

**ROLLANDER ENTERPRISES, INC.
and INDY INVESTMENTS, LLC, Appellants,**

v.

H.C. NUTTING COMPANY, Appellee.

No. 15A01-1008-CC-430

COURT OF APPEALS OF INDIANA

July 8, 2011

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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APPEAL FROM THE DEARBORN CIRCUIT COURT The Honorable James D. Humphrey,
Judge Cause No. 15C01-0807-CC-41

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellants-plaintiffs Rollander Enterprises, Inc. ("Rollander") and Indy Investments, LLC ("Indy") (collectively, "the Appellants") appeal the trial court's judgment on the evidence in favor of appellee-defendant H.C. Nutting Company ("Nutting") on the Appellants' claims for negligence and negligent misrepresentation following a trial for the same. We affirm.

Issues

The Appellants raises two issues for our review, which we restate as:

- I. Whether the trial court abused its discretion by granting a judgment on the evidence in favor of Nutting on the Appellants' negligence claims; and
- II. Whether the trial court abused its discretion by granting a judgment on the evidence in favor of Nutting on the Appellants' negligent misrepresentation claims.

Facts and Procedural History¹

This appeal arises out of litigation involving the construction of the Slopes of Greendale ("the Slopes"), an unfinished and now-stalled condominium complex in Greendale, Indiana originally commenced in 2004. Rollander, a real estate development company incorporated in Ohio, served as general contractor for the construction of the Slopes. Rollander has six shareholders: John Wolterman ("Wolterman"), his sons John W. Wolterman and Charles Wolterman, his daughter Rebecca Hebert, Bob Roll, and Doug Anderson. Chuck Lyons ("Lyons") is Rollander's construction manager for the Slopes project. Indy is a special purpose entity limited liability company incorporated in Indiana that owns the Slopes, and is itself owned by Rollander (75%) and Lyons (25%).

In late 2004, Rollander contacted and eventually hired Nutting, a geotechnical engineering firm, to perform a study to determine the geological composition of the proposed condominium site. Nutting conducted its study and issued its findings in a June, 2005 written report. The report indicated the presence of colluvium, a "medium plastic clay containing pieces of shale and limestone" that corresponds with slope instability and landslides, as well as groundwater, bedrock, and other materials. Ex. 327.

Based on these findings and after numerous meetings with Nutting, Rollander decided to pursue the installation of soldier pile and lagging retaining walls at the Slopes. Wolterman contacted Dennis Brodbeck ("Brodbeck") of Scherzinger Drilling ("Scherzinger") to see if this type of wall was appropriate for the Slopes. Brodbeck concluded it was, and told Wolterman that he and James Wang ("Wang"), an engineer for Nutting, had performed the installation of several retaining wall projects. Rollander hired Nutting to design the retaining walls² and Scherzinger to construct them. Later, Rollander hired Nutting to provide "testing, inspection, and observation" services on earthwork and concrete. Ex. 391. This included monitoring the construction of the retaining walls and eventually monitoring and testing components of "Building B," the only condominium building that has been built at the Slopes.

Construction began in April 2007. That summer, Thomas Gehring ("Gehring"), an excavation subcontractor, noticed cracks in State Route 1, which runs above the east wall. Nutting installed a tool to measure wall movement (deflection) called an inclinometer that indicated significant and unacceptable degrees of deflection in the walls. Wolterman conducted his own measurements and found problems in the east retaining wall, the central wall, and the detention basin wall. The detention basin wall was of special concern to Wolterman because it held up the earth on which Building B rested, and measured up to 14 ? inches of deflection³ in two locations.

The parties brought in \$12,000 worth of dirt as an emergency measure to stabilize the walls. Wang then designed, and Scherzinger installed, a "tie-back" system of large steel rods to anchor the walls and prevent further movement. However, the addition of tie-backs was expensive and made the walls unsightly, and local authorities would not approve a certificate of occupancy due to wall failure. The Appellants brought in experts to assess the problems and suggest possible repair options. One of these experts, an engineer named Dr. Tseng, testified at trial that there were several problems with the walls, including that they were inadequately designed.

In addition to deflection in the walls, Building B has sustained damage. Specifically, the lower floor concrete slab is cracking, the ground floor walls are separating, and the patios facing the detention basin are settling. Dr. Akomolede, another expert retained by the Appellants, testified that lateral movement of the earth behind the retaining walls is a likely cause of Building B's damage.

Construction has now stopped. Litigation ensued on July 18, 2008, when Scherzinger sued Rollander, Indy, and others. Other subcontractors later joined by filing a third party complaint against the Appellants on August 26, 2008. Nutting joined as an intervening plaintiff on March 10, 2009, suing Rollander for breach of contract and Rollander and Indy for unjust enrichment. On March 16, 2009, Rollander and Indy, proceeding as co-plaintiffs, sued Nutting for negligence, breach of good faith and fair dealing, negligent misrepresentation, loss of business opportunity, breach of contract, breach of warranty, and fraud and punitive damages.

The only remaining claims at the time of trial were those between the Appellants and Nutting. A jury trial was held between July 29, 2010 and August 4, 2010, and after the presentation of evidence, Nutting moved for, and the court granted, a judgment on the evidence as to the Appellants' negligence and negligent misrepresentation claims. The jury then found in favor of Nutting on the Appellants' breach of contract, fraud, and breach of warranty claims. The jury also found in favor of Nutting on Nutting's breach of contract claims against the Appellants. The Appellants have appealed only the trial court's judgment on the evidence as to their negligence and negligent misrepresentation claims.

Discussion and Decision

Choice of Law

As a threshold matter, we address the Appellants' contention that Ohio law applies in this case. When conducting a choice of law analysis, Indiana courts first determine whether the differences between the state laws are important enough to affect the outcome of the litigation. Simon v. United States, 805 N.E.2d 798, 805 (Ind. 2004). If such a conflict exists, then Indiana courts follow the presumption that the traditional *lex loci delicti* rule (the place of the wrong) applies. Id. Under this rule, the court applies the substantive laws of the state where the last event necessary to make the actor liable for the alleged wrong takes place. Id. This presumption is not conclusive, however, if the tort bears little connection to the legal action. Id.

Regardless of the differences between Indiana and Ohio law, the last event necessary to make Nutting potentially liable for both negligence and negligent misrepresentation occurred in Indiana. A defendant is liable to a plaintiff for the tort of negligence if (1) the defendant has a duty to conform its conduct to a standard of care arising from its relationship with the plaintiff; (2) the defendant failed to conform its conduct to that standard of care; and (3) an injury to the plaintiff was proximately caused by the breach. Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 726 (Ind. 2010). Negligent misrepresentation is defined as:

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.

Thomas v. Lewis Engineering, Inc., 848 N.E.2d 758, 760 (Ind. Ct. App. 2006) (quoting Restatement (Second) of Torts § 552 (1977)).

Here, the alleged damage to the Slopes, located in Indiana, occurred after both Nutting's alleged negligent design of the wall and its alleged negligent misrepresentations. Thus, the last event making Nutting potentially liable on both claims was an injury that occurred in Indiana and consequently, under the *lex loci delicti* analysis, Indiana law applies. Moreover, far from bearing "little connection" with the claims, almost all the events pertinent to this lawsuit occurred in Indiana. Simon, 805 N.E.2d at 806 (quoting Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071, 1074 (Ind. 1987)). Appellants refer to the location of some of the meetings, office locations, and correspondence, but the relative importance of these events to the overall action is too insignificant for us to conclude that Indiana bears little connection to Appellants' claims. Indiana law applies.

Standard of Review

"The purpose of a motion or judgment on the evidence is to test the sufficiency of the evidence." City of Hammond v. Cipich ex rel. Skowronek, 788 N.E.2d 1273, 1278 (Ind. Ct. App. 2003), trans. denied. A trial court has broad discretion to grant or deny a motion for judgment on the evidence, and we will reverse its decision only when it abuses that discretion. Id. Indiana Trial Rule 50 governs motions for judgment on the evidence, and states, in relevant part:

Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issue from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict.

When we review a trial court's ruling on a motion for judgment on the evidence, we are bound by the same standard as the trial court. City of Hammond, 788 N.E.2d at 1278. We may not substitute our judgment for that of the jury on questions of fact, nor should a motion for judgment on the evidence be granted because the evidence favors the moving party. Id. Instead, we consider the evidence in the light most favorable to the nonmoving party and determine only whether there exists any reasonable evidence supporting the claim, and, if so, whether the inference supporting the claim can be drawn without undue speculation. Id. "If there is evidence that would allow reasonable people to differ as to the result, judgment on the evidence is improper." Newland Resources, LLC v. Branham Corp., 918 N.E.2d 763, 770 (Ind. Ct. App. 2009) (quoting State Farm Mut. Auto Ins. Co. v. Noble, 854 N.E.2d 925, 931 (Ind. Ct. App. 2006), trans. denied). "In other words, the court should withdraw the case from the jury only if there is a complete failure of proof on at least one essential element of the plaintiff's case." Wellington Green Homeowners' Ass'n v. Parsons, 768 N.E.2d 923, 925 (Ind. Ct. App. 2002), trans. denied (quoting Johnson v. Naugle, 557 N.E.2d 1339, 1342 (Ind. Ct. App. 1990)).

Analysis

The Economic Loss Rule

The Appellants assert that the trial court erred when it granted Nutting's motion for a judgment on the evidence as to the Appellants' claims for negligence and negligent misrepresentation based on the economic loss rule. The economic loss rule precludes tort liability for purely economic loss. Indianapolis-Marion County Public Library, 929 N.E.2d at 726. Economic losses are "disappointed contractual or commercial expectations." Gunkel v. Renovations, Inc., 822 N.E.2d 150, 153-54 (Ind. 2005) (citing Am. United Logistics, Inc. v. Catellus Dev. Corp., 319 F.3d 921, 926 (7th Cir. 2003)). They represent "the diminution in the value of a product and consequent loss of profits because the product is inferior in quality and does not work for the general purposes for which it was manufactured and sold." Id. (quoting Reed v. Central Soya Co., 621 N.E.2d 1069, 1074 (Ind. 1993)). "Damage to the product itself, including costs of repair or reconstruction, is an 'economic loss' even though it may have a component of physical destruction." Id.

If the plaintiff's injury results from a defective product or service,⁴ the defendant is liable under a tort theory only if the defect causes personal injury or damage to property other than the product or service the plaintiff purchased. Indianapolis-Marion County Library, 929 N.E.2d at 726. However, a defendant is not liable under a tort theory for a pure economic loss caused by its negligence, including damage to the product or service itself. Id. at 726-27. Stated differently:

The rule of law is that a party to a contract or its agent may be liable in tort to the other party for damages from negligence that would be actionable if there were no contract, but not otherwise. Typically, damages recoverable in tort from negligence in carrying out the contract will be for injury to person or physical damage to property, and thus "economic loss" will usually not be recoverable.

Greg Allen Constr. Co. v. Estelle, 798 N.E.2d 171, 175 (Ind. 2003); see also Reed, 621 N.E.2d at 1073-74 ("where the loss is solely economic in nature, as where the only claim of loss relates to the product's failure to live up to expectations, and in the absence of damage to other property or person, then such losses are more appropriately recovered by contract remedies"). In other words, "contract is the sole remedy for failure of a product or service to perform as expected." Gunkel, 822 N.E.2d at 152. The policy underlying this rule is that the law should permit the parties to a transaction to allocate the risk that an item sold or a service performed does not live up to expectations. Id. at 155.

Moreover, our supreme court recently held that the economic loss rule prevents recovery in tort where the plaintiff, although not in contractual privity, is connected through a "chain of contracts" with the defendant. Indianapolis-Marion County Library, 929 N.E.2d at 740. In Indianapolis-Marion County Library, the Library hired an architectural firm for the renovation and expansion of its downtown facility and parking garage. 929 N.E.2d at 725. The architectural firm subcontracted with two other firms, and the managing director of one served as lead engineer. Id. The two subcontractors and engineer did not directly contract with the Library, although all three were a party to one or more contracts with the main architectural firm or other entities involved in the project. Id.

After the project was underway, the Library discovered several construction and design defects in the garage which posed a serious risk for structural failure, so the Library suspended

construction, took steps to mitigate the effects of the negligent design, and sued, among others, both subcontractors and the lead engineer alleging negligence. Id. In rejecting the negligence claims, our supreme court observed that "participants in a major construction project define for themselves their respective risks, duties, and remedies in the network or chain of contracts governing the project" and added that "this applies as much to the project owner as it does to contractors and subcontractors, engineers and design professionals, and others." Id. at 740. The Court therefore held that

[T]here is no liability in tort to the owner of a major construction project for pure economic loss caused unintentionally by contractors, subcontractors, engineers, design professionals, or others engaged in the project with whom the project owner, whether or not technically in privity of contract, is connected through a network or chain of contracts.

Id.

Still, our supreme court has clarified that the economic loss rule is not without limitations. While the economic loss rule "operates as a general rule to preclude recovery in tort for economic loss, it does so for purely economic loss. . .and even when there is purely economic loss, there are exceptions to the general rule." Indianapolis-Marion County Public Library, 929 N.E.2d at 730 (emphasis in original); see also id. at 736 ("Indiana courts should recognize that the rule is a general rule and be open to appropriate exceptions") (emphasis in original); Greg Allen Constr. Co., 798 N.E.2d at 175 ([the economic loss rule] is only the usual case, not the uniform rule"). There are two important limitations to the rule: (1) there must be purely economic loss for the rule to apply; and (2) even in cases of pure economic loss there are some exceptions to its application. Indianapolis-Marion County Public Library, 929 N.E.2d at 730. Some of these exceptions include lawyer malpractice, breach of duty of care owed to a plaintiff by a fiduciary, breach of duty to settle owed by a liability insurer to the insured, and negligent misstatement. Id. at 736. Here, the Appellants argue that (1) they have not suffered pure economic loss, and, (2) even if they have, the negligent misstatement exception applies. We address each of these arguments below.

Negligence

The Appellants maintain that the economic loss rule does not preclude their claim for negligence, and, moreover, even if the rule prevents their recovery for the retaining wall damage, they should still be able to proceed in tort for the damage to Building B, as it constitutes property damage outside the contemplation of the contract and is therefore not pure economic loss. We disagree.

As we noted above, a defendant is liable to a plaintiff for the tort of negligence if (1) the defendant has a duty to conform its conduct to a standard of care arising from its relationship with the plaintiff; (2) the defendant failed to conform its conduct to that standard of care; and (3) an injury to the plaintiff was proximately caused by the breach. Indianapolis-Marion County Public Library, 929 N.E.2d at 726. Notwithstanding the fact that the jury has already determined that Nutting did not breach the contract,⁵ as our prior discussion on the economic loss rule reveals, a defendant is not liable under a tort theory for a pure economic loss caused by its negligence, including damage to the product or service itself. Id. at 726-27.

Here, Rollander contracted with Nutting for the design of the walls and therefore any claimed defect with the design that resulted in a defective wall is a disappointed commercial expectation. Rollander is therefore limited to its breach of contract claim. Likewise, Indy may not recover for negligence in the wall's design pursuant to the "chain of contracts" holding of Indianapolis-Marion County Library because although it was not in contractual privity with Nutting, it is nevertheless connected to Nutting through Rollander's contract because Indy hired Rollander as general contractor. See id. at 740. Regardless of privity,⁶ Indy has only suffered economic loss in the form of a disappointed commercial expectation for a finished condominium project. Thus, neither Rollander nor Indy would have been able to recover in tort for damage to the retaining walls as a result of Nutting's design.⁷

Still, the Appellants assert that the trial court erred by granting Nutting judgment on the evidence because they introduced evidence of property damage outside the parameters of the wall design contract, drawing our attention to the "other property" exception to the economic loss rule. In Gunkel, our supreme court stated that although "contract law governs damage to the product or service itself and purely economic loss arising from the failure of the product or service to perform as expected. . . damage from a defective product or service may be recoverable under a tort theory if the defect causes personal injury or damage to other property." 822 N.E.2d at 153. Stated differently, "[t]o the extent that a plaintiff's interests have been invaded beyond a mere failure to fulfill contractual obligations, a tort remedy should be available. If so, damage to person or property or to economic interests may be recoverable." Greg Allen Constr. Co, Inc., 798 N.E.2d at 173. The Gunkel court provided guidance as to what constitutes "other property":

If a component is sold to the first user as a part of the finished product, the consequences of its failure are fully within the rationale of the economic loss doctrine. It is therefore not "other property." But property acquired separately from the defective good or service is "other property," whether or not it is, or is intended to be, incorporated into the same physical object... [T]he "product" is the product purchased by the plaintiff, not the product furnished by the defendant.

Gunkel, 822 N.E.2d at 155.

In Gunkel, some homeowners contracted with a construction company for the construction of a residence, and then separately contracted with a stone company for the installation of a stone facade. 822 N.E.2d at 151. Shortly after the stone company installed the facade, water entered through the gaps and damaged parts of the house, and the Gunkels sued the stone company for both breach of contract and for negligence. Id. In addressing their claim for negligence,⁸ our supreme court determined that the economic loss rule precluded tort recovery as to the stone facade, but not as to the home damage because the home was "other property." Id. at 156. The Court stated that "[t]he economic loss rule does not bar recovery in tort for damage that a separately acquired defective product or service causes to other portions of a larger product into which the former has been incorporated" and held that because the facade was installed under an arrangement separate from that for the overall house, it was not part of the larger whole. Id. at 156.

The Indianapolis-Marion County Library court also addressed the issue of "other property" within the context of a major construction project. 929 N.E.2d at 731-32. The court rejected the Library's argument that damage to the parking facility was damage to "other property" for purposes of the rule, and stated that:

[t]he Library purchased a complete refurbishing of its library facility from multiple parties. The Library did not purchase a blueprint from the Defendants, concrete from a materials supplier, and inspection services to ensure the safety of the construction project in isolation; it purchased a complete renovation and expansion of all the components of its facility as part of a single, highly-integrated transaction. Thus, irrespective of whether Defendants' negligence was the proximate cause of defects in design of the library facility, for purposes of the other property rule, the product or service that the Library purchased was the renovated and expanded library facility itself.

Id. at 731.

Here, Indy cannot escape the economic loss rule because, much like the Library, Indy hired a general contractor to complete the entire project. Indy has not alleged, nor did it show at trial, that it has sustained damage to any property other than property at the Slopes of Greendale. Because Indy has only sustained property damage to the item it purchased, it may not recover in tort. The trial court was therefore correct to grant Nutting's motion as to Indy's negligence claim because Indy has suffered only economic loss.

Rollander, on the other hand, contracted with Nutting for the design of the walls, and, in separate transactions, contracted with other subcontractors for various services necessary to erect Building B (including hiring Nutting to provide monitoring, testing and inspection services, which they did on all aspects of the Slopes, including Building B). Thus, the product it purchased was not the entire condominium complex, but separate pieces. The piece at issue is the design of the wall, and its alleged effect on other parts. Consequently, Rollander's claim is much more similar to that in Gunkel.

Still, we cannot conclude that damage to Building B was damage to other property, rather than economic loss. "The theory underlying the economic loss doctrine is that the failure of a product or service to live up to expectations is best relegated to contract law and to warranty either express or implied." Gunkel, 822 N.E.2d at 155. The expectation here was that the walls would be designed to adequately retain the ground. Rollander decided to install retaining walls after receiving the geotechnical report indicating the earth composition was such that it corresponds with slope instability and landslides. It then purchased the retaining walls to prevent these potential problems. Unlike an aesthetic stone facade, the very purpose of the retaining wall—the expectation of the product—was to prevent earth movement. A retaining wall fails when it does not hold back the earth and prevent soil erosion as intended, and therefore damage incidental to and flowing from non-retention is a disappointed commercial expectation of a properly designed wall. This is economic loss, and it precludes Rollander's negligence claim.

Negligent Misrepresentation

The Appellants also maintain that the trial court erred when it granted Nutting's motion for a judgment on the evidence as to the Appellants' negligent misrepresentation claims.² Liability for the tort of negligent misrepresentation has been recognized in Indiana. U.S. Bank, N.A. v. Integrity Land Title Corp., 929 N.E.2d 742, 747 (Ind. 2010) (citing Passmore v. Multi-Mgmt. Servs., Inc., 810 N.E.2d 1022, 1025 (Ind. 2004)). The Restatement (Second) of Torts § 552(1), entitled Information Supplied for the Guidance of Others, provides:

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.

Id. (quoting Restatement (Second) of Torts § 552(1)).

Moreover, "we have said 'negligent misrepresentation may be actionable and inflict only economic loss[,]' citing Restatement (Second) of Torts § 552." Id. (quoting Greg Allen Constr. Co., 798 N.E.2d at 174)). For instance, our supreme court recently held that a title commitment issuer could be held liable for negligent misrepresentation to a bank when the title company negligently issued a title commitment that failed to disclose an encumbrance. Id. at 749. In carving out an exception to the economic loss rule, the court stated that "[i]n the context of the title insurance industry, Indiana courts have shown a willingness to go beyond the terms of the insurance contract to explore whether a duty might lie in tort as well as contract."¹⁰ Id. at 748.

Such is not the case here, in a construction context, where reliance on contracts to establish the relative expectations of the parties "is perhaps greater in construction projects than any other industry." Indianapolis-Marion County Library, 929 N.E.2d at 730. Rollander was in contractual privity with Nutting, and Indy was connected to Nutting through a chain of contracts. As such, any damages asserted by alleged negligent misrepresentations are best remedied through breach of contract claims, not through tort law. See id. at 741 (distinguishing U.S. Bank and holding that the Library could not recover for negligent misstatements because it was "connected with the Defendants through a network or chain of contracts, [and] the economic loss rule precludes it from proceeding in tort").

Conclusion

Because Rollander was in contractual privity with Nutting, and Indy was connected to Nutting through a chain of contracts and no exception applies, the economic loss rule precludes their recovery in tort. Damage to Building B was not damage to "other property," and the negligent misrepresentation exception to the economic loss rule is inapplicable on these facts. The trial court therefore did not abuse its discretion by entering judgment on the evidence in favor of Nutting on the Appellants' negligence and negligent misrepresentation claims.

Affirmed.

FRIEDLANDER, J., and BROWN, J., concur.

Notes:

¹ The Appellants' Statement of the Facts in their brief is inappropriately argumentative. A Statement of the Facts should be a concise narrative of the facts stated in the light most favorable to the judgment and should not be argumentative. Ruse v. Bleeke, 914 N.E.2d 1, n.1 (Ind. Ct. App. 2009). Statements such as: "Mr. Wang.. testified for over one full day at trial, providing rambling, contradictory and frequently evasive and non-responsive testimony" and "It is inconceivable that Nutting never once documented the alleged improper wall construction," Appellants' Br. pp. 8-9, are inappropriate for the Statement of Facts. We remind counsel of the duty to follow the Rules of Appellate Procedure.

² There was no written contract for the design of the retaining walls. Wang faxed Wolterman a cost estimate of \$15,800 for the design of the walls, and based on that figure, Wolterman told Wang to proceed.

³ Five to six inches of deflection is excessive.

⁴ "Construction claims are not necessarily based on defective goods or products, but nonetheless are subject to the economic loss doctrine." Id. at 155.

⁵ "The law implies a duty in every contract for work or services that the work will be performed skillfully, carefully, diligently, and in a workmanlike manner." Mullis v. Brennan, 716 N.E.2d 58, 64 (Ind. Ct. App. 1999). Even if the Appellants' negligence claim could survive the economic loss rule, to remand this case would be tantamount to asking the jury to decide a question it has already answered, i.e., whether Nutting's design was performed skillfully, carefully, diligently, and in a workmanlike manner.

⁶ The Appellants point out that there was no contract between Indy and Rollander.

⁷ We also reject the Appellants' argument that the "chain of contracts" holding of Indianapolis-Marion County Library applies only to "major" construction projects and that the Slopes of Greendale is not a major construction project because the damages at issue are significantly less than in that case. It is true that the supreme court uses the term "major construction project" throughout its opinion, but we think that the adjective "major" refers to those projects with multiple parties connected through several contracts, not to any particular amount of damages. Indeed, we see no reason why the amount of damages bears any relationship to the applicability of the economic loss rule, and in fact our supreme court has applied the rule in cases concerning small construction projects on residential homes. See, e.g., Greg Allen Constr. Co., 708 N.E.2d at 172-75; Gunkel, 822 N.E.2d at 156-57. Therefore, we think that the holding of Indianapolis-Marion County Library controls here.

⁸ The Gunkels elected not to pursue the contract claim on appeal. Gunkel, 822 N.E.2d at 151.

⁹ Appellants argue in their brief that, in addition to their independent claims for negligent misrepresentation, their claims for negligence also should have survived the economic loss rule because of the negligent misstatement exception. Appellant's Br. p. 24 ("Rollander's professional negligence claims should have been submitted to the jury, because of the negligent misrepresentation exception to the economic loss rule). To be clear, the negligent misrepresentation exception applies when the plaintiff actually sues for negligent misrepresentation—negligence that would otherwise be precluded by the economic loss rule is not permitted simply because a plaintiff alleges that misrepresentations were made.

¹⁰ The title issuer and the bank in this case were not in contractual privity. but our supreme court added that "the existence or non-existence of a contract is not the dispositive factor for determining whether a tort action is allowable where special circumstances and overriding public policies have carved out exceptions for tort liability." Id. at 748.
