FILED

IN THE SUPREME COURT OF GUAM

MAEDA PACIFIC CORPORATION,
Plaintiff-Appellant,

v.

GMP HAWAII, INC., et al.,
Defendants-Appellees.

and

DERIVATIVE AND OTHERWISE RELATED LITIGANTS

Supreme Court Case No.: CRQ10-001

OPINION

Cite as: 2011 Guam 20

Certified Question from the United States District Court for the District of Guam
Argued and submitted July 6, 2011
Hagåtña, Guam

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20111214

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, C.J.:

[1] Maeda Pacific Corporation ("Maeda") is commercial construction company, and GMP Hawaii (comprising GMP Hawaii, Inc., dba GMP Associates, Ohio Pacific Tech, Inc. dba GMP Associates, Inc., and GMP Associates, Inc., collectively "GMP") is an engineering firm. The two became involved in litigation in the District Court of Guam ("District Court") concerning a project in Guam.[1] The District Court has certified to this court two questions of law.[2] We respond as follows.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] In 2003, the U.S. Naval Facilities Engineering Command ("Navy") solicited proposals to design and build a replacement for the off-base water supply system at Andersen Air Force Base ("Project"). Appellant's Br. at 2 (June 17, 2010); GMP's Br. at 1 (July 19, 2010). In submitting a proposal, Maeda engaged GMP to prepare a cost estimate. GMP's Br. at 1. After Maeda was awarded the contract, it engaged GMP once more, purportedly as lead designer and quality control provider for the Project.[3] Maeda Pac. Corp. v. GMP Haw., Inc., CV-08-00012 (Op. & Order Re: Mot. for Approval of Good-Faith Settlement at 2 (Feb. 23, 2010)) ("Op. & Order").

[1] The designation for the underlying case in the District Court is Civil Case No.: CV-08-00012.

[2] For the purposes of the litigation conducted in this court, Maeda has been designated the appellant and GMP and the several other litigants have been designated as the appellees. This is pursuant to Rule 20(a) of the Guam Rules of Appellate Procedure ("GRAP") which reads in relevant part: "Where there are several questions which have been certified or reserved and a party maintains the affirmative to some and the negative to other certified or reserved questions, the plaintiff shall be regarded as the Appellant . . . ." Guam R. App. P. 20(a).

[3] As described by the District Court's "Opinion And Order Re: Motion For Approval Of Good-Faith Settlement":

> Maeda and GMP disagree over the exact scope of this contract. Maeda contends that GMP agreed to design the large water reservoir tank contemplated by the primary contract, and to use "its best professional skill and knowledge to prepare the Plans and Specifications and other information,

[3] One part of the Project for which Maeda solicited separate "design-build" bids was a water reservoir tank ("Tank"). *Id.* Maeda subcontracted construction of the Tank to Smithbridge, Inc., who in turn hired Jorgensen & Close ("Jorgensen") for "structural engineering design services." *Id.* at 2 (Feb. 23, 2010); GMP's Br. at 3. In July 2007, when construction of the Tank had been substantially completed, but Smithbridge had not yet delivered it to Maeda, the tank roof collapsed during a test of the water pumping system. *Id.* at 4.

[4] A forensic engineering firm investigated, concluding that the collapse of the roof was caused by gross overload due to the absence of air vents that had not been designed for the tank. Opinion & Order at 3. Maeda alleges the Tank roof's collapse was proximately caused by the lack of a roof vent, causing "extensive damage to the roof, other structural elements and appurtenances of the reservoir, and other elements of Maeda's work." Appellant's Br. at 6. Maeda claims that the contracts for the Tank's construction required it to be built according to Navy general specifications, which included a reservoir vent. Appellant's Br. at 30.

[5] Of the briefs provided to the court, GMP provides the most detail about the design and build of the Tank. *See* GMP's Br. at 2-4. According to GMP, Smithbridge initially submitted a proposed design for the Tank that incorporated roof vents, but several months later Smithbridge submitted a replacement proposal, based on a new design created by Jorgensen. *Id.* at 2. This

and the ultimate design for said tank." Docket No. 54 at ¶14. GMP denies these allegations. *See generally* Docket No. 95. Specifically, GMP states that it agreed "to provide construction quality control management, and design engineering for the Project," but that these responsibilities "did not include design of the water storage tank, and [that] the compensation paid to GMP under that contract did not include design of the water storage tank." Docket No. 98 at ¶¶2, 4. The actual contract simply appears to call for "DESIGN," "QUALITY CONTROL," and "VALUE ENGINEERING." Docket No. 54, Exh. A at 1; Docket No. 98, Exh. A at 1 (same document). At any rate, the price of that contract, after a few change orders, was $1,555,966.70. Docket No. 54 at ¶9.

Maeda Pac. Corp. v. GMP Haw., Inc., CV-08-00012 (Op. & Order Re: Mot. for Approval of Good-Faith Settlement at 2 (Feb. 23, 2010)).

proposal failed to incorporate a vent in preliminary drawings. *Id.* The reservoir was designed and ultimately constructed without the vent. GMP also reports that after the Tank's roof collapsed, Maeda agreed to pay Smithbridge extra to repair the tank, instead of demanding such performance pursuant to its existing contract, and agreed to settle its claims against Smithbridge in exchange for Smithbridge's help in pursuing Maeda's claims against GMP and Jorgensen. GMP's Br. at 4.

[6] Maeda filed an initial Complaint in the District Court on August 14, 2008 against GMP and Jorgensen, alleging breach of contract and negligence claims against both parties. Maeda Pac. Corp. v. GMP Haw., Inc., CV-08-00012 (Compl. at 4-5 (Aug. 14, 2008)); Appellant's Br. at 2. Maeda contends that it "seeks only damages associated with repairing and replacing" physical property damage to Maeda's work. Appellant's Br. at 32. There is some factual dispute, however, about the extent of these damages.

[7] In October 2008, GMP answered the complaint, brought a counterclaim for breach of contract against Maeda, and brought a cross-claim for contribution against Jorgensen. Maeda Pac. Corp. v. GMP Haw., Inc., CV-08-00012 (Answer, Counterclaim, Cross-claim, & Jury Trial Demand (Oct. 14, 2008)). GMP also brought a third-party complaint for contribution under Guam's Contribution Among Joint Tortfeasors Act against Smithbridge. Smithbridge Br. at 1 (July 19, 2010); Maeda Pac. Corp. v. GMP Haw., Inc., CV-08-00012 ([Smithbridge Guam, Inc.'s [Proposed] Cert. Order at 4 (Jan. 12, 2010)).

[8] In April 2010, the District Court certified two questions to this court. The questions arise from motions for summary judgment filed in August 2009 by Jorgensen and third-party defendant Smithbridge, asserting that damages sought by Maeda for the cost of repairing the damage caused by the collapse are "economic losses," which are not recoverable in tort.

Appellant's Br. at 3; Smithbridge Br. at 1. Opposing the motion, Maeda argued that the economic loss rule does not apply to parties who lack a contractual relationship, or where there is a contractual relationship, but the law imposes a duty independent of the contract. Appellant's Br. at 3. Further, Maeda contended that the economic loss rule does not apply to claims against design professionals, and that the damages alleged by Maeda are not "pure economic loss" prohibited by the economic loss rule. *Id.* at 3-4. The questions certified are these:

> 1. Does the economic loss doctrine apply in Guam?
> 2. If the economic loss doctrine does apply in Guam, does it preclude negligence-based claims against design professionals, such as engineers and architects, who provide services in the context of commercial property development or improvement, when the plaintiffs seek to recover purely economic losses?

Maeda Pac. Corp. v. GMP Haw., Inc., CV-08-00012 (Certification Order: Req. for Answers to Cert. Questions of Law at 2 (Apr. 1, 2010)) ("Certification Order"). On April 12, 2010, we accepted the Certified Questions, pursuant to GRAP 20(b). *See* Order, Apr. 12, 2010. After briefing was filed in the case, we agreed to postpone oral argument pursuant to a joint motion by the parties. *See* Stip. & Mot. to Postpone Oral Argument (Sept. 2, 2010). The case returned to the active calendar in March 2011. *See* Order (Mar. 30, 2011). The case was again postponed after this court raised an issue of subject matter jurisdiction with the parties. *See* Order (Apr. 19, 2011). The case was returned to the active calendar in May 2011, and was finally submitted after oral arguments on July 6, 2011. *See* Order (May 10, 2011).

II. JURISDICTION[4]

[9] We have never considered a certified question case from the District Court of Guam, or from any of the "other" courts described by GRAP 20(b)(1). Guam R. App. P. 20(b)(1) ("The

[4] This Section of this opinion supersedes our Order of May 10, 2011.

Supreme Court may answer questions of law certified to it by the United States Supreme Court, a court of appeals of the United States, a United States district court, or the highest appellate or intermediate appellate court of any other state . . . ."). All of our previous certified question cases have involved requests from either the Legislature, the sitting Governor, or the Superior Court. *See, e.g., In re Request of Governor Carl T.C. Gutierrez, Relative to the Organicity & Constitutionality of Pub. Law 26-35*, 2002 Guam 1 (involving request from the governor); *In re Request of I Mina' Bente Sing'ko Na Liheslaturan Guåhan Relative to the Application of the Earned Income Tax Credit Program to Guam Taxpayers ("The EIC Question")*, 2001 Guam 3 (involving request from the legislature); *People v. Johnny*, 2006 Guam 10 (involving request from the Superior Court of Guam). The lack of precedent on this issue compels us to examine our own jurisdiction to entertain this matter in detail.

A. Statutory History of the Supreme Court's Authority

[10] The scope of our original[5] subject matter jurisdiction is determined both by provisions of the Organic Act of Guam (found at 48 U.S.C.A. § 1421a *et seq.*) and by provisions of local Guam law as promulgated by the political branches of Guam's territorial government (found within Title 7 of the Guam Code Annotated). We will briefly examine our historical powers under both of these sources of law.

1. The Organic Act of Guam

[11] Prior to 2004, the provisions of the Organic Act dealing with the establishment of a local judiciary read as follows:

> (a) Composition; establishment of appellate court . . . . The local courts of Guam shall consist of such trial court or courts as may have been or may hereafter be established by the laws of Guam. On or after the effective date of this Act, the

[5] Certified questions are considered an issue of original, rather than appellate, subject matter jurisdiction.

> legislature of Guam may in its discretion establish an appellate court. . . . (b) Jurisdiction . . . . The legislature may vest in the local courts jurisdiction over all causes in Guam over which any court established by the Constitution and laws of the United States does not have exclusive jurisdiction. Such jurisdiction shall be subject to the exclusive or concurrent jurisdiction conferred on the District Court of Guam by section 1424(b) of this title.

48 U.S.C.A. § 1424-1 (West 2002).

[12] In October 2004, this section was amended by U.S. Public Law 108-378, which revised the section of the Organic Act governing the judiciary of Guam to its current form. *See* Pub. L. No. 108-378, 118 Stat. 2206 (2004). Section 1424-1 of the Organic Act now reads in relevant part:

> (a) The Supreme Court of Guam shall be the highest court of the judicial branch of Guam (excluding the District Court of Guam) and shall . . . (1) have original jurisdiction over proceedings necessary to protect its appellate jurisdiction and supervisory authority and such other original jurisdiction as the laws of Guam may provide . . . .

48 U.S.C.A. § 1424-1(a)(1) (Westlaw through Pub. L. 112-39 (Oct. 12, 2011).

[13] Under this plain language, any original subject matter jurisdiction we may possess to entertain in any case, must flow from either this section of the Organic Act, or from "such original and appellate jurisdiction over all causes on Guam as the laws of Guam provide" as contemplated by subsection (a)(1). *Id.* § 1424-1(d). As the court finds no basis for any argument that original jurisdiction to hear certified questions from other courts would be "original jurisdiction over proceedings necessary to protect [our] appellate jurisdiction and supervisory authority," we are left to rely on local law. *Id.* § 1424-1(a)(1).

2. Local Law

[14] Prior to 1974, judicial authority in Guam was originally divided between the District Court, the Island Court, the Police Court, and the Commissioner's Courts. *See* Guam Code Civ. Proc. § 51 *et seq.* In 1974, under Public Law 12-85 (styled the Judicial Reorganization Act), the

Supreme Court and the Superior Court of Guam were created; Code of Civil Procedure section 62 described the Jurisdiction of the Supreme Court of Guam, cross-referencing numerous other sections of the Civil Code. *See* Guam Code Civ. Proc. § 62 (1975); Guam Pub. L. 12-85 (Jan. 16, 1974). Public Law 21-147 (styled the Frank G. Lujan Memorial Court Reorganization Act) was promulgated in 1985 and came into force as law in 1993; this law repealed the previous Code of Civil Procedure, transposing the sections of law dealing with the Supreme Court to their current location in Title 7 of the Guam Code Annotated. *See* Guam Pub. L. 21-147 (Jan. 14, 1993); 7 GCA § 3107 (1985). The new section of the Guam Code Annotated specifically dealing with the jurisdiction of the Supreme Court, 7 GCA § 3107, removed the substantial cross-referencing found in the previous Code of Civil Procedure. Subsection (a) of 7 GCA § 3107 regarding jurisdiction has remained unchanged since 1985 and reads as follows: "The Supreme Court shall have authority to review all justiciable controversies and proceedings, regardless of subject matter or amount involved." 7 GCA § 3107(a) (2005).

B. The Ability of Courts to Entertain Certified Questions Generally

[15] The question of whether courts may entertain certified questions from the courts of other jurisdictions (including the federal courts) is generally considered a question of state or local law. *See, e.g.*, *Shirley v. Russell*, 69 F.3d 839, 844 (7th Cir. 1995) (noting certification is appropriate when question of state law controls the outcome of the case); *L.A. Alliance for Survival v. City of L.A.*, 993 P.2d 334, 338 (Cal. 2000) (recognizing sister states' decisions to entertain certified question based on state law and adopting certification procedure based on question of state law). The propriety of entertaining such certified questions is largely a function of the specific language of individual state constitutions and statutes. *See, e.g.*, *Sunshine Mining Co. v. Allendale Mut. Ins. Co.*, 666 P.2d 1144, 1146 (Idaho 1983); *Scott v. Bank One Trust Co.*

Inc., 577 N.E.2d 1077, 1079 (Ohio 1991); *Haley v. Univ. of Tennessee-Knoxville*, 188 S.W.3d 518, 521 (Tenn. 2006).

[16] In the 1981 case of *Holden v. N L Industries, Inc.*, 629 P.2d 428 (Utah 1981), the Supreme Court of Utah considered a request to certify a question of state law from the U.S. District Court for the District of Utah. This was done under the text of Utah's then current Certification Rule. *Holden v. N L Indus., Inc.*, 629 P.2d 428, 429 n.3 (Utah 1981). The Utah Certification Rule discussed in *Holden* is virtually identical to our GRAP Rule 20(b). *Compare* 629 P.2d at 429 n.3 *with* GRAP 20(b). The Utah Supreme Court rejected the certified question and revoked the Certification Rule, finding that as written, it was in excess of the court's original jurisdiction as defined by Utah's constitution. *See Holden*, 629 P.2d at 429-32.

[17] Our granting certification in this case, as well as the certification order from the District Court, referenced GRAP 20(b) without any further analysis. *See* Order at 1 (Apr. 12, 2010) (granting certification). We remain convinced that we have subject matter jurisdiction to entertain this case and that action similar to that taken by the Utah court in *Holden* is not required.

C. The Supreme Court of Guam May Entertain Certified Questions from Courts of Other Jurisdictions

[18] In contrast to the several other cases in which we have considered certified questions, there is not a specific Guam statute that underlies GRAP 20(b), nor one that codifies our ability to entertain certified questions from "other" courts. *See* 7 GCA § 4104 (added by P.L. 29-103:2 (July 22, 2008)) (allowing Legislature and Governor to seek requests for declaratory judgments); 7 GCA § 4105 (2005) (allowing certified questions from the Superior Court of Guam). Also, we have previously held that grants of original jurisdiction should be read literally and construed

narrowly. *See In re Request of Gutierrez*, 2002 Guam 1 ¶ 12 (citing *State ex rel. Wieland v. Moore*, 561 N.W.2d 230, 236 (Neb. 1997)).

[19] We hold that the power to entertain certified questions from "other" courts, as described in GRAP 20(b), falls within our subject matter jurisdiction by virtue of the expansive language of 7 GCA § 3107(a). From that subsection, we derive the power "to review *all* justiciable controversies and proceedings." 7 GCA § 3107(a) (emphasis added); *see also* 48 U.S.C.A. § 1424-1(a)(1) ("The Supreme Court of Guam shall . . . (1) have original jurisdiction over proceedings necessary to protect its appellate jurisdiction and supervisory authority and *such other original jurisdiction as the laws of Guam may provide* . . . .") (emphasis added). In previous cases, we have discussed the concept of what defines a "justiciable controversy" in American law:

> The "case or controversy" limitation of the United States Constitution prohibits federal courts from rendering advisory opinions. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461 (1937); U.S. Const. amend. X. *Aetna* announced the meaning of "controversy" in the constitutional sense as follows:
>
>> A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts . . . .

The EIC Question, 2001 Guam 3 ¶ 12 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. at 240-41). This illustrates that the question of justiciability is an inquiry into whether resolution of the particular dispute before the court would require rendering an advisory opinion. We have previously considered jurisdiction and justiciability as two separate issues. *See People v. Gay*,

2007 Guam 11 ¶¶ 5, 6-10 (discussing jurisdiction and justiciability issues in separate sections); *see also The EIC Question*, 2001 Guam 3 ¶¶ 12-13 (discussing justiciability); *id.* ¶ 14-16 (discussing jurisdiction). However, these previous cases did not involve interpretation or application of the language of section 3107(a). In this case, there is no indication that the case before us would not be "justiciable" in any way. *Contra Gay*, 2001 Guam 3 ¶¶ 6-10 (finding that the question certified to this court by the Superior Court of Guam had not ripened into a justiciable controversy under the standards set down in U.S. Supreme Court precedent).

[20] It is also notable that many of our previous certified question cases were decided before the 2004 revision to the Organic Act, which clarified that our original jurisdiction could be expanded by local laws passed by the political branches of Guam's government. *See In re Request of Gutierrez*, 2002 Guam 1 ¶ 12. Given the unrestrictive language of section 3107(a) and the lack of any Guam law purporting to limit our power to consider certified questions,[6] we hold that we have jurisdiction to entertain this case even in the absence of any specific Guam statute addressing the issue of certified questions from "other" courts (including the District Court) as contemplated in GRAP 20(b). Courts have universally acknowledged that provision of a process for certification of questions by other courts: (1) promotes comity between courts; (2) reinforces the status of a jurisdictions highest court as the ultimate organ of the law of that jurisdiction; (3) improves clarity and removes uncertainty in the state of the law, leading to a more efficient judicial climate; and (4) advances the causes of federalism as conceived in the U.S. Constitution. *See Bellotti v. Baird*, 428 U.S. 132, 150-51 (1976); *Scott*, 577 N.E.2d at 1079-81; *Haley*, 188 S.W.3d at 521-23. We are convinced that it was within our subject matter

[6] This is in contrast to provisions such as those found in article VIII, section IV of the Utah State Constitution discussed in *Holden*. *See* 629 P.2d at 430-32.

jurisdiction under section 3107(a) to adopt GRAP 20(b) as a provision for hearing certified questions and that acceptance of this case was similarly proper.

III. STANDARD OF REVIEW

[21] "Normal standards of review do not apply when addressing certifications of law; instead, the court addresses the matters in the context in which they arise and as if they were presented to the court in the first instance." *People v. Johnny*, 2006 Guam 10 ¶ 8 (quoting *People v. Anson*, 1998 Guam 11 ¶ 6). Maeda contends that the "[c]ourt should define parameters for the economic loss rule which create a sensible policy for Guam as a whole and which comport with general standards of fairness." Appellant's Br. at 11 (citing *Peagler v. USAA Ins. Co.*, 628 S.E.2d 475, 477 (S.C. 2006)) ("In answering a certified question raising a novel question of law, the Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right.").

[22] Although we intend to answer the questions certified to us by the District Court, we are not inclined to go as far as Maeda and the other litigants in this case would perhaps wish us to go. It is well established that it is inappropriate for courts to consider arguments beyond the scope of the questions certified to them. *See, e.g.*, *Phillips v. Duro-Last Roofing, Inc.*, 806 P.2d 834, 837-38 (Wyo. 1991). This general rule has several bases; principally, it is essential that the court avoid issuing an advisory opinion on a legal or factual scenario, which is not present in the case before the certifying court. *Id.* at 837. This requirement also implicates the equally important obligation to confine our consideration to issues that are "determinative" of the underlying proceeding. *See* GRAP 20(b); *see also W. Helicopter Servs., Inc. v. Rogerson Aircraft Corp.*, 811 P.2d 627, 630 (Or. 1991). These same concerns were implicated in *Terracon*

Consultants Western, Inc., v. Mandalay Resort Group, 206 P.3d 81 (Nev. 2009), cited by the District Court in its certification to this court. *See Terracon Consultants W., Inc., v. Mandalay Resort Grp.*, 206 P.3d 81, 85 (Nev. 2009) ("[I]n exercising our discretion to answer certified questions, we nevertheless must constrain ourselves to resolving legal issues presented in the parties' pleadings.").

IV. ANALYSIS

[23] Before applying these general standards to the arguments presented by the parties in this case, it is also important to discuss the general historical legal construction at the heart of this case, the "economic loss doctrine."

A. The Economic Loss Doctrine Generally

[24] The economic loss doctrine is a common law rule that emerged in the field of products liability. *See Moransais v. Heathman*, 744 So. 2d 973, 983 (Fla. 1999). The doctrine is a "judicially-created remedies principle that operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship." *Plourde Sand & Gravel v. JGI E., Inc.*, 917 A.2d 1250, 1252 (N.H. 2007) (quoting *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 241 (Wis. 2004)). In some form, "[t]he economic loss rule has been adopted in a majority of jurisdictions." *Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1246 n.2 (Fla. 1993).

[25] The economic loss doctrine draws a legal line between contract and tort liability, forbidding tort compensation for "certain types of foreseeable, negligently caused, financial injury." *Terracon*, 206 P.3d at 87 (quoting *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 52 (1st Cir. 1985)). As a New Jersey court explained:

> The economic loss rule, which bars tort remedies in strict liability or negligence when the only claim is for damage to the product itself, evolved as part of the common law, largely as an effort to establish the boundary line between contract and tort remedies. As this Court long ago noted, the economic loss rule was developed in conjunction with strict liability theories that were "a judicial response to inadequacies in sales law with respect to consumers who sustained physical injuries from defective goods made or distributed by remote parties in the marketing chain."

Dean v. Barrett Homes, Inc., 8 A.3d 766, 770 (N.J. 2010).

[26] The U.S. Supreme Court first recognized the economic loss doctrine in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 868-69 (1986). In *East River*, the parties contracted for the design, manufacture, and installation of turbines for supertankers; however, the turbines malfunctioned, resulting in damage to the turbines, but causing no other property damage or personal injury. *Id.* at 859. The plaintiff filed a products liability action, seeking damages for the cost of repairs and income lost due to the broken turbines. *Id.* at 861. The Supreme Court held that a products liability claim could not stand if a commercial plaintiff alleged injury to only the product itself resulting in purely economic loss. *Id.* at 876. Such loss was defined as the resulting loss, when a product damages itself, due to repair costs, decreased value, and lost profits—loss that was "essentially the failure of the purchaser to receive the benefit of its bargain—traditionally the core concern of contract law." *Id.* at 870 (citing E. Farnsworth, Contracts § 12.8, at 839-40 (1982)).

[27] While some states generally limit application of the economic loss doctrine to products liability cases, many other states have expanded its application to other contexts. *Compare Moransais*, 744 So. 2d at 983 (declining to expand the economic loss doctrine beyond the products liability context), *with Lempke v. Dagenais*, 547 A.2d 290, 296 (N.H. 1988) (expanding the economic loss doctrine). Although across jurisdictions, the terms and scope of the economic loss rule may be the subject of disagreement, there is no dispute that recovery in tort actions for

purely economic losses is often difficult to obtain. *See generally* Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 Am. J. Comp. L. 111, 112 (1998) (stating that American law is "generally opposed to recovery [for pure economic loss] on a negligence theory").

[28] One state Supreme Court Justice has lamented that at "the current pace, the economic loss doctrine may consume much of tort law if left unchecked." *Grams v. Milk Prods., Inc.*, 699 N.W.2d 167, 180 (Wis. 2005) (Abrahamson, C.J., dissenting) (citing a case study from 2000 to 2004). The vigor with which the economic loss doctrine is now applied suggests that the pendulum of American law has swung far in the direction of favoring resolution of disputes via contract law rather than tort law. In effect, contract law is preempting tort law. *See* Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 Wash. & Lee L. Rev. 523, 571 (2009).

[29] One commentator has explained that the principal explanation for the rise of the economic loss rule "is a preference for private ordering over public regulation." *See* Jay M. Feinman, *The Economic Loss Rule and Private Ordering*, 48 Ariz. L. Rev. 813, 817 (2006) (describing the history, rationale, application, and debates about the economic loss rule). Barring negligence claims stemming from a contractual duty preserves the expectancy interest of contracting parties in their allocation of risk. *See* GMP's Br. at 17 (citing *Miller v. U.S. Steel Corp.*, 902 F.2d 573, 574 (7th Cir. 1990) (Posner, J.)). In contractual contexts, the "[a]pplication of the economic loss doctrine to tort actions between commercial parties is . . . [intended] to encourage the party best situated to assess the risk [of] [sic] economic loss, the commercial purchaser, to assume, allocate, or insure against that risk." *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 846 (Wis. 1998).

[30] Enforcing the boundary between tort and contract law also promotes the "efficient revelation of asymmetric information," one commentator argues. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, at 570 (footnote and quotation marks omitted). Employing the economic loss rule to prevent recovery of economic damages in tort "forces parties to a contract to reveal relevant information that enables those with whom they deal to assess how much care should be exercised to prevent a loss." *Id.* (citing *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 958 (7th Cir. 1982) (Posner, J.) (discussing the type of costs a party to a contract might have to incur to protect itself from liability for consequential losses if applicable rules did not create incentives to reveal relevant information)). In contract law, there is no liability for consequential economic damages without "notice of special circumstances." *See id.* Tort law is "not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement." *Sun Co. (R & M) v. Badger Design & Constructors, Inc.*, 939 F. Supp. 365, 371 (E.D. Pa. 1996) (quoting *Palco Linings, Inc. v. Pavex, Inc.*, 755 F. Supp. 1269, 1271 (M.D. Pa. 1990)) (internal quotation marks omitted). "Compensation in such cases requires an analysis of damages which were in the contemplation of the parties at the origination of the agreement, an analysis within the sole purview of contract law." *Palco*, 755 F. Supp. at 1271. Thus, commentators argue that by refusing to extricate parties from the bargains they have struck, the economic loss rule encourages parties to consider the possibility that the product or service will be deficient, and either assign risk or negotiate the price accordingly. *See* Barton, Note, *Drowning in a Sea of Contract*, at 1798-99 (citing *Detroit Edison Co. v. NABCO, Inc.*, 35 F.3d 236, 239 (6th Cir. 1994)).

B. The Questions Certified to This Court

[31] All the parties involved in this litigation have conceded that some of the economic loss doctrine should be enforced in the courts of Guam, primarily for the purpose of encouraging and facilitating the expected expansion of the island's construction industry as a result of the federal government's anticipated military build-up. Having considered the doctrine fully, we see no reason why the doctrine should not be applied here. As a result, we answer the District Court's first certified question in the affirmative.

[32] The true conflict in this case, unsurprisingly, stems from arguments over exactly how far, and in what specific circumstances, the doctrine should apply. Maeda makes three separate arguments about why the doctrine should not bar their claims in this case: (1) the exception where an independent duty of care exists, *see* Appellant's Br. at 33-35; (2) the exception for claims of negligent misrepresentation, *see id.* at 35; and (3) a theory contemplating recovery of the cost of repairing or replacing physical property damage resulting from design defects. *See id.* at 38.

[33] Unfortunately for Maeda, two of these three arguments go beyond the District Court's certification to this court, and we are therefore compelled not to consider them. The second question certified by the District Court was:

> 2. If the economic loss doctrine does apply in Guam, does it preclude negligence-based claims against design professionals, such as engineers and architects, who provide services in the context of commercial property development or improvement, when the plaintiffs seek to recover purely economic losses?

Order at 2 (Apr. 12, 2010). As we indicated above, a court to which a question is certified should not (and cannot) review questions that are beyond what has been certified by the court which originally entertained the litigation.

[34] Here, the legal theory of "negligent misrepresentation" was not pleaded in the District Court, and the issue will not be addressed by the court, despite the arguments concerning the issue by the parties in the pleadings in this court. *See* CR, Doc. 54 at 4 (First Amended Compl.); Appellant's Br. at 35-38; *see also United States v. Anderson*, 669 A.2d 73, 78-79 (Del. 1995) (finding that where a plaintiff did not plead a legal theory as an independent cause of action, no dispute between the parties had "arisen" in the federal court, and that consideration of the issue was thus inappropriate).

[35] We are also unable to fully consider Maeda's arguments regarding the characterization of the damage that took place in this case. In *East River*, the U.S. Supreme Court explained why it is necessary to distinguish between damage to only a product itself and damage to "other property":

> When a product injures only itself, the reasons for imposing tort duty are weak and those for leaving the party to its contractual remedies are strong.
>
> The tort concern with safety is reduced when an injury is only to the product itself. When a person is injured, the "cost of an injury and the loss of time or health may be an overwhelming misfortune," and one the person is not prepared to meet. In contrast, when a product injures itself, the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or, as in this case, experiences increased costs in performing a service. Losses like these can be insured. Society need not presume that a customer needs special protection. The increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified.

East River, 476 U.S. at 871-72 (internal citations omitted).

[36] The *East River* Court rejected the idea that an exception should be made when the harm to the product itself occurs through an abrupt, accident-like event. *Id.* at 870. Even in such cases, "the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain—traditionally the core concern of

contract law." *Id.* Thus, "when only the work product itself is damaged as a result of its defective nature, the damage is defined as 'economic' rather than as 'property damage' and is not recoverable in tort." Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C. L. Rev. 891, 896 (1989). Similarly, in the construction context, recovery barred as "[pure] economic loss includes the cost to repair or replace defective materials, damage to a structure, diminution in value of a damaged structure not repaired, loss of use or delay in utilizing property for its intended purposes, and related lost profits, lost revenue, and costs." 6 Philip L. Bruner & Patrick J. O'Connor, Jr., *Bruner & O'Connor on Construction Law* § 19:10 (2010) (internal quotation marks omitted). Consequently, most jurisdictions applying the rule hold that recovery for "property damage" is limited to damage to property *other* than that which was the subject of a commercial transaction. *See, e.g.*, *East River*, 476 U.S. at 870 (noting that where "no person or *other* property is damaged, the resulting loss is purely economic") (emphasis added); *Aardema v. U.S. Dairy Sys. Inc.*, 215 P.3d 505, 510 (Idaho 2009) ("[W]here there is no accident, and no physical damage, and the only loss is a pecuniary one, *through loss of the value or use of the thing sold, or the cost of repairing it*, the courts have adhered to the rule, . . . that purely economic interests are not entitled to protection against mere negligence, and so have denied the recovery.") (emphasis added). This is a sensible approach.

[37] However, the ultimate issue of whether the damage which resulted from the collapse of the water tank could be considered solely "pure economic loss" is a factual question, which has (in our opinion) not been resolved by any court. Thus, although we can state that generally damages to property that was the subject of a commercial transaction in the construction context can be defined as "pure economic losses," we cannot take the further analytical step of applying this definition to this case by resolving whether what occurred here went beyond such "pure

economic loss." As we are confined, by the language of the certified question, to consider only a scenario where "the plaintiffs seek to recover purely economic losses," we are not inclined to explore the question of whether, factually, what the parties experienced here was solely pure economic loss. The final resolution of that issue is best left to the District Court.

[38] We are able to fully analyze the third major dispute in the case, the question of whether the economic loss doctrine "preclude[s] negligence based claims against design professionals, such as engineers and architects, who provide services in the context of commercial property development or improvement." Order at 2 (Apr. 12, 2010).

[39] The field of construction "presents some unique and troublesome questions" in the economic loss doctrine debate. Emily M. Usow, *Redefining the Professional Service Contract: The Evolution and Deconstruction of Florida's Economic Loss Rule*, 8 U. Miami Bus. L. Rev. 1, 21 (1999). This is because, if there is a spectrum with manufacture of goods on one end (addressed by products liability law) and delivery of fiduciary, professional services on the other hand (addressed by an independent professional duty of care), the services of a design professional fall somewhere in the middle—construction projects typically involve hybrid contracts, neither uniquely goods nor services. So this context poses the difficult question of whether the economic loss doctrine should be extended to bar claims for professional malpractice of a design professional, where the service that is the subject of the contract involves the production of a tangible good that can, in some instances or at least theoretically, be quantified and warrantied. *See id.* at 20.

C. The Economic Loss Doctrine Bars Claims Against Design Professionals

[40] In *Terracon*, the Nevada Supreme Court concluded that contract law is better suited to resolve professional negligence claims against engineers and architects than tort law, at least in

cases where no personal injury or other property damage is present. *Terracon*, 206 P.3d at 89. This appears to be the majority trend, with most jurisdictions applying the economic loss doctrine to bar commercial construction industry plaintiffs from recovering under a negligence-based theory against design professionals, especially when the parties are in privity. *See, e.g.*, *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 71-75 (Colo. 2004) (holding that the economic loss doctrine barred subcontractor's negligence and negligent misrepresentation claims against engineering firm and inspector); *City Express, Inc. v. Express Partners*, 959 P.2d 836, 840 (Haw. 1998) (quoting *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 992 (Wash. 1994)) (economic loss rule barred development corporation from recovering for architect's alleged negligence in failing to properly design for weight of forklifts on second floor of warehouse, which caused structural damage and loss of use of building).

[41] These decisions rely on the heavily commercial nature of the construction industry and the importance of contractual legal relationships in allocating risks in this industry. For example, in holding as a matter of first impression that purely economic losses cannot be recovered in tort from design professionals by those in privity of contract, the Supreme Court of Hawaii explained that, in the context of construction litigation, "sound policy reasons counsel against providing open-ended tort recovery to parties who have negotiated a contractual relationship." *City Express, Inc.*, 959 P.2d at 839-40. The court continued:

> If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity. The construction industry in particular would suffer, for it is in this industry that we see most clearly the importance of the precise allocation of risk as secured by contract. The fees charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained and provided for in the contract. Academic commentary recognizes that there is a growing trend of cases which bar recovery in negligence between parties to a contract, where the damages constitute what is known as economic loss. . . . . Construction projects are characterized by detailed and comprehensive contracts

> that form the foundation of the industry's operations. Contracting parties are free to adjust their respective obligations to satisfy their mutual expectations.
>
> . . . .
>
> Our holding preserves the right of design professionals to limit their exposure to liability through contract.

Id. (internal citations and quotation marks omitted).

[42] Tort remedies continue to be recognized as important when design activities create the unreasonable risk of bodily or personal injury to one who is not a direct party to the design services agreement involved, the contract approach:

> would seem more natural than a tort one, however, when design activity causes damage to commercial participants in the construction process. To begin with, virtually every business that becomes involved with the modern construction industry does so under the auspices of some sort of agreement. Furthermore, one could scarcely find a human activity that is more commercial than building design and construction. The industry represents an enormous segment of all economic activity, and those who participate in it must manage enormous financial and economic risks. Residential construction aside, a large proportion of those involved are sophisticated business entities, and even those who are relatively unsophisticated recognize that design and construction activities involve important legal relationships that require deliberate risk allocation.

Carl J. Circo, *Contract Theory and Contract Practice: Allocating Design Responsibility in the Construction Industry*, 58 Fla. L. Rev. 561, 573-74 (2006) (internal footnotes omitted).[7]

1. The Economic Loss Doctrine Is Applicable if Privity Exists

[43] We hold that in the context of commercial construction litigation, where a party in privity of contract with a design professional is seeking to recover economic loss damages, and no personal injury or damage to property other than the subject of the contract is alleged, such a

[7] The commentators quoted above rely upon the presumption that parties to a contract can and must pre-negotiate liability in the event of a breach. In some relationships, however, information disparities between the parties make it impossible to negotiate such terms. For example, although information disparities are not presumed among sophisticated parties negotiating for the sale of goods, where an attorney and client are negotiating a contract for legal services, the asymmetry of powers is obvious. In such circumstances, the economic loss rule should not be applied to force the parties to rely on liability provisions negotiated at the time of the contract. *See* Usow, *Redefining the Professional Service Contract*, at 27.

party is limited to contractual remedies, and a negligence action may not be maintained. *Accord City Express, Inc.*, 959 P.2d at 839 ("In the context of construction litigation, where a party is in privity of contract with a design professional, economic loss damages are limited to contractual remedies, and a negligence action may not be maintained."). We also reject Maeda's argument that a different standard of care should be applied to design professionals beyond what is applied to other parties.

[44] A closer question concerns whether the economic loss doctrine should also be applied to bar recovery in negligence by a commercial party not in privity of contract with the defendant, where the party is instead a party to *other* contracts involving the same overall construction project.

2. The Economic Loss Doctrine Is Applicable Regardless of Privity

[45] Courts have previously applied the economic loss doctrine to bar negligence claims when there is no privity between the parties, but a contractual relationship similar to privity exists. These courts have recognized that a complex, highly developed, and commercially coherent risk allocation relationship may exist among participants in a construction project even though they are not all parties to the same contracts. *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d at 71-72; *accord Excel Const., Inc. v. HKM Eng'g, Inc.*, 228 P.3d 40, 45 (Wyo. 2010) (applying economic loss doctrine to bar contractor's negligence claim against design professional, the court declined to recognize a tort duty of care even in the absence of contractual privity between an architect/engineer and a contractor, instead applying rationale that parties to a construction contract have the opportunity to allocate the economic risks associated with the work, and that they do not need the special protections of tort law to shield them from losses arising from risks, including negligence of a design professional, which are inherent in performance of the

contract). In such circumstances, actual privity of contract is less relevant than whether a party could have bargained to allocate the risks of negligent design. *Id.*; *see also Ass'n of Apartment Owners of Newtown Meadows ex rel. Its Bd. of Dirs. v. Venture 15, Inc.*, 167 P.3d 225, 281-85 (Haw. 2007) (barring plaintiff's economic loss recovery in tort, even though plaintiff and defendant were not in privity, where "[i]mposing a tort duty upon the defendant . . . would disrupt the contractual relationships between and among the various parties"); *Berschauer/Phillips Constr. Co.*, 881 P.2d at 992-93 (noting that precise allocation of risk is secured by contract, whereas expanding the duty in tort would overexpose defendants to an indeterminate level of liability); *Rissler & McMurry Co. v. Sheridan Area Water Supply Joint Powers Bd.*, 929 P.2d 1228, 1235 (Wyo. 1996) (barring contractor's claim against design profession not in privity, where contractor had the opportunity to allocate the risks associated with the work when it contracted with the owner).

[46] In *Berschauer*, the Supreme Court of Washington granted review to decide whether a general contractor may recover in tort, $3.8 million in economic damages for construction delays against an architect, a structural engineer, and a project inspector, none of whom were in privity of contract with the general contractor. *Berschauer/Phillips Constr. Co.*, 881 P.2d at 988. Even though there was no actual privity among the parties, the court stated "[w]e hold parties to their contracts," and applied the economic loss rule to bar the general contractor's recovery in tort of purely economic damages. *Id.* at 992-93. Thus, *Berschauer* is consistent with the complex risk allocation relationship approach described in *BRW, Inc. v. Dufficy & Sons.*

[47] The Supreme Court of Indiana recently held that the economic loss doctrine bars recovery only where "the plaintiff reasonably could have, by contracts with the defendant or

through an intermediary, protected itself from the loss."[8] *Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 740 (Ind. 2010). The court explained:

> A common thread in the . . . cases that allow negligence claims to proceed even though contract claims exist is the respective courts' view that the gravamen of the complaint is as much malpractice as it is breach—and that tort is regularly deployed to remedy malpractice. We respectfully disagree with the conclusion in these cases. For over a generation, Indiana law has recognized the applicability of the economic loss rule to those who supply a defective product or service pursuant to contract, and we believe that the policy reasons set forth in this opinion amply justify application of these precedents to engineers and design professionals. As the Arizona Supreme Court recently observed, "the policy concerns that justify applying the doctrine to construction defect cases do not justify distinguishing between contractors on the one hand and design professionals, including architects, on the other."

Id. at 735 (citing *Flagstaff Affordable Hous. Ltd. P'ship v. Design Alliance, Inc.*, 223 P.3d 664, 673 (Ariz. 2010)); *accord Maine Rubber Int'l v. Envtl. Mgmt. Grp., Inc.*, 298 F. Supp. 2d 133, 137 (D. Me. 2004) (applying Maine law in federal district court, determining that Maine would not carve out an exception to the economic loss doctrine for environmental engineering professional services contract, because such a professional services contract involves no "fiduciary or extra-contractual relation" such as the attorney-client relationship).

[48] Under this Indiana construction of the doctrine, 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

[8] It is worth noting that the Supreme Court of Indiana acknowledged that *Rissler*, *Berschauer*, and *BRW* all involved claims by contractors against engineers, rather than claims presented by a project owner against engineers and design professionals. However, the court refused to distinguish project owners, stating that:

> The substance of our holding is that when it comes to claims for pure economic loss, the 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. As a participant, this applies as much to the project owner as it does to contractors and subcontractors, engineers and design professionals, and others.

Indianapolis-Marion Cnty. Pub. Library, 929 N.E.2d at 740.

project owner, whether or not technically in privity of contract, is connected through a network or chain of contracts. This approach treats whether a party had an *opportunity* to negotiate a contract as relevant. *See Indianapolis-Marion Cnty. Pub. Library*, 929 N.E.2d at 736.

[49] We are inclined to follow the reasoning of the Supreme Court of Indiana in *Indianapolis-Marion County Public Library* as well as the analysis laid down by the Supreme Court of Hawaii in *Newtown Meadows*. There is no principled reason, in the commercial construction context, to establish a bright-line rule dependent solely on privity. Such an approach would ignore the traditional practices of the construction industry. Rather, application of the doctrine should depend on the opportunity a party had to reasonably protect itself through contract.

D. Default Rule

[50] We reiterate that the analysis above is narrowly tailored to the case before us, which involves sophisticated parties engaging in a commercial construction project. Parties in Guam should assume that such standards will apply in factually similar cases. However, this analysis would not necessarily apply in other potential factual scenarios, such as, in construction projects involving homeowners or other third party purchasers outside the scope of a commercial construction project. *See, e.g.*, *Newtown Meadows*, 167 P.3d at 288 (quoting *Kennedy v. Columbia Lumber & Mfg. Co.*, 384 S.E.2d 730 (S.C. 1989)) (affirming *Kennedy* precedent "to the extent that a homeowner may pursue a negligence claim against a builder where it is alleged that the builder has violated an applicable building code, despite the fact that the homeowner suffered only economic losses"); *Morris v. Osmose Wood Preserving*, 667 A.2d 624, 345 (Md. 1994) (noting that conditions short of "clear danger of death or personal injury will not suffice to permit a tort recovery for economic loss"); *Terracon*, 206 P.3d at 84 n.3 (observing Nevada precedent that economic loss doctrine "does not apply to preclude tort-based claims in which the

plaintiffs seek to recover purely economic losses resulting from alleged construction defects in newly constructed residential properties"); *Davencourt at Pilgrim's Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 221 P.3d 234 (Utah 2009) (applying economic loss doctrine in homeowner association case). In this case, there is no showing that such danger has been created. Moreover, scenarios where there is such a great asymmetry of bargaining power between the parties that meaningful allocation of risk is not possible through bargaining would also require a different analysis.

[51] Here, we find that none of these factors are in play. The parties are all sophisticated and ably represented actors in Guam's commercial construction industry, and we presume that they are capable of resolving such issues through negotiation in the future.

V. CONCLUSION

[52] We hold that under 48 U.S.C.A. § 1424-1(a)(1) and 7 GCA § 3107(a), we have original subject matter jurisdiction to entertain certified questions from other courts under the mechanisms found in GRAP 20(b).

[53] We hold that the economic loss doctrine does indeed apply in Guam. We further hold that in the context of commercial construction litigation, where a party in privity of contract with a design professional is seeking to recover for economic loss damages, and no personal injury or damage to property other than the subject of the contract is alleged, such a party is limited to contractual remedies, and a negligence action may not be maintained. We reject the argument that a different standard of care should be applied to design professionals beyond what is applied to other parties. Finally, we hold that where a party reasonably could have, by contracts with the defendant or through an intermediary, protected itself from the loss, a lack of privity will not

render the economic loss doctrine inapplicable. Accordingly, we answer the questions of the District Court in the **AFFIRMATIVE**.

Original Signed By: Robert J. Torres
ROBERT J. TORRES
Associate Justice

Original Signed By: Katherine A. Maraman
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: F. Philip Carbullido
F. PHILIP CARBULLIDO
Chief Justice