

No. 28202 -- Eastern Steel Constructors, Inc., a Maryland corporation doing business in the State of West Virginia v. The City of Salem, a municipal corporation; and Kananui Associates, a West Virginia corporation, and unidentified John Doe defendants and The City of Salem, a municipal corporation v. Old Republic Surety Company, a corporation domiciled in the State of Wisconsin

FILED

July 2, 2001

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, Justice, dissenting:

I would affirm the circuit court's grant of summary judgment on behalf of Kananui Associates.

First, I agree with the circuit court that Eastern Steel Constructors' claim against Kananui for solely economic damages could be maintained only as a cause of action in contract, and not in tort. By holding otherwise, the majority unnecessarily extends the "special relationship" exception in *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2000), to protect sophisticated commercial entities who are able to protect themselves from economic loss by contract.

In *Berschauer/Phillips Construction Co. v. Seattle School District No. 1*, 124 Wash.2d 816, 881 P.2d 986 (1994), the Supreme Court of Washington held that the economic loss rule does not allow a general contractor to recover purely economic damages from a design professional in tort.

The Court explained:

We so hold to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract. We hold parties to their contracts. If tort and contract remedies were allowed to overlap,

certainty and predictability in allocating risk would decrease and impede future business activity. The construction industry in particular would suffer, for it is in this industry that we see most clearly the importance of the precise allocation of risk as secured by contract. The fees charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained and provided for in the contract.

124 Wash.2d at 826-27, 881 P.2d at 992. Likewise, the Supreme Court of Virginia stated in *Blake Construction Co. v. Alley*, 233 Va. 31, 35, 353 S.E.2d 724, 727 (1987):

The parties involved in a construction project resort to contracts and contract law to protect their economic expectations. Their respective rights and duties are defined by the various contracts they enter. Protection against economic losses caused by another's failure properly to perform is but one provision the contractor may require in striking his bargain. Any duty on the architect in this regard is purely a creature of contract. (Citation omitted).

I agree wholeheartedly with these courts. We should not intrude into commercial relationships, where all parties involved are able to conduct business on an equal footing, in order to relieve one of the parties of the consequences of a bad bargain. This is especially true when the Court resorts to a novel extension of the law to do so. If I had known that this is what the Court meant when it fashioned a special relationship exception to the economic loss rule in *Aikens*, I would have dissented in that case also.

For the same reasons, I would not allow Eastern Steel to bring an implied warranty claim against Kanakanui. I see no reason to extend the rule in *Dawson v. Canteen Corp.*, 158 W.Va. 516, 212 S.E.2d 82 (1975), to the instant set of facts. The plaintiff in *Dawson* suffered acute food poisoning and gastroenteritis after purchasing from a vending machine a cheeseburger prepared on a bun containing

mice feces. In *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988), *Dawson* was applied to protect subsequent home purchasers after latent defects resulted in significant damage to the home. These cases are in contrast to the instant one involving a claim for *purely* economic damages where the party allegedly injured could have contractually protected itself at the outset.

For the reasons stated above, I dissent to the majority opinion.