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IN THE
COURT OF APPEALS OF INDIANA

The Residences of Ivy Quad Unit Owners Association, Inc.,
Appellant-Plaintiff,

v.

Ivy Quad Development, LLC, John Ward Concrete, Inc. d/b/a JW Concrete and Excavation, Matthews, LLC, DMTM, Inc., David Matthews, Velvet Canada, Todd Miller, and JM Quality Construction, LLC,
Appellees-Defendants

January 29, 2021

Court of Appeals Case No. 19A-PL-2974

Interlocutory Appeal from the St. Joseph Superior Court

The Honorable Jenny Pitts Manier, Judge

Trial Court Cause No. 71D05-1803-PL-105

Crone, Judge.

Case Summary

[1] In the fall of 2017, various unit owners of the Residences at Ivy Quad condominium complex (Ivy Quad) began noticing crumbling and cracking concrete and water infiltration at Ivy Quad. The Ivy Quad Unit Owners Association, Inc. (the HOA), hired an engineering firm to inspect the property and thereafter filed suit against the property developer, Ivy Quad Development, LLC, based upon implied warranty and negligence theories. The HOA also sued a concrete supplier based upon negligence. The HOA amended its complaint three times and added additional defendants, including Matthews, LLC, DMTM, Inc., David Matthews, and Velvet Canada (the Matthews Defendants), as well as other construction professionals involved in the project.

The Matthews Defendants filed a motion to dismiss the HOA's claims against them alleging that they were not the builder-vendor of the properties and thus not parties against whom the implied warranty claims could be pursued, and that the HOA's negligence claim was barred by the economic loss doctrine. Following a hearing, the trial court granted the motion to dismiss. The HOA now brings this interlocutory appeal from the trial court's dismissal order. We reverse the relevant parts of that order and remand for further proceedings.

Facts and Procedural History

[2] The record indicates that Ivy Quad is a ten-building, sixty-eight-unit residential condominium complex located in South Bend. The HOA's complaint alleges that David Matthews (David) owns all or part of Ivy Quad Development, LLC, the now insolvent developer that arranged for the construction of Ivy Quad, supervised construction, and sold units to the original members of the HOA.[1] Matthews, LLC, was the general contactor involved in the development, design, and construction of Ivy Quad, and DMTM, Inc., managed the construction of Ivy Quad and provided design services. David owns all or part of and manages Matthews, LLC, and DMTM. Velvet Canada (Velvet), David's wife, was involved in the design, construction, development, and sale of Ivy Quad units.

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[1] According to the HOA, Ivy Quad Development "is in Chapter 7 Bankruptcy after the HOA filed a Chapter 7 Involuntary Petition against the [d]eveloper in the United States Bankruptcy Court for the Northern District of Indiana." Appellant's Br. at 9 (citing *In re Ivy Quad Dev. LLC*, No. 19-32033 hcd (Bankr. N.D. Ind. Dec. 6, 2019)).

[3] In the fall of 2017, various Ivy Quad unit owners began noticing crumbling and cracking concrete and water infiltration at Ivy Quad. The HOA hired Keller Engineering, Inc., to inspect the property. Keller Engineering inspected Ivy Quad on October 27, 2017, and, on November 9, 2017, issued a written report that reflected the finding of the following defects:

> a. improper construction of retaining walls,
>
> b. missing drip grooves on windowsills,
>
> c. improper connections in brick columns,
>
> d. a failed drainage pipe,
>
> e. cracked, flaking, mis-matched, and/or spalling concrete,
>
> f. missing expansion joints between concrete slab and adjacent building components,
>
> g. improperly finished roof drain penetrations,
>
> h. missing weep holes around limestone lintels,
>
> i. improperly caulked expansion joints and improper location of downspouts near expansion joints,
>
> j. improper location of downspout over an electrical box,
>
> k. improper pouring of concrete patios over flexible block retaining walls,
>
> l. concrete stairs that violate Residential and Commercial building codes, []

m. missing bricks at electrical penetrations.

Appellant's App. Vol. 2 at 72.

[4] On February 1, 2018, Keller Engineering inspected Ivy Quad a second time and, on February 7, 2018, issued a written report finding the following additional defects:

a. Water intrusion in ground level living spaces caused by improper construction of patios, doorways, and downspouts,

b. Inadequate attic ventilation,

c. Missing expansion joints and missing or improperly caulked seals,

d. Failure to grade sidewalk patios, creating drainage problems,

e. Spalling concrete, []

f. Improper grading of garage floors to prevent water pooling.

Id. at 73. Keller Engineering issued a third report on February 28, 2018, detailing additional issues with ventilation and other problems relating to the attics, roofs, and gutters. In December 2018, Anthony Polotto issued a report addressing numerous further defects and problems with the Ivy Quad property. Keller Engineering issued a fourth report on May 31, 2019, concluding that the balconies and wooden decking did not comply with building codes due to the

use of improper materials and that the balconies and decking required replacement.

[5] The HOA filed a complaint against Ivy Quad Development and John Ward Concrete, Inc. d/b/a JW Concrete and Excavation on March 23, 2018. Specifically, the complaint alleged breach of the implied warranty of habitability and other warranties against Ivy Quad Development, and negligence against both Ivy Quad Development and JW Concrete and Excavation. The HOA requested damages and included a count seeking statutory attorney's fees. The HOA twice amended its complaint to add additional defendants, including the Matthews Defendants, Todd Miller, and JM Quality Construction, LLC. The HOA amended its complaint a third time on August 14, 2019, to include additional factual allegations concerning the nature of the defects, but still alleged four counts, including negligence, against all defendants.

[6] On August 15, 2019, pursuant to Indiana Trial Rule 12(B)(6), the Matthews Defendants filed a motion to dismiss the claims against them on the following two grounds: (1) they do not owe implied warranties to any of the unit owners because they were not the "builder-vendor" of Ivy Quad; and (2) they cannot be held liable in negligence for construction defects because the HOA's claim is barred by the economic loss rule. The trial court held a hearing on the motion to dismiss on October 11, 2019, and entered its order granting the motion and dismissing all counts against the Matthews Defendants on October 28, 2019. Specifically, the order provides:

1. The Motion of the Matthews Defendants to Dismiss Counts I and II [warranty claims] of Plaintiff's Third Amended Complaint, as alleged against the Matthews Defendants directly, is granted. The Matthews Defendants, individually or collectively[,] are not the proper parties against whom the warranty claims alleged can be enforced directly.

2. The Motion of the Matthews Defendants to Dismiss Count III [negligence] of the Plaintiff's Third Amended Complaint, as [alleged] against the Matthews Defendants, is granted. Indiana's economic loss doctrine precludes Plaintiff's negligence claim against these defendants for the damages it has alleged.

3. The Motion of the Matthews Defendants to Dismiss Count IV [statutory attorney fees] is granted, subject to the right of [Plaintiff] to file a Fourth Amended Complaint with sufficient factual specificity to support its alter ego theory of liability against the Matthews Defendants.

4. The request for an award of attorney fees made by the Matthews Defendants remains under consideration.

Appealed Order at 1-2 (footnote omitted).[2]

[2] The Matthews Defendants alleged that, among other reasons, dismissal of the warranty claims was appropriate because the HOA failed to attach to the complaint the purchase agreements between the unit owners and the "builder-vendor" or any "construction professional." Appellant's App. Vol. 2 at 89. The trial court noted that although the HOA indeed failed to attach any purchase contracts, such failure was not, in and of itself, a sufficient basis for dismissal of those counts. Rather, in dismissing the implied warranty claims against the Matthews Defendants, the court relied upon the HOA's acknowledgement during the hearing on the motion to dismiss that the only party with whom the individual owners contracted for the construction of their units was Ivy Quad Development.

[7] The HOA filed a motion to certify the trial court's dismissal order for interlocutory appeal. The trial court granted the motion for certification, and this Court subsequently accepted jurisdiction. This appeal ensued.[3]

Discussion and Decision

[8] The HOA appeals the trial court's order dismissing its claims against the Matthews Defendants. A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim, not the facts supporting it. *Hall v. Shaw*, 147 N.E.3d 394, 400 (Ind. Ct. App. 2020), *trans. denied*. The appellate standard of review in this regard is well settled.

> We review de novo the trial court's grant or denial of a motion based on Indiana Trial Rule 12(B)(6). In so reviewing, we look at the complaint in the light most favorable to the plaintiff, with every inference drawn in its favor, to determine if there is any set of allegations under which the plaintiff could be granted relief. A dismissal under Trial Rule 12(B)(6) is improper unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts.

Bd. of Comm'rs of Union Cnty. v. McGuinness, 80 N.E.3d 164, 167 (Ind. 2017) (citations and quotation marks omitted).

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[3] JM Quality Construction and additional subcontractor-defendants were not parties to the motion to dismiss, and thus they are not parties to this interlocutory appeal. However, JM Quality Construction has filed a brief in support of the trial court's dismissal of the HOA's negligence claim against the Matthews Defendants based upon application of the economic loss doctrine. JM Quality Construction indicates that it has filed a motion for summary judgment against the HOA on the same grounds, which has been stayed by the trial court pending the outcome of this appeal.

Section 1 – The trial court improperly dismissed the HOA's implied warranty claims against the Matthews Defendants.

[9] Although the lion's share of the HOA's appellate argument involves its challenge to the trial court's dismissal of its negligence claim against the Matthews Defendants, we begin by briefly addressing the trial court's dismissal of the implied warranty claims.[4] Specifically, the trial court determined that the Matthews Defendants are not the proper parties against whom the implied warranty claims can be enforced directly.

[10] It is well settled that a person who builds a house provides an implied warranty of habitability to the homebuyer for a period of six years. *Carroll's Mobile Homes, Inc. v. Hedegard*, 744 N.E.2d 1049, 1051 (Ind. Ct. App. 2001). An implied warranty of fitness for habitation warrants that a house will be free from defects that substantially impair its use and enjoyment. *Corry v. Jahn*, 972 N.E.2d 907, 913 (Ind. Ct. App. 2012), *trans. denied* (2013). Our supreme court has extended the implied warranty of habitability to second or subsequent purchasers in the case of latent defects that are not discoverable upon the

[4] The Matthews Defendants urge that this appeal should be limited to review of the trial court's dismissal of the HOA's negligence claim because the HOA's motion for certification of interlocutory appeal with this Court specifically stated that the appeal was limited to that issue. However, it is well established that any issues that were properly raised in the trial court in ruling on its order are available on interlocutory appeal. *Ind. Dep't of Envtl. Mgmt. v. NJK Farms, Inc.*, 921 N.E.2d 834, 841 (Ind. Ct. App. 2010), *trans. denied*. Indeed, our supreme court has emphasized that interlocutory appeals are taken from orders, not issues. *Harbour v. Arelco, Inc.*, 678 N.E.2d 381, 386 (Ind. 1997) (discussing predecessor to Indiana Appellate Rule 14). In *Harbour*, the court held that Indiana Appellate Rule 14 "does not require or even permit certification of particular issues. Rather it requires certification of an interlocutory order." *Id*. at 386; *but see Coca-Cola Co. v. Babyback's Int'l, Inc.*, 841 N.E.2d 557, 561 n.2 (Ind. 2006) (stating in footnote that some of issues presented by co-appellant "were not among the issues certified for interlocutory appeal"). Accordingly, in addition to the negligence claim, we will also review the HOA's assertion that the trial court erred in dismissing the implied warranty claims.

purchaser's reasonable inspection and that manifest themselves after the purchase. *Barnes v. Mac Brown & Co., Inc.*, 264 Ind. 227, 229, 342 N.E.2d 619, 621 (1976). However, the implied warranty of habitability does not apply to all involved in the building process; it applies only to home builders-vendors. *Choung v. Iemma*, 708 N.E.2d 7, 12 (Ind. Ct. App. 1999). A "builder-vendor" is a person in the business of building and selling homes for profit. *Id*.

[11] The HOA asserts that the trial court improperly dismissed its implied warranty claims against the Matthews Defendants because the complaint sufficiently alleges that the Matthews Defendants were builders-vendors. The Matthews Defendants counter that it is clear from the face of the complaint that Ivy Quad Development was the sole builder-vendor of Ivy Quad, and therefore the trial court properly dismissed the HOA's implied warranty claims against them. We disagree with the Matthews Defendants' characterization of the allegations in the complaint. Rather, the HOA sufficiently alleged in its Third Amended Complaint that, in addition to Ivy Quad Development, each of the Matthews Defendants is in the business of and/or had some hand in building and selling the Ivy Quad condominium units.[5] Whether there is evidence that each or any of those individual defendants actually assumed the responsibilities of a builder-vendor is a question that might be ripe for disposition in an eventual motion for

[5] We note that the Matthews Defendants cite us to no authority, and we are not aware of any, that there can be only a single builder-vendor/developer for a particular home construction. Indeed, the HOA directs us to persuasive authority indicating that breach of the implied warranty of habitability may, at least initially, be pursued against multiple parties involved in the development of property. *See, e.g.*, *Stillwater of Crown Point Homeowner's Ass'n v. Kovich*, 820 F.Supp.2d 859, 902-03 (N.D. Ind. 2011).

summary judgment, but is not appropriate for resolution in the context of the current 12(B)(6) motion to dismiss. *See id*. (holding that entry of summary judgment was proper because, among other things, plaintiff failed to designate sufficient evidence to establish that defendants were builders-vendors).

[12] The Matthews Defendants' statement in their appellate brief that they "contend there is only one builder-vendor and developer for [] Ivy Quad and that is [Ivy Quad Development]" is just that: a contention. Appellees' Response Br. at 22. We remind them that a dismissal under Trial Rule 12(B)(6) is improper unless it appears *to a certainty* that the plaintiff would not be entitled to relief *under any* set of facts. *McGuinness*, 80 N.E.3d at 167 (emphases added).[6] Under the circumstances presented, we cannot say with certainty that the HOA would not be entitled to relief against the Matthews Defendants under any set of facts. Accordingly, we reverse the trial court's dismissal of the HOA's implied warranty claims against the Matthews Defendants.

[6] The trial court noted in its dismissal order that "Plaintiff, at the hearing, acknowledged that the only party with whom the condominium owners whose interests it represents contracted with for the construction of the units and the project is Ivy Quad Development, LLC." Appealed Order at 2 n.1. Be that as it may, we do not believe that a lack of contractual privity acknowledgement by counsel results in the HOA's failure to state a claim upon which relief can be granted. *See Jordan v. Talaga*, 532 N.E.2d 1174, 1184 (Ind. Ct. App. 1989) (citing with approval persuasive authority recognizing that although the implied warranty of habitability "has its roots in the execution of the contract for sale," it exists independently, and contract privity is not required).

Section 2 – The trial court improperly dismissed the HOA's negligence claim against the Matthews Defendants.

[13] We turn to the HOA's assertion that the trial court improperly dismissed its negligence claim against the Matthews Defendants based on its conclusion that such claim was barred by the economic loss doctrine as enunciated by our supreme court over a decade ago in *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 727 (Ind. 2010). As with the HOA's implied warranty claims, we think that dismissal of the negligence claim was premature and that there are numerous questions of fact that must be resolved at a later stage in these proceedings. Moreover, we believe that the trial court applied the economic loss doctrine too broadly under the facts of this in case. Thus, we provide guidance moving forward.

[14] "[U]nder longstanding Indiana law, a defendant is not liable under a tort theory for any purely economic loss caused by its negligence …." *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742, 745 (Ind. 2010) (citation and quotation marks omitted). "This rule precluding tort liability for purely economic loss—that is, pecuniary loss unaccompanied by any property damage or personal injury (other than damage to the product or service itself)—has become known as the 'economic loss rule' *…." Indianapolis-Marion Cnty. Pub. Libr.,* 929 N.E.2d at 727.

[15] Specifically, the economic loss doctrine provides that

> a defendant is not liable under a tort theory for any purely economic loss caused by its negligence (including, in the case of a

> defective product or service, damage to the product or service itself)—but that a defendant is liable under a tort theory for a plaintiff's losses if a defective product or service causes personal injury or damage to property other than the product or service itself.

Id. at 729. Under this doctrine, Indiana courts have barred negligence actions that sound exclusively in contract law. Stated another way:

> 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 v. Cent. Soya Co.*, 621 N.E.2d 1069, 1074-75 (Ind. 1993) ("[W]here 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."). Thus, "contract is the sole remedy for the failure of a product or service to perform as expected." *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 152 (Ind. 2005). "Construction claims are not necessarily based on defective goods or products, but nonetheless are subject to the economic loss doctrine." *Id*. 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.

[16] In the seminal case on this issue, *Indianapolis-Marion County Public 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 that posed a serious risk for structural failure. *Id*. Accordingly, the Library suspended construction, took steps to mitigate the effects of the negligent design, and sued, among others, both subcontractors and the lead engineer for negligence. *Id*.

[17] In rejecting the Library's 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

> there 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.

[18] We see several problems with the trial court's reliance on *Indianapolis-Marion County Public Library* and the application of the economic loss doctrine here as a complete bar to the HOA's negligence claim on a motion to dismiss. From the face of the complaint, we have no idea how the HOA and the Matthews Defendants are connected. There are no facts or allegations suggesting that a contract or "a network or chain of contracts" connects the HOA members with the Matthews Defendants such that the economic loss doctrine should apply. The contractual relationship, or lack thereof, between the parties is the fundamental issue in any case regarding application of the economic loss doctrine. As already stated, dismissal under Trial Rule 12(B)(6) is improper unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts. *McGuinness*, 80 N.E.3d at 167. We have no such certainty here.[7]

[19] Moreover, although our supreme court extended the economic loss doctrine beyond its customary scope in *Indianapolis–Marion County Public Library* to bar a negligence claim in a case where there was technically no privity of contract, the court specifically cautioned that "there are situations where it would be

[7] Contrary to the assertion of the Matthews Defendants, brief explanations and background given by counsel for both sides regarding the relationship between the parties during the hearing on the motion to dismiss are neither facts nor evidence. Indeed, because a motion to dismiss tests the legal sufficiency of the complaint, the trial court was foreclosed from considering matters outside the pleadings. *Murphy Breeding Lab., Inc. v. W. Cent. Conservancy Dist.*, 828 N.E.2d 923, 926 (Ind. Ct. App. 2005). If the Matthews Defendants desired the trial court to consider facts not alleged, they should have sought summary judgment and designated evidence supporting the same.

unjust" not to allow a plaintiff to proceed in tort "for purely economic loss where no contract exists nor could exist between the parties." *Id*. We think the current situation may be one in which it would be "unjust" not to allow the plaintiff members to proceed in tort against the various construction professionals for their economic losses. Unlike in the sophisticated world of commercial construction, in the residential construction context all participants are generally not in privity of contract and thus have not defined for themselves their respective risks, duties, and remedies through a "network or chain of contracts" governing the project. Other than a largely nonnegotiable purchase contract with a property developer, the unsophisticated individual homebuyer is wholly frozen out of any legitimate risk allocation process. Indeed, we must seriously question whether the economic loss doctrine, which originally focused on the ability of parties involved in commercial transactions to allocate potential risks through contracts and warranties, should extend to tort claims brought by homebuyers against certain residential construction professionals and contractors for negligence. We think that the rationales upholding the economic loss doctrine do not necessarily support its application to these types of disputes.

[20] Amici Curiae appear in support of both sides regarding application of the economic loss rule to bar the HOA's negligence claim. On behalf of the HOA, the Indiana Trial Lawyers Association (ITLA) urges that the economic loss rule has no application in the context of residential construction, that homebuyers should have recourse against contractors and subcontractors, and that it would

be "fundamentally unjust" to restrict the HOA's remedies to claims just against Ivy Quad Development, which is now insolvent. ITLA Br. at 16. On behalf of the Matthews Defendants, the Indiana Builders Association (IBA) urges that elimination of the economic loss rule in this context "would have serious negative impacts" on the residential construction industry, that homebuyers and builders expressly limit and allocate their risks and obligations by contract, and that the economic loss rule "preserves the important boundary between contract law and tort law." IBA Br. at 5, 11.

[21] While we believe that the economic loss doctrine serves an important purpose of protecting bargained-for expectations, it is a pendulum that can swing too far. In the case at bar, and many like it, we discern no boundary in need of preservation between contract law and tort law because there is allegedly no contractual relationship or agreement between the plaintiffs and many of the defendants that protects expectations and allocates economic risks. Indeed, it was much clearer ten years ago, than it is today, the extent to which Indiana would preclude recovery of economic damages in a negligence suit between contractual strangers. It is noteworthy that *Indianapolis-Marion County Public Library* relied upon a working draft of the Restatement (Third) of Torts on economic harms that was substantially narrowed by the time it came to fruition. *See Indianapolis-Marion Cnty. Pub. Libr.*, 929 N.E.2d at 727-40. The current Restatement provides generally that "there is no liability in tort for economic loss caused by negligence *in the performance or negotiation of a contract between the parties*." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 3

(emphasis added). As the commentary makes clear, application of the economic loss doctrine as a bar to liability "is limited to parties who have contracts" because "[i]f two parties have a contract, the argument for limiting tort claims between them is at its most powerful." *See id.*, cmt. a. As for a broader application forbidding tort claims between parties who are only "indirectly" linked by contract, the commentary cautions that while threat of application of the doctrine would put pressure on parties to specify their rights carefully in advance and spare courts the need to decipher them later, "that incentive is most likely to be noticed by sophisticated parties negotiating large projects[.]" *Id.*, cmt. f. "Meanwhile, less sophisticated parties would stand a good chance of being tripped up by a broad rule, as when they fail to provide for indemnification in some direction and inadvertently leave a party who has been wronged with no remedy." *Id.*

[22] In light of the foregoing, we are persuaded that the reasoning behind and sweeping holding of *Indianapolis-Marion County Public Library* was meant to apply only to sophisticated parties involved on all sides of large commercial construction projects and not in the typical residential construction context. Our supreme court used the term "major construction project" throughout its opinion, underscoring that the use of the doctrine as a shield by a defendant without contract privity should be limited to such. We do not think our current supreme court would be inclined to apply the economic loss rule to leave plaintiffs remediless in cases where contract privity between the buyer and the majority of the construction professionals is understandably lacking, especially

those concerning much smaller residential construction projects. The economic loss doctrine was never meant to operate as a sword to be used by defendants to attack a plaintiff's tort claim that falls wholly outside of contract law.

[23] We conclude that the trial court's application of the economic loss doctrine as a complete bar to the HOA's negligence claim against the Matthews Defendants was both premature and unwarranted.[8] We therefore reverse the trial court's dismissal order, specifically as it pertains to counts I through III of the HOA's Third Amended Complaint, and we remand for further proceedings.

[24] Reversed and remanded.

Kirsch, J., and Tavitas, J., concur.

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[8] Assuming that the economic loss doctrine does not apply in this context, we note that in addition to the survival of the HOA's claim of general negligence against the various defendants, the HOA alleged sufficient facts in its amended complaint to support a claim of negligence per se. The HOA clearly alleged facts indicating that certain aspects of the Ivy Quad construction violated building codes. "The unexcused or unjustified violation of a duty proscribed by a statute or ordinance constitutes negligence *per se* if the statute or ordinance is intended to protect the class of persons in which the plaintiff is included and to protect against the risk of the type of harm which has occurred as a result of its violation." *Am. United Life Ins. Co. v. Douglas*, 808 N.E.2d 690, 704 (Ind. Ct. App. 2004), *trans. denied*. This is obviously a theory that should be fleshed out during further proceedings.