MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

LPC Surgery Center, LLC,
Appellant-Plaintiff,

v.

KJG Architecture, Inc., et al.,
Appellees-Defendants.

September 21, 2021

Court of Appeals Case No. 20A-PL-1873

Appeal from the Tippecanoe Superior Court

The Honorable Randy J. Williams, Judge

Trial Court Cause No. 79D01-1808-PL-114

Altice, Judge.

Case Summary

[1] Shazia and Meraj Siddiqui (the Siddiquis) and LPC Surgery Center, LLC (LPC) (collectively, the Plaintiffs) filed a complaint against Land Quest, LLC,[1] KJG Architecture, Inc. (KJG), and RTM Consultants, Inc. (RTM), alleging breach of contract and negligence in the design and construction of an ambulatory surgery center (ASC). ProDeComm Engineering, Inc. (ProDeComm) was subsequently added as a third-party defendant. KJG, RTM, and ProDeComm (collectively, the Defendants) filed and/or joined in motions for summary judgment. The Plaintiffs responded and filed a cross-motion for partial summary judgment. KJG then filed a motion to strike the Plaintiffs' claim of negligent misrepresentation, asserting that the Plaintiffs first raised such claim in their cross-motion. Following a hearing, the trial court granted summary judgment in favor of the Defendants as to all claims set out in the complaint and denied the Plaintiffs' cross-motion. The court also granted KJG's motion to strike LPC's claim of negligent misrepresentation. LPC appeals,[2] presenting two issues for our review:

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[1] The Plaintiffs filed their initial complaint on August 6, 2018, and an amended complaint on August 21, 2018. The Siddiquis, LPC, and Land Quest entered into a written Mutual Release and Settlement Agreement (the Settlement), which was executed by the parties on August 15 and August 20, 2018. The Settlement included an assignment of claims, a release of claims as to Land Quest, a liquidation of damages with an agreed judgment against Land Quest, and a cooperation agreement for the claims against the Defendants. Land Quest does not participate in this appeal.

[2] The Siddiquis do not appeal the trial court's decision against them individually.

1. Did the trial court properly conclude that the economic loss doctrine barred LPC's negligence claims against the Defendants?

2. Did the trial court err in granting the Defendants' motion to strike LPC's claim of negligent misrepresentation?

[2] We affirm.

Facts & Procedural History

[3] The Siddiquis, husband and wife, are physicians involved in the field of pain management. In 2012, Shazia formed Lafayette Pain Care, P.C., which operates out of a building in Lafayette owned by the Siddiquis' company, MSHS Realty, LLC. In 2014, the Siddiquis contracted with Land Quest for the design and construction of an ASC (the Project) that would allow the Siddiquis to perform more invasive pain management procedures that would require monitored anesthesia care (MAC). The ASC was to be located within the same building but in the available space adjacent to Lafayette Pain Care. Land Quest engaged KJG to serve as the Project architect.[3] In turn, KJG hired RTM[4] to provide code consulting services to ensure the Project would meet Indiana State Department of Health (ISDH) regulations regarding ASCs. KJG also hired ProDeComm to provide mechanical engineering services for the Project.

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[3] Although there is no written contract between Land Quest and KJG, the parties do not dispute that there was a contract in place.

[4] RTM submitted two different proposals to KJG outlining its services and pricing, neither of which were signed. Again, the parties do not dispute that there was an agreement between RTM and KJG.

[4] In the latter part of 2014, KJG produced schematic drawings and construction documents for the Project, which RTM reviewed for compliance with ISDH regulations, among other things. RTM submitted its review and comments to KJG on December 9, 2014. In February 2015, RTM prepared an AIA[5] Narrative on behalf of "Lafayette Pain Care ASC" that it submitted to ISDH as part of the construction permit application and licensure process for the Project. In the AIA Narrative, RTM noted that the ASC would be "practicing under the license of Dr. Shazia Siddiqui" and that the procedure rooms were "designed, in terms of size, to accommodate Class B Procedures."[6] *Appellant's Appendix Vol. 2* at 203.

[5] Thereafter, on April 16, 2015, Shazia formed LPC and identified herself as the sole member/owner. Less than two weeks later, in a letter dated April 29, 2015, ISDH issued an Order to Grant Waiver, waiving compliance with certain regulations for the Project, including "the omission of providing a *post anesthesia care unit* from an ambulatory surgery center." *Id*. at 208. ISDH further noted that "[t]he anesthetics administered do not leave the patient unconscious after surgery. As such, patients will go from their procedure to the *step-down recovery*

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[5] AIA stands for American Institute of Architects.

[6] Under applicable regulations, a Class B procedure room "[p]rovides for minor or major surgical procedures performed in conjunction with oral, parenteral, or intravenous sedation or under analgesic or dissociative drugs" and must have a minimum clear area of 250 square feet. *Appellant's Appendix Vol. 3* at 215. A Class C procedure room, which "[p]rovides for major surgical procedures that require general or regional block anesthesia and support of vital bodily functions," must have a minimum clear area of 400 square feet. *Id*. RTM claims that it determined the classification of the procedure rooms based on the size of the rooms (i.e., less than 400 square feet) as represented in the schematic drawings and construction documents created by KJG.

area at this facility". *Id*. (emphasis in original). ISDH further provided that the waiver "is effective only as long as the ASC remains a pain clinic and does not perform any procedures under general anesthesia or [MAC]." *Id*. at 209. On May 7, 2015, ISDH sent a letter approving the Project with "two (2) Class-B operating rooms," subject to the waiver. *Id*. at 206.

[6] On May 13, 2015, Dale Krynak, project manager for LPC, sent an email to Land Quest indicating there was a problem with the ISDH approval and waiver. Krynak explained:

> Please see number 3., under Order to grant a Waiver. This is an erroneous statement, with regard to [no] monitored anesthesia care. Of course we will perform this level of anesthesia.
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> ***
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> It makes me think the state has no understanding of MAC anesthesia for this type of setting. I think we need to talk about this issue.

Appellant's Appendix Vol. 3 at 221. Land Quest forwarded Krynak's email to KJG and emphasized, "This is A VERY BIG deal to them. They are performing general anesthesia in the procedure room areas." *Id*. at 220 (emphasis in original). KJG then contacted RTM. RTM reached out to ISDH for clarification regarding the waiver and classification of the procedure rooms.

[7] Following discussions with Krynak, Land Quest, KJG, and ISDH, RTM reapplied for approval of the Project on September 3, 2015. In the AIA

Narrative accompanying the new approval request, RTM again stated that the procedure rooms were "designed, in terms of size, to accommodate Class B Procedures." *Appellant's Appendix Vol. 4* at 45. In January 2016, ISDH again approved the Project "with two Class-B operating rooms" subject to the restriction that "only pain procedures performed without . . . MAC or general anesthesia will occur at this facility." *Appellant's Appendix Vol. 2* at 212.

[8] In the meantime, Land Quest moved forward with construction on the Project based on KJG's original schematic plans, which called for two procedure rooms with less than 400 square feet of clear area. Land Quest claimed substantial completion of the Project in September 2017. As designed and constructed, the Project did not meet LPC and the Siddiquis' needs in that the procedure rooms were too small to be licensed as capable of being used to perform Class C procedures. Additionally, the HVAC system failed to maintain a constant temperature rendering it difficult to control humidity levels in the procedure rooms.

[9] The Siddiquis hired an outside consultant, who determined that the HVAC system was inadequate. As to the deficiency with the size of the procedure rooms, it was decided, with input from ISDH, to make physical changes to the layout of the facility so that there would be one procedure room capable of being licensed as a Class C procedure room and the second procedure room could be licensed as a Class A procedure room.

[10] On August 6, 2018, the Plaintiffs filed their initial complaint asserting a breach of contract claim against Land Quest, third-party beneficiary breach of contract claims against Land Quest, KJG, and RTM, and negligence claims against KJG and RTM. The Plaintiffs alleged that the Project was defectively designed in that the two procedure rooms were not capable of being licensed for Class C procedures and were constructed with an inadequate HVAC system. The Plaintiffs sought damages of $5.7 million for loss of use, redesign, and reinstallation of HVAC system, as well as lost revenue of $350,000 a month for each month that the procedure rooms could not be used and certified to perform Class B and Class C procedures. The Plaintiffs filed an amended complaint on August 21, 2018. Thereafter, KJG and RTM answered the complaint and added ProDeComm as a third-party defendant.

[11] RTM filed a motion for summary judgment on February 12, 2020. KJG filed its motion for summary judgment on March 16, 2020, in which RTM and ProDeComm subsequently joined. LPC filed its response to the motions for summary judgment along with its own cross-motion for partial summary judgment on March 24, 2020. As is pertinent to the issues herein, the Defendants argued that LPC's negligence claims were barred by the economic loss doctrine. LPC argued that the economic loss doctrine did not apply because it was claiming negligent misrepresentation, which in certain situations can be an exception thereto. LPC also argued that the economic loss doctrine applied only to "major" construction projects and that the Project did not fall into this category.

[12] On May 14, 2020, KJG filed a motion to strike portions of LPC's cross-motion for summary judgment to the extent LPC asserted claims of negligent misrepresentation for the first time. The trial court held a hearing on all the motions for summary judgment and other pending motions on June 22, 2020. On September 10, 2020, the trial court issued its order granting KJG's motion to strike the Plaintiffs' claim of negligent misrepresentation and granting summary judgment in favor of KJG, RTM, and ProDeComm as to all claims in the amended complaint, finding in part that the economic loss doctrine barred the Plaintiffs' negligence claims. The Plaintiffs filed a motion to reconsider, which the trial court denied. LPC now appeals.

Discussion & Decision

[13] Our standard of review on summary judgment is well settled:

> The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Reed v. Reid*, 980 N.E.2d 277, 285 (Ind. 2012). Once these two requirements are met by the moving party, the burden then shifts to the non-moving party to show the existence of a genuine issue by setting forth specifically designated facts. *Id*. Any doubt as to any facts or inferences to be drawn therefrom must be resolved in favor of the non-moving party. *Id*. Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows there is no genuine issue of material fact and that the moving party deserves judgment as a matter of law. *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37 (Ind. 2002).

A House Mechanics, Inc. v. Massey, 124 N.E.3d 1257, 1262 (Ind. Ct. App. 2019) (quoting *Goodwin v. Yeakle's Sports Bar and Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016)). We may affirm an entry of summary judgment "if it can be sustained on any theory or basis in the record." *DiMaggio v. Rosario*, 52 N.E.3d 896, 904 (Ind. Ct. App. 2016), *trans. denied*.

1. Economic Loss Doctrine

[14] LPC argues that the trial court erred in concluding that the economic loss doctrine barred its negligence claims against the Defendants. "[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 Cty. Pub. Libr. v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 727 (Ind. 2010). In *Charlier*, our Supreme Court concluded that the rule applies in the construction context holding that "the economic loss rule precludes participants in major construction projects connected through a network or chain of contracts from proceeding against each other in tort for purely economic loss." *Id*. at 739.

[15] In their respective motions for summary judgment, the Defendants argued, in part, that LPC's negligence claims were barred by the economic loss doctrine. In response, LPC argued that the economic loss doctrine does not apply to the

present case because (1) its negligence claim is one for negligent misrepresentation and as such falls within an exception to the economic loss doctrine and (2) the construction project was not a "*major* construction project" subject to a chain of contracts. *Appellant's Appendix Vol. 3* at 196 (emphasis supplied). On appeal, however, LPC changes course and argues that the economic loss doctrine does not apply because LPC did not have a contractual relationship with Land Quest or any of the Defendants as it did not exist as a legal entity when the construction contracts were executed. LPC asserts that it is a third party to the construction contract with Land Quest and a third-party beneficiary to the contracts between Land Quest and KJG, RTM, and/or ProDeComm. Citing *Peters v. Forster*, 804 N.E.2d 736 (Ind. 2004), LPC claims that "in the construction industry, builders and designers may be held liable to third parties not involved in the contracts for the building project." *Appellant's Brief* at 16.

[16] First, the *Peters* decision is inapposite. The *Peters* case involved personal injury and thus involved more than economic loss. Moreover, in *Peters*, our Supreme Court considered and ultimately abandoned the acceptance rule, which provided that contractors "'were immune from civil liability to third persons who were injured as a result of their negligence in design or construction.'" 804 N.E.2d at 738 (quoting George Anthony Smith, *Recent Statutory Devs. Concerning the Limitations of Actions Against Architects, Engineers, & Builders*, 60 Ky. L.J. 462, 463 (1972)). In this case, there is no personal injury and the issue does not concern the acceptance rule.

[17] Second, we note that LPC's argument on appeal is different than what was argued to the trial court for summary judgment purposes. Because LPC did not present this argument to the trial court, it is waived for our review. *See Ind. Bureau of Motor Vehicles v. Gurtner*, 27 N.E.3d 306, 311 (Ind. Ct. App. 2015) (noting that it has "long been the general rule in Indiana that an argument or issue presented for the first time on appeal is waived for purposes of appellate review").

[18] Waiver notwithstanding, LPC's argument does not save it from application of the economic loss doctrine. We first note that there is no dispute that the damages sought are for purely economic losses. *See Charlier*, 929 N.E.2d at 731 (noting that the economic loss rule is "implicated where a plaintiff has suffered 'pure economic loss'"). Second, as we explain below, LPC is clearly "connected" through a chain of contracts with the Defendants. *See id*. at 736

[19] To put itself outside the chain of contracts, LPC asserts that it was not a party to the contracts because it was not established as a corporate entity until after the contracts were formed. We find LPC's argument to be disingenuous. As noted above, the Siddiquis desired to construct an ASC, and each of them signed the contract with Land Quest to accomplish such task. In the amended complaint, the Siddiquis asserted that the contract with Land Quest was for the benefit of LPC: "On March 17, 2015, Siddiqui engaged Land Quest to design and build a new ambulatory surgery center for LPC (the 'Project') pursuant to a Construction Contract." *Appellant's Appendix Vol. 2* at 26. In the contract, the Siddiquis and Land Quest agreed that Land Quest would be responsible for the

design and construction of the Project. The Siddiquis, especially Shazia, worked directly with Land Quest regarding the design and construction of the ASC. To accomplish the task, Land Quest contracted with KJG, who in turn contracted with RTM. ProDeComm was also consulted regarding the HVAC system.[7] We further note that Shazia's real estate company paid for the design and construction of the Project. When Shazia formally established LPC as a corporate entity, the designs for the ASC had already been submitted to ISDH for approval and licensure on behalf of LPC. Shazia was identified as the doctor under whose license the ASC/LPC would be operated. In the Settlement, it is noted that "Siddiqui is the owner of a project known as the LPC Surgery Center." *Appellant's Appendix Vol. 3* at 114. In light of the forgoing, we conclude that the designated evidence demonstrates that LPC is clearly "connected" through a series of contracts with the Defendants. This case falls squarely within the economic loss doctrine. To hold otherwise would put form over substance. The trial court did not err in granting the Defendants' motions for summary judgment.

2. Motion to Strike

[20] LPC also argues that the trial court erred in granting the Defendants' motion to strike LPC's claim of negligent misrepresentation. LPC maintains that it was

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[7] In the Settlement. it was acknowledged that Land Quest "entered into an agreement with Siddiqui," "Land Quest entered into an agreement with KJG," and "KJG entered into an agreement with RTM." *Appellant's Appendix Vol. 3* at 114.

not required to separately plead a claim of negligent misrepresentation and regardless, it sufficiently plead the operative facts in its complaint to put the Defendants on notice that it was asserting a claim of negligent misrepresentation.

[21] Indiana law recognizes a cause of action for negligent misrepresentation as a separate and distinct cause of action from a general negligence claim. *See U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742, 747 (Ind. 2010) ("[L]iability for the tort of negligent misrepresentation has been recognized in Indiana"); *Thomas v. Lewis Engineering, Inc.*, 848 N.E.2d 758, 761 (Ind. Ct. App. 2006) ("Thomas attempts to create a duty based on the recipe set out in *Webb v. Jarvis*, 575 N.E.2d 992 (Ind. 1991). . . But the court in *Webb* used that formula to determine duty in the context of an ordinary negligence claim. Here, Thomas alleged negligent misrepresentation, not negligence."). Negligent misrepresentation is defined as:

> One who, in the course of his business, profession or employment . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused by them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

U.S. Bank N.A., 929 N.E.2d at 747.

[22] In its amended complaint, LPC alleged that KJG and RTM each had "a duty to LPC . . . to diligently and properly design the Project" and that they each breached their duty by failing "to provide a satisfactory design of the Project" in

terms of achieving Class C certification of the procedure rooms and an adequate HVAC system. *Appellant's Appendix Vol. 2* at 32. LPC also generally alleged that "KJG and RTM knew or should have known that the designs they prepared and presented would not meet the requirements of the contract, codes and regulations for certification, or the needs and desires expressed by Siddiqui." *Id*. at 27.

[23] As noted by the trial court, nowhere in the amended complaint did LPC allege that any of the Defendants supplied "false information for the guidance of others in their business transactions," that LPC justifiably relied on such information, or that any of the Defendants failed to "exercise reasonable care or competence in obtaining or communicating the information." *U.S. Bank*, 929 N.E.2d at 747 (quoting Restatement (Second) of Torts § 552(1)). Rather, LPC identified only a general duty to properly design the Project and alleged that the Defendants breached such duty. The operative facts in support of such claims were that, as designed, the procedure rooms could not achieve the desired Class C certification due to their size and the HVAC was inadequate for an ASC.

[24] Plaintiffs are not permitted to assert new claims for the first time in their summary judgment filing. *See 5200 Keystone Ltd. Realty, LLC v. Filmcraft Labs, Inc.*, 30 N.E.3d 5, 12 (Ind. Ct. App. 2015); *Briggs v. Finley*, 631 N.E.2d 959, 964 (Ind. Ct. App. 1994) ("A memorandum opposing summary judgment is not a proper place to assert a claim against a defendant"). LPC asserted its claims of negligent misrepresentation for the first time in their response to KJG's motion for summary judgment and its cross-motion for summary judgment. Given our

review of the record, we conclude that the trial court did not err in striking LPC's untimely claim of negligent misrepresentation.

[25] Judgment affirmed.

Kirsch, J. and Weissmann, J., concur.