co v JM Martinac & Co*, 520 US ___; 117 S Ct 1783; 138 L Ed 2d 76 (1997), the Court considered what constitutes the "product itself," as opposed to "other property," for purposes of applying *East River*. Specifically, in *Saratoga*, a shipbuilder built a ship, installed a hydraulic system designed by another company and sold the ship new to Joseph Madruga (the initial user) in approximately 1971. *Id*. at 81. The initial user added extra equipment to the ship, including a skiff, a seine net, and various spare parts. *Id*. In 1974, the initial user resold the ship to Saratoga Fishing Company (the subsequent user). *Id*. In 1987, the ship caught fire and sank. *Id*. A significant cause of the fire was the defectively designed hydraulic system. *Id*.

The subsequent user brought a tort suit in admiralty against the shipbuilder and the hydraulic system designer. *Id*. The federal district court awarded the subsequent user damages for the loss of the equipment the initial user added to the ship after the initial user's purchase of the ship. *Id*. A majority of the federal appeals court held that the subsequent user could not recover in tort for the damage to the property added by the initial user because this property was part of the ship when sold by the initial user to the subsequent user and, therefore, part of the "product itself" for which tort recovery was precluded under *East River*. *Id*.

The United States Supreme Court reversed the federal appeals court, holding that when a manufacturer (or distributor selling in the initial distribution chain)

> places an item in the stream of commerce by selling it to an initial user, that item is the "product itself" under *East River*. Items added to the product by the Initial User are therefore "other property," and the Initial User's sale of the product to a Subsequent User does not change these characterizations. [*Id*. at 82.]

The Court reasoned as follows:

> Indeed respondents here conceded that, had the ship remained in the hands of the Initial User, the loss of the added equipment could have been recovered in tort. . . .
>
> Indeed, the denial of recovery for added equipment simply because of a subsequent sale makes the scope of a manufacturer's liability turn on what seems, in one important respect, a fortuity, namely whether a defective product causes foreseeable physical harm to the added equipment before or after an Initial User (who added the equipment) resells the product to a Subsequent User.

We make clear that unlike admiralty law as defined in *Saratoga* and *East River*, in Michigan, the economic loss doctrine, as more broadly defined in *Neibarger*, bars tort claims for damage not only to the defective product itself, but also damage to other property "where such property damage necessarily results from the delivery of a product of poor quality." *Neibarger, supra* at 531; see also *Valleyside Dairy Farms, Inc v AO Smith Corp*, 944 F Supp 612, 615 (WD Mich, 1995). However, we nevertheless find *Saratoga* instructive because of its treatment of the role of a subsequent user in the analysis. Specifically, in determining the applicability of the economic loss doctrine under admiralty law, the *Saratoga* Court found that the relevant transaction was the sale of the product to the initial user. The *Saratoga* Court rejected the notion that the scope of a manufacturer's liability would turn on the fortuity of a resale of the product. Rather, it appears that the *Saratoga* Court implicitly recognized that a subsequent user of a defective product "inherits" the tort claims that could be brought by the initial user of a defective product.[12]

Thus, under *Saratoga*, when defendants in this case placed the high bay light fixture in the stream of commerce by selling it, either directly or through a distributor, to the initial user, who was apparently the person who built the building, Bob Kehrig, the high bay light fixture became the "product itself." The fact that Kehrig apparently installed the high bay light fixture in the building does not change this characterization. Rather, the building is simply "other property."

The type and function of the property involved, i.e., thousand-watt high bay light fixtures in a manufacturing facility, evidence the commercial nature of the property at the time it was sold to the initial user. This transaction was certainly a sale of goods subject to the UCC. If the high bay light fixture had failed and caused a fire while the building was owned by the initial user, we believe that the economic loss doctrine would bar any tort claims brought by the initial user against defendants and limit the initial user to the remedies available under the UCC. *Michigan Mut, supra*; *Neibarger, supra*. Like *Saratoga*, we do not believe that the scope of defendants' products liability in tort should turn on the fortuity of a resale. Thus, for the foregoing reasons, we reject plaintiff's contention that the relevant transaction for the purpose of our analysis was the sale of the building. Rather, plaintiff's tort claims against defendants arise out of defendants' commercial sale of defective goods.

Next, plaintiff contends that the economic loss doctrine does not apply in this case because Motor City was a consumer when it purchased or obtained the defective light fixtures. However, Motor City is a commercial enterprise that used the high bay light fixture in a commercial setting. Motor

City's losses are commercial losses that arise out of defendants' commercial sale of defective goods. Accordingly, we reject this argument. *Michigan Mut, supra*.

Finally, plaintiff argues that even if the economic loss doctrine applies to this case, questions of fact exist concerning whether the doctrine bars its tort claims for the fire damage to "other property," i.e., property other than the defective light fixture and capacitor. As stated in *Michigan Mut*, *supra* at 995, "[f]ires caused by electrical products are simply not beyond the contemplation of commercial entities." We believe that in this case it was entirely foreseeable to the initial user and seller of the light fixture (defendants or the distributor selling in the initial distribution chain) that the component part of a thousand-watt light fixture could cause a fire. Because plaintiff's property damages "necessarily result[ed] from the delivery of a product of poor quality" and the damage was not beyond the contemplation of the initial user and seller of the product, we conclude that the economic loss doctrine would bar the initial user of the light fixture from tort recovery for the damages claimed in this case. *Michigan Mut, supra*; *Neibarger, supra* at 531. Thus, we conclude that the subsequent user is thus likewise precluded from seeking any recovery in tort for these damages. *Neibarger, supra*; cf *Saratoga, supra*. To paraphrase *Saratoga, supra* at 83, to allow recovery for the damage to the property other than the light fixture simply because of a subsequent sale would make the scope of defendants' liability turn on the fortuity of whether the defective product caused damage to the other property before or after the initial user resold the product to Motor City.

In summary, we conclude that plaintiff's claim for damages arises out of the commercial sale of defective goods. The losses sustained by plaintiff were purely economic. Thus, the economic loss doctrine bars plaintiff's from recovery in tort. Accordingly, we affirm the trial court's grant of summary disposition of plaintiff's tort claims, albeit for slightly different reasons and pursuant to MCR 2.116(C)(8) (failure to state a claim).

Affirmed.

/s/ Michael R. Smolenski
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage

[1] Having reached a settlement with plaintiff, Electrex has been dismissed with prejudice from this action.

[2] Jones Metal has been dismissed without prejudice pending review of this matter by Michigan's appellate courts.

[3] We assume that Motor City purchased the building because this is how plaintiff represents the matter in its brief. However, we note that the record establishes that K&K Management purchased the building from "Bob Kehrig, Structural Steel" and then leased the building to Motor City. Roger and Judith Kucway are the sole partners in K&K and the sole directors and shareholders of Motor City.

[4] Apparently, defendant Abolite either merged with or is a division of defendant LSI.

[5] This statement is based on assertions made by plaintiff in its response to defendants' motions for summary disposition.

[6] Article two of the UCC, MCL 440.2101 *et seq*.; MSA 19.2101 *et seq*., applies only to transactions in goods, MCL 440.2102; MSA 19.2102. "Goods" are defined as "all things . . . which are moveable at the time of identification to the contract for sale . . . ." MCL 440.2105(1); MSA 19.2105(1).

[7] See note 6, *supra*.

[8] In *Sullivan*, a manufacturer sought recovery from the remote supplier of a defective component part under theories of negligence, breach of implied warranty sounding in products liability, and breach of implied warranty of merchantability under the UCC. *Id*. at 337-338. Notwithstanding the lack of privity between these parties, this Court held that the economic loss doctrine barred the manufacturer's tort claims against the remote supplier and that any relief to which the manufacturer may be entitled as against the remote supplier must be obtained under the UCC. *Id*. at 339, 345.

[9] In *Sullivan*, this Court found that similar theories were barred by the economic loss doctrine. See note 8, *supra*.

[10] The district court noted that in *Neibarger* "'[p]laintiffs, . . . contracted with defendant Charles Brinker to install a milking system. According to plaintiffs, the milking system was designed by defendants Universal Cooperatives, Inc., and Brinker, and was installed by Brinker to begin milking operations on September 1, 1979.'" *Michigan Mutual*, *supra* at 994, n 2 (quoting *Neibarger*, *supra* at 516). However, in *Neibarger*, our Supreme Court expressly declined to consider the plaintiffs' lack-of-privity argument because this argument had not been raised either in the trial court or in the Court of Appeals. *Id*. at 537, n 31. Our Supreme Court also noted that in each case the plaintiffs had alleged that the defendant retailer was an "agent" of the manufacturer. *Id*.

However, as indicated previously, in *Sullivan*, this Court expressly held that a lack of privity between the parties does not preclude an application of the economic loss doctrine. See note 8, *supra*.

[11] We note that in *McCann, supra* at 517, Judge Griffin noted in a partial concurring and dissenting opinion that "several courts have held that the economic-loss doctrine precludes a purchaser of a building from recovering in negligence against a builder where the purchaser's losses are wholly economic."

[12] Applying Michigan law to the facts of *Saratoga* while retaining *Saratoga's* treatment of a subsequent user would, we believe, yield the following result. The damage to the property added by the ship's initial user necessarily resulted from the fire and flooding that was caused by the defectively designed hydraulic system. This damage was most likely not beyond the contemplation of the initial user and seller of the ship. Thus, we believe that the economic loss doctrine under *Neibarger* would bar the tort claims of both the ship's initial user and the subsequent user for damage not only to the product itself (the ship) but also to the other property added by the initial user.