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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CONTROL AIR CONDITIONING  
CORPORATION,

Cross-complainant and Appellant,

v.

WSP FLACK & KURTZ, INC.,

Cross-defendant and Respondent.

G045500

(Super. Ct. No. 30-2008-00103191)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David C. Velasquez, Judge. Affirmed in part and reversed in part.

Case, Ibrahim & Clauss, Brian S. Case, F. Albert Ibrahim and D. Michael Clauss for Cross-complainant and Appellant.

Jenkins Goodman Neuman & Hamilton and Michael L. Marx for Cross-defendant and Respondent.

\* \* \*

In this case we determine that an engineering firm hired by an architect to design the Rand Corporation's new headquarters building in Santa Monica owed no duty

in tort to an air conditioning company hired by the general contractor on the project. (See *Weseloh Family Ltd. Partnership v. K.L. Wessel Construction Co., Inc.* (2004) 125 Cal.App.4th 152 (*Weseloh*) [engineer hired by subcontractor hired by general contractor owed no tort duty to owner in design of retaining wall]; accord, *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 (*Bily*) [auditors owed no duty to potential investors in company about to go public].) However, because the opening brief asserts statements of fact which, if included in an amended pleading, might constitute a cause of action for negligent misrepresentation (see *id.* at p. 376, citing Rest.2d Torts, § 552), we reverse the judgment to allow the air conditioning company the opportunity to amend its cross-complaint.

## FACTS

The Rand Corporation (“the Owner”) decided to build a new building to house its campus in Santa Monica. The Owner wanted a “green” building with operable windows and an “under floor air distribution system.” The Owner hired both an architectural firm, DMJMH+N, Inc. (“the Architect”), and a general contractor, Turner Construction Company (“the General Contractor”).

The Architect subcontracted with an engineering firm, WSP Flack & Kurtz (“the Engineering Firm”) to provide engineering services for the various interrelated systems entailed by the project, while the General Contractor subcontracted with Control Air Conditioning Corporation (“the Air Conditioning Company”) to supply and install the necessary heating, ventilation, and air conditioning units. (Such units are often called “HVAC” units; depending on the context we will refer to them as “air conditioners,” “Petra units,” or “HVAC” units.) The Engineering Firm and the Air Conditioning Company never had a contract with each other.

The Owner ultimately concluded that the air conditioners supplied by the Air Conditioning Company delivered neither the required cooling capacity nor energy

efficiency. It requested that the General Contractor remove the air conditioners supplied by the Air Conditioning Company. The General Contractor honored the request and gradually replaced the air conditioners delivered by the Air Conditioning Company.

The General Contractor also did not pay the Air Conditioning Company for the air conditioners. The result was about a \$600,000 out-of-pocket loss to the Air Conditioning Company. The Air Conditioning Company then sued the General Contractor for lack of payment, and also sued Air Treatment Corporation (the Distributor) for breach of warranty.

The General Contractor then filed a cross-complaint against the Air Conditioning Company for indemnity (including the losses incurred by the General Contractor in replacing the air conditioners). The Air Conditioning Company responded by filing its own cross-complaint against the Engineering Firm, plus Petra Engineering Industries Company (the Manufacturer or “Petra”), the manufacturer of the air conditioners.

The trial court sustained the Engineering Firm’s demurrer to the Air Conditioning Company’s second amended cross-complaint without leave to amend, and the Air Conditioning Company has brought this appeal from the ensuing judgment of dismissal.

The Air Conditioning Company’s second amended cross-complaint is not a model of clear pleading. It is studded with engineering jargon and numerous evidentiary facts detailing, as if in a vacuum, alleged malfeasances on the part of the Engineering Firm. For example, the pleading alleges that the Engineering Firm “improperly allowed the use of flawed lineal regression when refrigeration is non-lineal.” *How* the use of “flawed lineal regression” led to the Owner rejecting the Petra units is not explained (or if explained, not explained clearly) anywhere in the document.

The ultimate facts, however, are summarized. Essentially, the Engineering Firm subjected the Petra units to unfairly *rigorous* requirements, such as holding the units

to a “LEED” or “Leadership in Energy and Environmental Design” standard. Here is the summary: The building occupants experienced “discomfort” which was “a function of” the Engineering Firm’s “flawed design” that included the “allowance of Operable Windows” and a “defective Under Floor Air Distribution System.” Similarly, because the Engineering Firm “failed to coordinate and properly integrate the operable windows design with the building design,” the Owner would ultimately reject the Petra air conditioners, resulting in the loss to the Air Conditioning Company.

The second amended complaint does *not* say that the Air Conditioning Company was told to buy the Petra air conditioners by the Engineering Firm, nor does it say that the Air Conditioning Company asked for the Engineering Firm’s advice as to whether it should buy those units. The closest it appears to come to such an allegation is to say that in the design development phase of the building, two Engineering Firm employees “represented” that the firm “had prior favorable experience with Petra HVAC units in Europe and that based upon said experience, specified Petra for the Project and noting Petra’s high quality products.”

## DISCUSSION

### *1. Standard of Review*

In its original complaint, the Air Conditioning Company alleged that the Owner and General Contractor unfairly rejected the Petra units, causing the Air Conditioning Company not to be paid for them. In this appeal we take judicial notice of those allegations. (See *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425; *Colapinto v. County of Riverside* (1991) 230 Cal.App.3d 147, 151.)

However, in the original complaint, the Air Conditioning Company also alleged two alternative factual scenarios as regards the defectiveness of the Petra units. The units were either (1) defective, so the Distributor had breached its warranty, or (2) not defective, so the General Contractor had wrongfully refused to pay for them. In this

particular appeal against the Engineering Firm, the Air Conditioning Company receives the benefit of the better alternative, i.e., we will assume on appeal that the units were not defective. (See *Rader Co. v. Stone* (1986) 178 Cal.App.3d 10, 27-29 [accepting as true, for purposes of appellate review, allegations by real estate broker that owner of commercial rental property disparaged broker to prospective tenant thus prompting tenant to enter into lease with owner which did not provide for broker's commission, despite other allegations that broker had a "fully executed contract" with owner].)

## 2. Appealability

The judgment was filed June 30, 2011, the Air Conditioning Company's notice of appeal was filed less than 10 days later on July 8, so there is no question of timeliness of this appeal. The question does arise, however, as to whether the judgment of dismissal on this cross-complaint is appealable under the single judgment rule given that litigation between the Air Conditioning Company and the General Contractor evidently remains ongoing.

The answer is yes. The judgment resolves all claims between a plaintiff and a single defendant, hence the judgment is appealable. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 740 [leaving untouched the rule that "Judgment in a multiparty case determining all issues as to one or more parties may be treated as final even though issues remain to be resolved between other parties"]; *Tinsley v. Palo Alto Unified School Dist.* (1979) 91 Cal.App.3d 871, 880 ["when there is a several judgment resolving all issues between a plaintiff and one defendant, either party may appeal from an adverse judgment, although the action remains pending between the plaintiff and other defendants"]; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶¶ 2:97, 2:103, pp. 2-58 to 2-60 [ruling disposing of all claims between some, but not all parties, is a final, appealable judgment as to those parties]; see *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1830

[“*Morehart* did not purport to overturn the judicially created exception to the one final judgment rule that permits appeal from a judgment in a multiparty case determining all issues between certain parties even though issues remain to be resolved between other parties.”].)

### 3. *Third Party Beneficiary Claim*

The statute that governs third party beneficiary contract claims, Civil Code section 1559, is short: “A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.” Case law has held that while a contract need not expressly state that it is intended to benefit a third party, if such an intent is apparent through the ordinary means of contract interpretation, the intent will be inferred. (See *Service Employees Internat. Union, Local 99 v. Options -- A Child Care and Human Services Agency* (2011) 200 Cal.App.4th 869, 878 (*Local 99*).) On the other hand, the fact that a literal interpretation of a contract might result in some benefit to a third party is not enough by itself to require enforcement in favor of that third party. (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524.) Moreover, a third party who is only benefited incidentally by the contract cannot enforce it as a third party beneficiary. (*Local 99, supra*, 200 Cal.App.4th at p. 878.) The relevant intent is that of the promisee. If the circumstances indicate that the promisee intended to give the third party the benefit of the promised performance, the third party may enforce the contract. (*Ibid.*)

Here, the promisee was the Architect. There is very little in the Architect-Engineering Firm contract, however, to indicate that the contract was intended to benefit either the Air Conditioning Company or even the various contractors on the job as a class. The focus of the contract is the ultimate satisfaction of the *Owner*, which desired a green building, and the Architect, which wanted a plan that properly coordinated a variety of diverse building systems. Thus the services contemplated by the contract involve the coordination of no less than five systems. Moreover, there are no provisions

that the Engineering Firm would be responsible to anyone other than the Architect, a point emphasized by the Architect's taking ownership of the Engineering Firm's nonproprietary work, by the Architect's specifically retaining the power to make changes in the scope of the Engineering Firm's services, and by the inability of the Engineering Firm to provide any additional services without the Architect's express permission. For example, if coordinating the air conditioning system with the plumbing system required some unintended additional designs, it would be the *Architect*, not any air conditioning or plumbing contractor, who would make the decision whether the Engineering Firm could be paid for those designs. Under such circumstances, the benefit to the general class of contractors on the job can only be described as "incidental."

*COAC, Inc. v. Kennedy Engineers* (1977) 67 Cal.App.3d 916 (*Kennedy Engineers*), relied on by the Air Conditioning Company, is not to the contrary. There, the successful bidder on a water treatment plant awarded a contract by a water district sued the engineers who had also contracted with the district for the delay occasioned by the engineers' initial failure to prepare an EIR for the project, a delay compounded by deficiencies in the EIR they eventually did prepare. The bidder asserted a third party beneficiary theory based on the contract between the engineers and the district requiring the engineers to prepare the EIR.

The engineers demurred to the original complaint on the ground of *uncertainty* (*Kennedy Engineers, supra*, 67 Cal.App.3d at pp. 918-919), because the complaint did not allege whether the district-engineers contract was "written or oral," or even whether it was "express or implied." (*Id.* at p. 918.) That is, it is reasonably clear from the *Kennedy Engineers* opinion that the bidder did not attach a written contract between the district and the engineers, and made only the most conclusory allegations about any contract. The trial court sustained the demurrer to the original complaint without leave to amend. (*Id.* at p. 919.)

The *Kennedy Engineers* court reversed, noting that the bidder was not required to add the word “express” to a proposed amended complaint, as it offered on appeal to do. (*Kennedy Engineers, supra*, 67 Cal.App.3d at p. 919.) The rationale of the opinion was that the bidder was a creditor beneficiary of the district in the district’s capacity *as owner*. The district, as owner, was obligated by law to provide a work site for the bidder where it could do its work “without hindrance or delay,” hence the bidder could be a third party beneficiary of the district-engineers contract to prepare the EIR, which was undertaken precisely to avoid such hindrance or delay. (*Id.* at pp. 920-921, quoting *Visintine & Co. v. New York, Chicago & St. Louis Rd. Co.* (1959) 169 Ohio St. 505, 508.)

*Kennedy Engineers* is inapposite to the case before us in two basic respects. First, in *Kennedy Engineers* the demurrer was for reason of uncertainty, in a context where the only facts about the complaint were those alleged in the pleading itself. Here, by contrast, we have access to the actual written contract, which the *Kennedy Engineers* court did not have, so we can analyze the contract to see what it actually says, not what the complaint paraphrases the contract to say.

Second, *Kennedy Engineers* only held that the *owner-engineer* contract could give rise to a third party beneficiary relationship favoring the bidder who, said the court, was completely dependent on the engineers to timely finish the EIR. (Cf. *United States use of Los Angeles Testing Laboratory v. Rogers & Rogers* (S.D. Cal. 1958) 161 F.Supp. 132, 136 (*Rogers & Rogers*) [architect’s power of “life and death” over prime contractor sufficient to establish duty in tort].) Here, the alleged third party beneficiary contract between the Architect is, as the trial court noted, “twice removed” from any duty on the part of the Owner to the Air Conditioning Company to prevent hindrance or delay to the Air Conditioning Company. More particularly, there are no allegations that the *Architect-Owner* contract required the *Architect* to so structure its relationship to the Engineering Firm so as to avoid even the possibility of the rejection of air conditioners

supplied by the Air Conditioning Company. In fact, the Architect-*Owner* contract is not attached to the complaint, and neither of them are parties to this litigation.

#### 4. *Negligence*

##### a. *the Biakanja/Bily factors*

It has been well established since at least *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*) that the absence of privity is no automatic bar to tort liability to third parties in contexts where the alleged negligence may have arisen out of the performance of a contract. *Biakanja*, in fact, is an almost textbook case of such liability to third parties arising out of a contract. There, a notary public, trying to practice law without a license, contracted to prepare a will for the plaintiff's brother, leaving everything to the plaintiff, his sister. Because the will was not properly attested, when the brother died the sister received only one-eighth of the brother's estate. (See *id.* at pp. 650-651.) Despite the absence of privity between the sister and the notary, the Supreme Court held that the notary could be liable to the sister for the loss. Among the factors which bore on liability was the "moral blame" attendant on the notary's attempt to practice law without a license and the loss suffered. (See *id.* at p. 650.)

Recognizing that legal duty is a shorthand conclusion to the sum total of factors bearing on whether the plaintiff is entitled to protection (see *Dillon v. Legg* (1968) 68 Cal.2d 728, 734), our Supreme Court has, since *Biakanja*, used a "checklist of factors" to analyze whether the plaintiff is entitled to tort protection. (See *Bily, supra*, 3 Cal.4th at p. 397.)

The original *Biakanja* factors were (1) intent of the transaction, (2) foreseeability of harm to the plaintiff, (3) degree of certainty plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm.

In *Bily*, the high court added three additional factors: (7) the degree to there might be a potential liability out of proportion to fault, (8) the level of sophistication of the plaintiff in the context of the transaction (including the potential for what the court called “private ordering” to contractually protect against the risk), and (9) the balance between, on the one hand, efficient loss spreading, and, on the other hand, and the potential for dislocation of resources. (*Bily, supra*, 3 Cal.4th at p. 398.)

*Bily* itself was a case that held that the auditors of a company did *not* owe a duty to third party investors who lost money relying on “clean” audit opinions of a company’s financial statements when those statements had grossly understated the company’s liabilities. (*Bily, supra*, 3 Cal.4th at pp. 377-378.) The court specifically downgraded foreseeability as a factor. (*Id.* at pp. 389-392 [criticizing “foreseeability approach”].)

*b. the Weseloh application*

This court had the occasion to apply the *Biakanja/Bily* factors in our 2005 decision in *Weseloh*. There, an engineer designed two retaining walls for a subcontractor that had been hired by a general contractor to build retaining walls for a new auto dealership. The general contractor, in turn, had been hired by the owner of the property to build that new dealership. When the retaining walls failed, the owner sued the engineer and his firm. This court affirmed a summary judgment in their favor. (*Weseloh, supra*, 125 Cal.App.4th at pp. 158-160.)

First applying the *Biakanja* factors, we noted that the engineers’ “role” in the project was to benefit the subcontractor-builder as a preparer of calculations and any benefit to the owner was only “through” that subcontractor-builder. (*Weseloh, supra*, 125 Cal.App.4th at p. 167.) We next noted that “it is generally foreseeable” that a design defect could result in the failure of a retaining wall, but that factor, given *Bily*’s criticism of it, only received “limited weight.” (*Weseloh, supra*, 125 Cal.App.4th at p. 168.) We

further recognized the lack of a close connection between the failure of the walls and the calculations prepared by the engineers. While the owners had submitted the declaration of a geotechnical expert to the effect that the engineers had “underdesigned” the walls (including not properly accounting for soil conditions), this court noted that there was no “evidence showing how or the extent to which those design defects actually *caused*” the owner’s damage. (*Ibid.*, italics in original.)

Continuing on with the *Biakanja* factors, we found there was, of course, a lack of moral blame on the engineer’s part, and the policy of preventing further harm was not promoted by liability. We specifically pointed out that the owner had a remedy in pursuing the general contractor, and the general contractor could sue the subcontractor who could *then* hold the engineer “accountable” for design defects. (*Weseloh, supra*, 125 Cal.App.4th at pp. 169-170.)

The *Weseloh* court applied the *Bily* factors. Allowing a direct suit by the owners “alone” would result in a liability disproportionate to fault, particularly in the context of the small amount of money the engineer was paid for the designs. (*Weseloh, supra*, 125 Cal.App.4th at pp. 171-172 & p. 171, fn. 5.) There were plenty of possibilities for the “private ordering” of the risk. The owner could have insisted on a clause in its contract with the general contractor requiring it to be named as a third party beneficiary in all contracts related to the project. The owner could have insisted on being named additional insureds on all insurance policies covering risks of defective workmanship of subcontractors. (*Id.* at pp. 171-172.) And there was nothing to indicate that liability on the part of the engineer directly to the owner was an effective way of distributing the loss. (*Id.* at p. 172.)

*c. present application*

As in *Weseloh*, the balance of factors weighs against direct tort liability from the Engineering Firm to the Air Conditioning Company. The trial court’s

observation that the Air Conditioning Company was “twice removed” from the work of the Engineering Firm is particularly salient. Here, the Air Conditioning Company’s loss was occasioned by the Owner’s alleged wrongful rejection of the Petra units, and then also by the General Contractor’s decision to agree with the Owner and replace the units and not pay the Air Conditioning Company. At least two levels of alleged wrongful conduct thus separate the Air Conditioning Company’s loss from the work of the Engineering Firm.

We now apply the *Biakanja* and *Bily* factors:

(1) *Intent of the transaction*: If, in *Weseloh*, there was no intent to benefit the plaintiff-owner, even though there the owner was linked in a direct chain to the engineer (owner to general contractor to subcontractor to engineer), how much less is there such an intent here, where no such link exists. Further, as in *Weseloh*, there was no “intended beneficiary clause” in the relevant contract (*Weseloh, supra*, 125 Cal.App.4th at p. 167), here the Engineering Firm-Architect contract.

(2) *Foreseeability of harm*: As the *Bily* opinion noted, foreseeability has been deemphasized since *Thing v. La Chusa* (1989) 48 Cal.3d 644 (*La Chusa*), because the test ““proves too much,”” i.e., tends to be limitless. (*Bily, supra*, 3 Cal.4th at pp. 398-399.) Or, in Witkin’s oft-quoted line, “there are clear judicial days on which a court can foresee forever.” (First quoted in *La Chusa, supra*, 48 Cal.3d at p. 668.) The irony in this case is that the foreseeability of some engineering miscalculation resulting in an *owner’s* rejection of certain air conditioners, followed by a general contractor’s *agreement* with the owner, is itself anything but clear. This is certainly not a case where “a court can foresee forever.” The second amended cross-complaint itself is vague as to the precise cause and effect relationship between the alleged malfeasances of the Engineering Firm and the Owner’s ultimate rejection of the Petra units. There is a lack of a direct “fit” between the harm to the Air Conditioning Company and any negligence on

the part of Engineering Firm. Most dispositively, the foreseeability of harm in this case is much hazier than it was in *Bily*, where it was found wanting.

(3) *Degree of certainty plaintiff suffered injury and the closeness of the connection between the defendant's conduct and the injury suffered:* We treat these two factors together because, in this case, they are effectively interlinked. Reading the complaint as a whole, it is possible, for example, that the Owner and the General Contractor *wrongfully rejected* the air conditioners delivered and installed by the Air Conditioning Company without any fault on the part of either the Air Conditioning Company or the Engineering Firm. Moreover, it is not at all clear that the Air Conditioning Company has even suffered any injury connected to the Engineering Firm. If the Air Conditioning Company prevails in its suit against the General Contractor, it will be effectively made whole independent of any need to recover from the Engineering Firm.

(4) *The closeness of the connection between the defendant's conduct and the injury suffered:* Here, the connection is attenuated. The Air Conditioning Company argues that “It stands to reason that a faulty design and/or specifications of the wrong units would prevent the HVAC system from functioning in a way that would meet RAND’s requirements and expectations.” We address the problem of actual specification of units below in our discussion of negligent misrepresentation (where indeed the Air Conditioning Company might have a cause of action). But as a general point, a faulty design might, or might not, have “caused” the rejection of the Petra units. Any purported link between the wrongful rejection and the Engineering Firm’s conduct is fuzzy.

(5) *Moral blame:* In context and reading the complaint as a whole, this factor strongly favors the Engineering Firm. The Engineering Firm sought to give the Owner and the Architect what *they wanted* -- a “green” building with operable windows. Thus a number of the alleged acts of negligence committed by the Engineering Firm involve the imposition of overly rigorous standards on the Petra units, including

imposition of “Leadership in Energy and Environmental Design” standards, and requiring a higher energy efficiency rating from the Petra units when it previously approved a lower rating. (An “EER of 9.7 when it had approved Petra for 9.5.”) In this instance, imposition of a duty in this case would effectively put the Engineering Firm in a conflict of interest, between seeking to do its contractual duty to satisfy the Architect (and presumably the Owner) and having to look out for the possibility of loss to a subcontractor whose only relationship was with the General Contractor. (Cf. *Trear v. Sills* (1999) 69 Cal.App.4th 1341, 1356 [treating psychologist owed no duty to third party father of patient whose relationship with patient was destroyed when psychologist found recovered memory of sexual abuse by father because imposing duty on psychologist toward father “would only chill the therapist’s ability to treat the patient”].)

(6) *Policy of preventing future harm*: This factor rests on the attenuated link between the Engineering Firm’s design and the Owner’s rejection of the air conditioners. There are no less than three sets of actors who might have made erroneous decisions between the Air Conditioning Company and the Engineering Firm (the General Contractor, the Owner, and the Architect), so liability sends only the haziest message to any future engineering firms. In fact, as we have just noted, liability may dilute the efforts of engineers to design buildings that use less energy because engineers will also have to take suppliers’ conflicting interests into account.

(7) *Liability out of proportion to fault*: If the air conditioners were indeed rejected wrongfully, at least two more parties (the Owner and the General Contractor) were involved in the decision that created the economic loss other than the Engineering Firm. We thus have a situation like that in *Weseloh*, where the lack of “complete control” by the defendant over the very subject that precipitated the lawsuit (here the rejection of the air conditioners) could result in liability disproportionate to fault. (See *Weseloh, supra*, 125 Cal.App.4th at pp. 171-172.) Indeed, the complaint is consistent with the idea that the Owner and the General Contractor might have wrongfully rejected the air

conditioners through no fault of the Engineering Firm at all. The threat of disproportionality is particularly acute given the role of the General Contractor in this case. Because the Air Conditioning Company fears that the General Contractor will also, through its indemnity clause with the Air Conditioning Company, seek the cost of replacing the Petra units (which could run in excess of \$3 million), the bulk of the liability might be attributable to a faulty decision of the General Contractor, independent of the Engineering Firm's role.

*(8) The level of sophistication of the plaintiff in the context of the transaction, including the potential for "private ordering" to contractually protect against the risk:* This factor also negates the imposition of a tort remedy in negligence, because the contracts in this case already protect the Air Conditioning Company against loss. In the normal course of events, the litigation of the original complaint against the General Contractor and the Distributor (presumably the Manufacturer should have been included with the Distributor in the original complaint as well) would yield a definitive answer to the question of whether the Petra units were wrongfully rejected, or, alternatively, rightfully rejected as defective. If wrongfully rejected, the Air Conditioning Company would be able to recoup any losses independent of the Engineering Firm's role from the General Contractor (who presumably might look to the owner). If not wrongfully rejected (i.e., the units were defective), recovery could be had from the Distributor and the Manufacturer.

*(9) The balance between efficient loss spreading, on the one hand, and the potential for dislocation of resources on the other:* We have already discussed the relative balance of interests between the Engineering Firm's need to give the Architect (and through the Architect, the Owner) what the Owner wanted, as distinct from the interests of third party subcontractors. The most efficient determination of the possibility of wrongful rejection is to be found in the Air Conditioning Company's suit against the General Contractor, which in the normal course of litigation will determine the issue of

wrongful rejection versus defective product. Allowing the Engineering Firm to be sued directly short circuits the process of more equitably allocating the loss to the most culpable parties involved.

*d. pre-Bily case law*

The three pre-*Bily* cases cited by the Air Conditioning Company are distinguishable. In *Rogers & Rogers, supra*, 161 F.Supp. 132, a federal district court held that an architect had a duty to a prime contractor not to negligently construe and interpret reports of tests on certain concrete, and also not to negligently approve preformed structures of the same concrete. The rationale was a relationship of *direct dependence* by the prime contractor on the architect: “Altogether too much control over the contractor necessarily rests in the hands of the supervising architect for him not to be placed under a duty imposed by law to perform without negligence his functions as they affect the contractor. *The power of the architect to stop the work alone is tantamount to a power of economic life or death over the contractor.*” (*Id.* at p. 136, italics added.) The case before us differs. Here, the Engineering Firm had no power over the Air Conditioning Company. It could not incur extra charges without the express written permission of the Architect. The air conditioners were rejected not by the Engineering Firm but by the General Contractor.

In *M. Miller Co. v. Dames & Moore* (1961) 198 Cal.App.2d 305 (*Miller*), the court held that soils engineers could be sued for an inaccurate soils report used by a winning contractor on a sewer project. Because of the inaccuracies, the winning contractor had made a bid about a million dollars less than what the project could be safely done for. To the degree that the *Miller* court simply said that the *Biakanja* factors should have been left to the trier of fact (see *id.* at pp. 308-309), the opinion has been superseded by *Bily*, which said that those factors are a question of law for the court. (See *Bily, supra*, 3 Cal.4th at p. 397 [duty is a question of law].) Moreover, *Miller* is broadly

distinguishable from the case before us because, in *Miller*, the “end and aim” of the soils report was specifically to be used as the basis for contractor bids. (Cf. *Miller, supra*, 198 Cal.App.2d at p. 307 [soils report “intended” to “provide information to prospective bidders”] with *Biakanja, supra*, 49 Cal.2d at p. 650 [“Here, the ‘end and aim’ of the transaction was to provide for the passing of Maroevich’s estate to plaintiff.”].) In the case before us, the Engineering Firm’s interaction vis-à-vis the Air Conditioning Company was only one aspect of its general design duties, not the central purpose of the contract.

Finally, in *Kent v. Bartlett* (1975) 49 Cal.App.3d 724 (*Kent*), a surveyor was held liable to the successors to the landowner who hired him to divide certain land into two parcels -- one with all existing improvements on it, and the other with none. The successors sold the vacant parcel to a buyer, who discovered that because the survey was done in error, a portion of a retaining wall and driveway that was supposed to be on the developed parcel was, in fact, on the undeveloped one. It took more than \$5,000 to placate the buyer of the vacant parcel by purchasing an easement from him, and the successors sued the surveyor. The trial court granted the surveyor’s nonsuit motion based on the lack of privity between the surveyor and the couple, but the appellate court reversed. The appellate court reversed, citing four considerations: (1) the surveyor knew the survey would be relied on by others than the person ordering it (the original owner); (2) liability was restricted to a small group, but ordinarily only one member of that group would suffer loss; (3) the innocence of the “reliant” party (presumably the successor owners) in contrast to the sole fault being that of the surveyor; and (4) the foreseeability of the result and the need to promote “cautionary techniques” among surveyors. (*Id.* at p. 730.)

By contrast, the consequences of a mistake or error on the part of the Engineering Firm are not nearly as clear as they were in *Kent*. There is no clear causal link between the Engineering Firm’s alleged mistakes here and the rejection of the air

conditioners by the Owner. Further, the *Kent* factor of restriction of liability to a small group cuts in favor of the Engineering Firm because of the presence of other parties who might share the fault if the air conditioners were rejected wrongfully. And here, there is no clear innocence on the part of the Air Conditioning Company the way that the successor owners were innocent in *Kent*. And we have already considered foreseeability, loss spreading and accountability.

*e. supervision*

The question of supervision remains. The *Weseloh* court noted that the engineer there had not “supervised the actual work done on the retaining wall” (*Weseloh, supra*, 125 Cal.App.4th at p. 162; see also *Oakes v. McCarthy Co.* (1968) 267 Cal.App.2d 231, 248 (*Oakes*) [duty where party undertook to “supervise and inspect the actual work” of compacting soil]) and suggested, citing *Oakes*, that facts showing actual supervision of the retaining wall might have yielded a different result.

In the case before us there are only *conclusory* allegations of “supervision” imputed to the Engineering Firm. There are no actual facts, not even asserted in the opening brief, that the Engineering Firm actually “supervised” the Air Conditioning Company’s installation of the Petra units on the job site in a way which caused otherwise good Petra units to be inadequate for the job. In fact, that task would normally be undertaken by the General Contractor. There are no allegations, for example, that an employee of the Engineering Firm told an employee of the Air Conditioning Company, to “put that unit here” when the plans otherwise called for it to be put “there” so as to make a difference in performance.

Rather, the gravamen of the complaint, read as a whole, is that the *plans and specifications* for the entire building produced by the Engineering Firm, albeit possibly (or possibly not) receiving input from the Air Conditioning Company prior to purchase and installation, somehow caused perfectly good air conditioners to fail. And if

that is true, as we have pointed out, the Air Conditioning Company already has a remedy against the General Contractor acting allegedly at the behest of the Owner.

#### *5. Intentional Interference*

There are no facts in the second amended cross-complaint which indicate that the Engineering Firm ever intended to disrupt anything, much less the General Contractor-Air Conditioning Company contractual relationship. The closest the pleading comes is to suggest that the Engineering Firm subjected the Petra units to unfairly rigorous performance tests which might (again, the second amended cross-complaint is hazy on the point) have prompted someone along the line to reject the Petra units.

The opening brief, however, goes a step further and insinuates that “instead of pointing to its flawed design,” the Engineering Firm “blamed the Petra units” as the “culprit” for the “discomfort” experienced by the Owner’s employees. But all that insinuation does is conflate advice which the Engineering Firm *may* have given to the Owner with the *validity* of the Owner’s decision to reject the Petra units. There is absolutely nothing, in either the second amended complaint or the opening brief, which implicates any activity by the Engineering Firm vis-à-vis the *General Contractor*, with whom the Air Conditioning Company had its actual contractual relationship.

#### *6. Negligent Misrepresentation*

The actual second amended complaint is vague on the subject of reliance on, or instruction by, the Engineering Firm in the Air Conditioning Company’s initial purchase of the Petra units. A review of the paragraphs which most seem to address that point shows no actual allegations of reliance: Paragraph 10 does not say that the Engineering Firm told the Air Conditioning Company to buy Petra units. It only says that the Air Conditioning Company’s contract with the General Contractor “was subsequently amended [and we do note the passive voice] to include the purchase and installation of

the HVAC.” Paragraph 52, which addresses the plans and specifications prepared by the Engineering Company, says nothing about the Engineering Firm requiring the Air Conditioning Company supply Petra units. Paragraph 64, which avers the Engineering Firm would remain “Engineer of Record,” says nothing about actual reliance in the purchase of the Petra units. The summary of allegations in paragraph 69 only goes to the quality of design vis-à-vis the purported “malfunction” of the Petra units, not the initial purchase and specification of them -- indeed, the paragraph suggests a theory inconsistent with reliance on a specific statement, namely that the Engineering Firm’s real fault was in the “flawed design” and not in the specifications of the Petra units. While there are conclusory allegations of negligent supervision in paragraph 86, there is nothing to address the precise issue of why or how the Air Conditioning Company acquired the Petra units.

However, there are statements in the opening brief which suggest that it was the Engineering Firm who actually *specified* the Petra units “in the first place.” The brief says that “the blame should be assigned to [the Engineering Firm] for specifying the Petra units in the first place under the law of negligence.” Elsewhere it indicates (albeit contradicting its own theory that the Engineering Firm specified the Petra units “in the first place”) that it was the Air Conditioning Company who originally “proposed” the Petra units to the Engineering Firm and the Engineering Firm apparently approved them.

We have not forgotten that this case comes to us on demurrer. In *Bily*, in the course of rejecting the imposition of a tort duty on an accounting firm for an audit prepared for a company about to make a public offering, the Supreme Court stated that the auditors *could* have been liable for negligent misrepresentation if the auditors had “intended to influence” the investors who lost money investing in the company. (See *Bily, supra*, 3 Cal.4th at p. 376, citing Rest.2d Torts, § 552.) The test was whether an information supplier (in *Bily*, auditors, here, engineers) would know “with substantial certainty” that a plaintiff, or “particular class of persons to which plaintiff belongs, will

rely on the representation in the course of the transaction.” (*Bily, supra*, 3 Cal.4th at p. 414 [giving guidance to trial court on how to craft jury instruction on issue].)

The opening brief has made two assertions of fact which, if presented in a pleading, *might* yet establish a claim by the Air Conditioning Company for negligent misrepresentation under *Bily*. At this juncture we need not speculate about the sufficiency of any amended pleading, since by definition we have not yet seen it.

#### DISPOSITION

The judgment of dismissal is affirmed to all causes of action other than the seventh cause of action for negligent misrepresentation. As to that cause of action, the matter is remanded to the trial court with instructions to give Control Air Conditioning Corporation (the Air Conditioning Company) leave to amend its cross-complaint consistent with this opinion. Because Control Air Conditioning Corporation might yet prevail on a negligent misrepresentation claim and the result at this stage of the litigation is a mixed one in terms of prevailing party, in the interests of justice each side shall bear its own costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

O’LEARY, P. J.

MOORE, J.