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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

BURNS PHILP INC. and TONE BROTHERS, INC.,	*	4-99-CV-90033
Plaintiffs,	*	
v.	*	
COX, KLIEWER & COMPANY, P.C., J. GREY MASON, GARY BURR, JERRY COX, ABIOUSNESS, CROSS & BRADSHAW, INC., EUGENE BRADSHAW and ALFRED ABIOUNESS,	*	MEMORANDUM OPINION AND ORDER
Defendants.	*	

There are two motions for summary judgment before the Court. In the first Motion for Summary Judgment, Defendants J. Grey Mason, Gary Burr and Jerry Cox move for summary judgment on all claims brought by Burns Philp Food, Inc. and Tone Brothers, Inc. Also in that motion, Cox, Kliewer & Company moves for summary judgment against all claims against it brought by Defendant Tone Brothers, Inc. In the second Motion for Summary Judgment, Defendant Cox, Kliewer & Company moves for summary judgment on Counts II, III, IV[1] and V brought by Plaintiff Burns Philp Food, Inc.

I. Facts

Plaintiff Tone Brothers, Inc. ("Tone Brothers") is a food processing facility located in Ankeny, Iowa. Tone Brothers is a wholly owned subsidiary of Plaintiff Burns Philp Food, Inc. ("Burns Philp"). Defendant Cox, Kliewer & Company ("Cox Kliewer") is an architectural firm.

[1]While Summary Judgment with respect to Count IV was not included in its pleadings, Defendant Cox, Kliewer & Company amended its Motion for Summary Judgment at the hearing to include Count IV.

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By:
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Defendants J. Grey Mason ("Mason"), Gary Burr ("Burr") and Jerry Cox ("Cox") are architects in the Cox Kliewer firm. Defendants designed an addition onto the food processing facility. The addition included a mezzanine area. Plaintiffs' lawsuit grows out of the alleged defective design of that mezzanine area.

Plaintiffs and Defendants are in dispute over the extent of contractual privity among them. Defendant Cox Kliewer states that it sent a contract, signed by it, to Plaintiff Burns Philp. Cox Kliewer argues that while Burns Philp never signed the contract, the parties performed under the contract, and the contract embodied the agreement of the parties including the mezzanine project. Plaintiffs contend that the parties did not enter into a written agreement, but rather entered into an oral agreement. Plaintiffs also contend that Tones Brothers was a party to the oral agreement.

Plaintiffs and Defendants are also in dispute over whether Defendants made certain assertions or representations concerning the mezzanine area. Plaintiffs claim that "Defendants represented that the new mezzanine area would be similar to the existing mezzanine area at the facility and would be suitable for the same uses as the existing mezzanine area."[2] Defendants claim that they never made any such representation. To the contrary, they state that Burns Philp directed Cox Kliewer to design the new mezzanine area for a loading of 150 pounds per square and that Burns Philp never advised Cox Kliewer that motorized forklifts or motorized pallet jacks would be used on it.

The construction of the mezzanine was completed in the summer of 1995. Shortly afterward, Plaintiffs claimed the mezzanine area was structurally defective and needed replaced.

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[2]Pl.s Burns Philp Food Inc. and Tone Brothers, Inc. Brief in Supp. of Resist. to Def.s, Cox Kliewer & Co., J. Grey Mason, Gary Burr, and Jerry Cox's Mot.s for Summ. J. at 5-6.

This lawsuit followed. Plaintiffs Second Amended Complaint alleges the following five causes of action against each Defendant: (1) Count I, Breach of Contract; (2) Count II, Breach of Express Warranty; (3) Count III, Breach of Implied Warranty; (4) Count IV, Negligence; (5) Count V, Negligent Misrepresentation. Defendants have moved for summary judgment on all counts except Count I by Burns Philp against Cox Kliewer.

II. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." An issue is "genuine," "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if the dispute over it might affect the outcome of the suit under the governing law. *Id.*

The moving party has the burden of demonstrating the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 323; *Anderson*, 477 U.S. at 248. In meeting its burden, the moving party may support his or her motion with affidavits, depositions, answers to interrogatories, and admissions. *See Celotex*, 477 U.S. at 323. Once the moving party has carried its burden, the nonmoving party must go beyond the pleadings and, by affidavits or by the depositions, answers to interrogatories, and admissions on file, designate the specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(c), (e); *Celotex Corp.*, 477 U.S. at 322-323; *Anderson*, 477 U.S. at 257. In order to survive a motion for summary judgment, the nonmoving party must present enough evidence for a reasonable jury to return a verdict in his or her favor. *Anderson*, 477 U.S. at 257.

On a motion for summary judgment, the Court is required to "view the evidence in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences." *United States v. City of Columbia*, 914 F.2d 151, 153 (8th Cir. 1990). The Court does not weigh the evidence or make credibility determinations. *See Anderson*, 477 U.S. at 252. The Court only determines whether there are any disputed issues and, if so, whether those issues are both genuine and material. *Id.*

III. Discussion

In this case there are two plaintiffs, five defendants and five claims by each plaintiff against each defendant, with all but one of those claims up for summary judgment consideration (the breach of contract claim by Burns Philp against Cox Kliewer). Before applying the summary judgment standard to the claims, the Court must first answer a choice of law question. After the Court determines what law to apply to each claim, the Court will then go through each claim and analyze it party by party.

A. Choice of Law

The parties disagree over whether Iowa law or Virginia law should apply to the various claims. "A district court, sitting in diversity, must follow the choice-of-law approach prevailing in the state in which it sits." *Dorman v. Emerson Elec. Co.*, 23 F.3d 1354, 1358 (8th cir. 1994) (citing *Birnstill v. Home Sav. of Amo*, 907 F.2d 792, 797 (8th cir. 1990)). This Court sits in Iowa and will therefore apply Iowa choice-of-law principles.

Virginia law governs the dispute between Burns Philp and Cox Kliewer. Iowa law provides that parties may decide in their contract what state law shall apply should a dispute arise. *See Aluminum Co. of America v. Hully*, 200 F.2d 257, 261 (8th Cir. 1952) (citations omitted). Article 9.1 of the contract signed by Cox Kliewer and sent to Burns Philp states as

follows: "Unless otherwise provided, this Agreement shall be governed by the law of the principal place of business of the Architect."[3] Defendants maintain that even though the written contract was not signed by Burns Philp it is valid nonetheless. Plaintiffs, on the other hand, maintain that Burns Philp did not enter into a written agreement with Cox Kliewer, that rather, both Plaintiffs entered into an oral agreement with Cox Kliewer.

Under Iowa law, "[t]he parties to an unsigned agreement are obligated to abide by the agreement, when the acceptance appears from the acts of the parties." *Phone Connection, Inc. v. Harbst*, 494 N.W.2d 445, 448 (Iowa Ct. App. 1992) (citing *Serv. Employees Int'l, Local 55 v. Cedar Rapids Community Sch. Dist.*, 222 N.W.2d 403, 407 (Iowa 1974)). The evidence establishes that Burns Philp assented to and performed under the unsigned written contract. Michael L. Siegmund, Corporate Engineering Manager for Burns Philp in 1995 and 1996, stated in an affidavit that a contract document was exchanged between Cox Kliewer and Burns Philp, that it embodied the agreement between the two parties, and that the terms and conditions included in that agreement applied to the mezzanine project and were agreed to by Burns Philp.[4] He also stated that Tone Brothers never entered into any agreement with Cox Kliewer.[5] James Able, Vice President of Operations of Tone Brothers, indicated in his deposition not only that Tone Brothers never entered into an agreement with Cox Kliewer, but that there was a written contract which embodied the agreement between Burns Philp and Cox Kliewer and that Burns

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[3]Def. Cox Kliewer & Co., P.C.'s Br. in Supp. of Mot. for Partial Summ. J. Against Burns Philp Food, Inc., Ex. A.

[4]Def.s' J. Grey Mason, Gary Burr and Jerry Cox's Br. in Supp. of Mot. for Summ. J. Against Burns Philp Food, Inc. and Tone Brothers, Inc. and Cox, Kliewer & Company, P.C's Br. in Supp. of Motion for Summ. J. Against Tone Brothers, Inc., Ex. D ¶¶ 1, 2.

[5]*Id.* ¶ 4.

Philp performed under that contract.[6] From this evidence, the Court finds that the written contract passed from Cox Kliewer to Burns Philp is valid and that no contract existed between Cox Kliewer and Tone Brothers. The Court will therefore apply Virginia law to the dispute between Burns Philp and Cox Kliewer because Virginia is Cox Kliewer's principal place of business.

That means that Virginia law governs all the claims by Burns Philp against Cox Kliewer, not just the breach of contract claim. The Restatement (Second) of Conflict of Laws § 187(2) (1989) provides the following:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
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> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or
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> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Whether or not Iowa has a materially greater interest in this litigation, Virginia law concerning Counts II through V against Cox Kliewer is not against the fundamental policy of Iowa. Therefore, Virginia law will apply to all the claims by Burns Philp against Cox Kliewer.

Iowa law governs the claims where no conflict of laws exists. In the absence of a conflict, the law of the jurisdiction where the case is pending controls. *See Phillips v. Marist Society of Washington Province*, 80 F.3d 274, 276 (8th Cir. 1996). Having reviewed the law of

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[6]Def.s' J. Grey Mason, Gary Burr and Jerry Cox's Br. in Supp. of Mot. for Summ. J. Against Burns Philp Food, Inc. and Tone Brothers, Inc. and Cox, Kliewer & Company, P.C's Br. in Supp. of Motion for Summ. J. Against Tone Brothers, Inc., Ex. E at 49, 78-80, 87.

both Virginia and Iowa, the Court finds that no conflict exists on the breach of contract claim (Count I), breach of express warranty claim (Count II), and the breach of implied warranty claim (Count III). Thus, the Court will apply Iowa law to those claims.

Iowa law also governs Tone Brother's negligence claims (Count IV) and negligent misrepresentation claims (Count V), as to which a conflict of laws does exist. Where a conflict of laws exists, Iowa applies the most significant relationship test to determine what law applies:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
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> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
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> (a) the place where the injury occurred,
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> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.
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> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Veasley v. CRST Int'l, Inc., 553 N.W.2d 896, 897-898 (Iowa 1996) (quoting Restatement (Second) of Conflict of Laws § 145 (1971)). Plaintiffs appear to contend that the negligent misrepresentations by Defendants Mason, Burr and Cox occurred for the most part in Iowa. Though any other negligence on Defendants' part probably occurred in Virginia. The injury resulting from any negligence or negligent misrepresentations occurred entirely at the Tone Brothers facility in Iowa. Defendants are from Virginia and Tone Brothers is a corporate citizen of Iowa. The tie breaker is where the relationship of the parties was centered, and the Court thinks that the center of the relationship between the parties is in Iowa if anywhere. Thus, it seems that Iowa has the most significant relationship to Tone Brothers' negligence and negligent

misrepresentation claims against Defendants Mason, Burr and Cox. The Court will therefore apply Iowa law to those claims.

B. Breach of Contract Claims

The only parties in contractual privity were Burns Philp and Cox Kliewer. As discussed above, Burns Philp and Cox Kliewer entered into a valid contract. Also as discussed above, Tone Brothers did not enter into a contract with Cox Kliewer. And, at the hearing on this matter, Plaintiffs conceded the contract claims against Defendants Mason, Burr, and Cox. Accordingly, summary judgment is appropriate with respect to Count I (breach of contract) as alleged by Plaintiff Tone Brothers against all Defendants and as alleged by Plaintiff Burns Philp against Defendants Mason, Burr, and Cox.

The Court, unlike Defendants, is unconvinced that the express and implied warranty claims against Defendants Tone Brothers, Mason, Burr and Cox must fail for lack of privity. In *Moore v. Vanderloo*, 386 N.W.2d 108, 112-113 (Iowa 1986), the plaintiff sued a chiropractic college for, among other things, breach of express warranty and breach of implied warranty because of the allegedly faulty chiropractic services she received from one of its graduates. The court stated that under a general warranty argument (because the Uniform Commercial Code did not apply to contracts for services), it refused to sustain a claim absent either reliance or privity. *Id.* at 112. And in *Ethyl Corporation v. BP Performance Polymers, Inc.*, 33 F.3d 23, 25 (8th Cir. 1994), the Eighth Circuit acknowledged that under Iowa law a breach of warranty claim sometimes sounds in contract and sometimes sounds in tort. (quoting Uniform Comparative Fault Act § 1 comment, 12 U.L.A. 44, 45 (Supp. 1994)). Contractual privity may not be necessary for Plaintiffs to sustain a breach of warranty claim. Regardless, the Court need not decide this issue because, as discussed below, there is no factual basis for Plaintiffs' breach of

express warranty claims, and Plaintiffs' breach of implied warranty claims are not allowed as a matter of law.

C. Breach of Express Warranty Claims

Plaintiffs assert that "Defendants represented that the mezzanine area would be similar to the existing mezzanine area at the facility and would be suitable for the same uses as the existing mezzanine area."[7] The Iowa Supreme Court has held as follows with regard to what type of representation is necessary to create an express warranty:

> Although words such as "warranty" or "guaranty" need not be used to create an express warranty, the plaintiff must "show that the seller made some distinct assertion of quality concerning the thing to be sold as distinguished from a mere statement of opinion or of praise, and that he intended such assertion to be believed and relied on by the purchaser as an undertaking on his part that the article is what he represents it to be, and that it was so understood and believed and relied on by the purchaser."

Flom v. Stahly, 569 N.W.2d 135, 140 (Iowa 1997) (quoting *Carleton D. Beh Co. v. City of Des Moines*, 228 Iowa 895, 900 292 N.W. 69, 71 (1940) (citation omitted). The Virginia Supreme Court has held likewise:

> "[T]o constitute a warranty no particular form of expression is required; an apparent intention to warrant is sufficient. It is enough if the words used import an engagement on the part of the vendor that the article is what he represents it to be. Any distinct affirmation of quality made by the vendor at the time of the sale, or during the negotiations that led up to the sale, not as an expression of opinion or belief, but as an assurance to the purchaser of the truth to the fact affirmed, and an inducement to him to make the purchase, is, if accordingly, received, and relied on, and acted upon by the purchaser, an express warranty."

Jacobs v. Warthern, 80 S.E. 113 (Va. 1913) (quoting a jury instruction from the trial court). Plaintiffs, however, fail to point to evidence of such a statement made by any of the Defendants

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[7]Pl.s Burns Philp Food Inc. and Tone Brothers, Inc. Brief in Supp. of Resist. to Def.s, Cox Kliewer & Co., J. Grey Mason, Gary Burr, and Jerry Cox's Mot.s for Summ. J. at 5-6.

with the intent that it be relied upon.

Plaintiffs failed to produce sufficient evidence to withstand Defendants' motion for summary judgment on this claim. At the most, the evidence Plaintiffs submitted might create a genuine issue of material fact as to whether some of the Defendants should have known that Plaintiffs wanted the new mezzanine area to be similar to and suitable for the same purposes as the existing mezzanines. *See* J. Grey Mason Depo. at 61-64; James Able Depo. at 187-189. This evidence, however, does not create a genuine issue of material fact as to whether any of the Defendants made a distinct assertion of quality as to which they intended Plaintiffs to rely on. This is especially true considering the fact that Plaintiffs knew that the contract for architectural services was between Burns Philp and Cox Kliewer. The bottom line is that any disagreement between the parties concerning what the new mezzanine area was supposed to be for appears to be limited to the contract between Burns Philp and Cox Kliewer. Accordingly, Defendants are entitled to summary judgment on all of Plaintiffs breach of express warranty claims.

D. Breach of Implied Warranty Claims

Plaintiffs contend that there is an implied warranty for reasonable fitness for the intended purpose in all construction-related contracts. First, the only contract in this case was between Burns Philp and Cox Kliewer. Second, while such a warranty may be implied in construction contracts, the same is not true for architectural contracts.

An architect's agreement to provide plans does not ordinarily imply a warranty for a perfect plan or satisfactory result. In *Surf Realty Corp. v. Standing*, 195 Va. 431, 442-443, 78 S.E.2d 901, 907 (Va. Ct. App. 1953), the court held as follows:

> An architect, in the preparation of plans and drawings, owes to his employer the duty to exercise his skill and ability, his judgment and taste reasonably and without neglect. *Simpson Bros. Corp. v. Merrimac Chemical Co.*,

> 248 Mass. 346, 142 N.E. 922; *Trunk and Gordon v. Clark*, 163 Iowa 620, 145 N.W. 277.
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> In his contract of employment he implies that he possesses the necessary competency and ability, to enable him to furnish plans and specifications prepared with a reasonable degree of technical skill. He must possess and exercise the care of those ordinarily skilled in the business and, in the absence of a special agreement, he is not liable for fault in construction resulting from defects in the plans *because he does not imply or guarantee a perfect plan or a satisfactory result*. (citations omitted).

(emphasis added); *see also Willner v. Woodward*, 201 Va. 104, 108, 109 S.E.2d 132, 134 (Va. Ct. App. 1959) (holding that an architect impliedly warranted that he would "exercise reasonable care, technical skill and ability in the performance of his contract"). The Court therefore sees no basis for Plaintiffs' breach of implied warranty claims against Defendants.

E. Negligence Claims

In their briefs, Defendants argue that the economic loss doctrine bars Burns Philp's negligence claims against Mason, Burr and Cox and Tone Brothers negligence claims against all Defendants. In the alternative, Defendants argue that even if the economic loss doctrine does apply to professional negligence claims it should not apply to Mason and Burr. At oral argument, Defendants stated that they now believed Burns Philp's negligence claim against Cox Kliewer was also barred. Plaintiffs argue that the economic loss doctrine does not bar their claims against Defendants because it does not apply to professional negligence claims. Plaintiffs argue in the alternative, that even if the economic loss doctrine does apply to professional negligence claims it does still not bar their claims because the case involves hazardous activity and/or damages outside the scope of the economic loss doctrine.

The Court believes that the Iowa Supreme Court intended for the economic loss doctrine to not apply to claims of professional negligence. In *Kemin Industries v. KPMG Peat Marwick LLP*, 578 N.W.2d 212, 220 (1998), the issue before the court was whether the trial court should

have entered judgment on the jury's verdict on the plaintiff's contract claim unreduced by the amount of the plaintiff's own comparative fault as determined on the negligence claim. The plaintiff gave two reasons why the court should answer in the affirmative: "(1) that the comparative fault law contained in Iowa Code chapter 668 is inapplicable to actions that only seek recovery for economic loss, and (2) that in this multicount litigation it was entitled to a separate verdict based on breach of contract." *Id.*

In support of the plaintiff's first contention, the plaintiff relied on the 8th Circuit's decision in *Ethyl Corp. v. BP Performance Polymers, Inc.*, 33 F.3d 23 (8th Cir. 1994). *Id.* In that case, the court stated, the Eighth Circuit held that the comparative fault principles in Iowa Code chapter 668 did not apply to a breach of warranty claim seeking entirely economic losses. *Id.* The court noted that the Eighth Circuit indicated that "under Iowa law a claim for purely economic loss is recoverable only in contract and not in tort," and that the Eighth Circuit relied on *Nelson v. Todd's Ltd.*, 426 N.W.2d 120, 123-25 (Iowa 1988) for that conclusion. *Id.* The court then stated as follows:

> Our reading of the Nelson decision indicates that it was limited to deciding whether purely economic injuries without accompanying physical injury are recoverable under a theory of strict liability in tort. *Nelson*, 426 N.W.2d at 123. *The case does not speak to the specialized situation of professional negligence.*

Id. (emphasis added). The court then went on to find that a specifically identified account receivable is property and thus plaintiff's acts could fall within the definition of fault in Iowa Code § 668.1(1). *Kemin*, 578 N.W.2d at 220-221.

Having disagreed with the plaintiff on its first contention, the court then addressed the plaintiff's second contention. The court disagreed with the plaintiff's second contention as well. *Id.* at 221. It held that the plaintiff was not entitled to a verdict on its contract claim separate

from the verdict on its negligence claim under the principle that while most relationships involving professional services arise from a simple contract, the claim that a provider of professional services has failed to meet a standard of care is essentially a negligence claim. *Id.*

Based on the this analysis, the Court thinks that the only interpretation of the Iowa Supreme Court's holding in *Kemin* is that the economic loss doctrine does not apply to professional negligence claims. The thrust of the court's rejection of the plaintiff's first contention is that *Nelson* did not bar the plaintiff's tort claim because it was a professional negligence claim. The court's statement that "[t]he case [Nelson] does not speak to the specialized situation of professional negligence, is a clear statement of distinguishment from the plaintiff's tort claim against an accounting firm. *Id.* at 220. The fact that the court even went on to answer the plaintiff's second contention bolsters this interpretation because if the court had held that the economic loss doctrine did apply to professional negligence claims, the plaintiff's second contention would have been superfluous. In other words, if the court would have felt that its decision in *Nelson* was controlling of the issue, it would not have needed to go on to the plaintiff's second contention. The Court therefore holds that the economic loss doctrine does not bar Plaintiffs' negligence claims in this case.

Defendant Burr, however, was not a professional architect. In support of the principle under which the court in *Kemin* struck down the plaintiff's second contention, as discussed above, the court specifically referenced two Iowa Code sections:

> To hold otherwise would render inapplicable those provisions of chapter 668 that are specifically tailored to actions involving professional negligence. See Iowa Code §§ 668.11 (disclosure of expert witnesses in cases involving licensed professionals), .12 (statute of repose as applied to licensed engineers and architects).

This Court takes these references to mean that "professional" for the purposes of a professional

negligence claim against an architect in Iowa means a negligence claim against a licensed architect. Defendants point out that Burr was not a licensed architect at the time in question, nor did he act in the capacity as a licensed architect on the project. The Court therefore finds that Plaintiffs' negligence claims against Burr do not fall within the professional negligence exception to the economic loss doctrine. Thus, unless Plaintiffs' claims against Burr fall outside the scope of the economic loss doctrine for some other reason, their negligence claims against him are barred. *See Determan v. Johnson*, 613 N.W.2d 259 (Iowa 2000); *Richards v. Midland Brick Sales Co.*, 551 N.W.2d 649 (Iowa 1996). Defendants also contend that Plaintiffs' negligence claims against Mason should not come within the professional negligence exception to the economic loss doctrine because Mason worked under the direction and supervision of Cox. The Court sees no reason to agree.

Plaintiffs contend that their claims are not barred by the economic loss doctrine because they involve hazardous activity and because they allege damages outside the scope of the economic loss doctrine. These are really one and the same reason. When it comes to the economic loss doctrine, Iowa courts state that "'the line to be drawn is one between tort and contract rather than between physical harm and economic loss.'" *American Fire and Casualty Co. v. Ford Motor Co.*, 588 N.W.2d 437, 439 (Iowa 1999) (quoting *Nelson v. Todd's Ltd.*, 426 N.W.2d 120, 125 (Iowa 1988)). Recovery in tort " is generally available when the harm results from 'a sudden or dangerous occurrence, frequently involving some violence or genuine hazard in the nature of the product defect.'" *Id.* (quoting the same). Whereas recovery is limited to a contract action if the loss was merely a forseeable result from the failure of a product to work properly and thus leading only to disappointed expectations. *American Fire and Casualty Co.*, 426 N.W. at 439. Plaintiffs' negligence claims do not allege the type of harm that is cognizable

in tort. Plaintiffs cannot point to any harm to property other than the property provided in the mezzanine project. Nor do Plaintiffs allege a hazardous situation caused by anything Burr might have done or failed to do. Plaintiffs have admitted that their engineer has concluded that the mezzanines pose no imminently hazardous condition under current loading conditions.[8] Therefore, the Court holds that Plaintiffs' negligence claims against Burr are barred by the economic loss doctrine.

At the hearing, Defendants amended their motions for summary judgment to include the negligence claim by Burns Philp against Cox Kliewer based on *Determan v. Johnson*, 613 N.W.2d 259 (Iowa 2000). Not only does *Determan* not apply to professional negligence claims, but it is an Iowa case, and Virginia law governs the claims by Burns Philp against Cox Kliewer. However, Virginia law does not seem to have carved out a professional negligence exception to the economic loss doctrine. It is the Court's reading of Virginia law that Burns Philp's negligence claim against Cox Kliewer is barred by Virginia's version of the economic loss doctrine. In *Blake Construction Co. v. Alley*, 233 Va. 31, 34, 353 S.E.2d 724, 726 (Va. 1987), the court held that "[w]hile such a duty may be imposed by contract, no common-law duty requires an architect to protect the contractor form purely economic loss." And in *Cincinnati Insurance Co. v. Puckett Brothers Construction Co.*, No. CL98-502, 1999 WL 153729, at *3 (Va. Cir. Ct. March 10, 1999), the court held that "[w]hen a loss results from a breach of duty assumed only by contract, compensation remains the province of the law of contracts." Virginia law seems to clearly preclude Burns Philp's negligence claim against Cox Kliewer.

Thus, the Court will grant summary judgment on both Plaintiffs' negligence claims

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[8]Pl.s' Statement of Contested Material Facts in Supp. of Resist. to Def.s' Mot.s for Summ. J. ¶ 28.

against Defendant Burr and on Burns Philp's negligence claim against Cox Kliewer. It will not grant summary judgment on the negligence claims brought by Burns Philp and Tone Brothers against Mason and Cox and by Tone Brothers against Cox Kliewer. With respect to these latter claims, it must be noted that Defendant did not raise the issue of duty or whether there is any merit to the claims.

F. Negligent Misrepresentation Claims

As discussed above, Virginia does not provide an exception for professional negligence claims from their economic loss doctrine. Virginia's application of the economic loss doctrine seems to extend to negligent misrepresentation as well. In NAP *Chesterfield v. J.H. Martin & Sons*, Nos. CL99-285, CL99-469, 1999 WL 1486250, at *4 (Va. Cir. Ct. Nov. 18, 1999), the court held that there was no exception to the economic loss doctrine for negligent misrepresentation claims. (citing Virginia Transformer Corp. v. P.D. George Co., 932 F.Supp 156, 163 (W.D. Va. 1996)). Thus, Virginia's economic loss doctrine bars Burns Philp's negligent misrepresentation claim against Cox Kliewer.

Under Iowa law though, the economic loss doctrine does not apply to negligent misrepresentation claims against professionals. In *Maynard Cooperative Co. v. Zeneca, Inc.*, 143 F.3d 1099, 1102-1103 (8th Cir. 1998), the Eighth Circuit held that Iowa's economic loss doctrine precluded the plaintiff's negligent misrepresentation claim against a producer of agricultural products. However, that decision was issued before the Iowa Supreme Court's decision in *Kemin Industries, Inc. v. KPMG Peat Marwick LLP*, 578 N.W.2d 212 (Iowa 1998). And, as discussed above, *Kemin* limited the economic loss doctrine to exclude professional negligence claims. *See id.* at 220. In fact, another court in the Northern District of Iowa as already recognized as much. In *Johnson v. Land O' Lakes, Inc.*, 18 F. Supp.2d 985, 1001 (S.D.

Iowa 1998), decided after *Maynard*, the court held that *Kemin* limited *Nelson v. Todd's Ltd.*, 426 N.W.2d 120 (Iowa 1988), and that therefore the plaintiff's tort claims, including a claim for negligent misrepresentation, against an agricultural cooperative were not precluded by the economic loss doctrine. This Court therefore holds that the economic loss doctrine does not bar Tone Brother's negligent misrepresentation claims against Cox Kliewer, Mason or Cox, or Burns Philp's negligent misrepresentation claims against Mason or Cox.

The economic loss doctrine does bar Plaintiffs' negligent misrepresentation claims against Burr. As discussed above, this Court is unconvinced that the Iowa Supreme Court intended in its opinion in *Kemin* for the professional negligence exception to the economic loss doctrine to apply to an unlicensed architect. The Court realizes that this might be a departure from the court in *Land O' Lakes*.

A genuine issue of material fact, however, does not exist on all the elements of Plaintiffs' remaining negligent misrepresentation claims under Iowa law. Iowa defines a negligent misrepresentation as follows:

> (1) One who, in the course of his business profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
> (2) Except as stated in subsection (3), the liability stated in subsection (1) is limited to loss suffered
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> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Bradshaw v. Wakonda Club, 476 N.W.2d. 743, 746-747 (Iowa Ct. App. 1991) (quoting Restatement (Second) of Torts § 552 (1997). In order to withstand a motion for summary judgment, a plaintiff must show there is a genuine issue of material facts with respect to the following elements: (1) the statements were made in the course of the maker's business; (2) the statements relied upon were false when made; (3) the statements were made for the guidance of others in their business transactions; (4) the maker was negligent; (5) the statements were made for the benefit of the persons harmed; (6) the maker intended the information to influence the recipient in a specified or similar transaction; (7) the recipient's reliance was reasonable or justified. *Id.* (citing Restatement (Second) of Torts § 537.

Plaintiffs' remaining negligent misrepresentation claims fail to create a genuine issue of material fact with respect to at least two of these elements. First, Plaintiffs point to no false statements made by any of the Plaintiffs. Second, even if Plaintiffs could point to false statements made by Defendants, it does not seem that anyone aside from a contracting party could justifiably or reasonably rely on the statements where contractual privity was clearly limited to Burns Philp and Cox Kliewer. Thus, all of the Defendants are entitled to the negligent misrepresentation claims brought by both Plaintiffs.

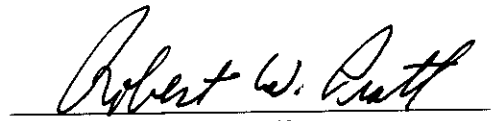
III. Conclusion

The Court **grants** Defendant Cox Kliewer's motion for summary judgment on all claims brought against it by Tone Brothers, except the negligence claim, and on all claims brought against it by Burns Philp, except for the breach of contract claim. The Court **grants** Defendants Mason and Cox's motion for summary judgment with respect to all claims brought against them by both Plaintiffs, except for the negligence claims. Finally, the Court **grants** Defendant Burr's motion for summary judgment on all claims brought against him by both Plaintiffs. The Court

denies Defendants' motions for summary judgment on the negligence claims brought by Tone Brothers against all of the Defendants, except Burr, and on the negligence claims brought by Burns Philp against Burr and Cox Kliewer.

IT IS SO ORDERED.

Dated this 2nd day of November, 2000.



ROBERT W. PRATT,
U.S. DISTRICT JUDGE