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Arizona Court Of Appeals Finds Architects Can Be Sued For Negligence

Architects and engineers must be aware when entering agreements to perform design work that a variety of potential claims may be asserted against them. These may be attributed to alleged design flaws, budget overruns, on-site accidents or even building collapse. With the economic down-turn, problems of delay claims and cost over-runs and claims of construction defects and consequential damages are increasing dramatically. Arizona markets in particular have been one of the hardest hit and have seen an increase in the number of claims against architects and engineers as parties are looking to the design professionals for additional avenues of recovery.

Duty of Care: Was the Work Performed Like a "Reasonably" Prudent Design Professional?

Professional liability of architects and engineers stems from their duty of care. "Design professionals have a duty to use ordinary skill, care, and diligence in rendering their professional services." They "must use their skill and care to provide plans and specifications that are sufficient and adequate." *Chaney Bldg. Co. v. Tucson*, 148 Ariz. 571, 574, 716 P.2d 28, 31 (Ariz. 1986); *Donnelly v. Oberg*, 139 Ariz. 184, 187, 677 P.2d 1292, 1295 (Ariz. 1984); *National Housing Industries, Inc. v. E.L. Jones Development Co.*, 118 Ariz. 374, 576 P.2d 1374 (Ariz. Ct. App. 1978). Foreseeability is not a factor in the determination of whether a duty exists. *Gipson v. Kasey*, 214 Ariz. 141, 144, 150 P.3d 228, 231 (Ariz. 2007).

However, these terms leave open what it really means to use the "ordinary" skill and diligence and what are "sufficient and adequate" plans and specifications. The Arizona courts have not provided specifics as to what these standards are other than the general guidance that professionals are to be held to the standards in their industry. Overall, design professionals should be sure that they are providing services that are what would be expected by their peers, and that the plans and specifications are carefully prepared to ensure accuracy and completeness.

There are substantive differences in claims based in contract rather than in tort, as discussed below, with one of the most important being whether the contract provides for a higher level of performance – that of the "highest" or "best" degree of skill – rather than the negligence standard of the degree of care expected of a similarly situated design professional. Further, the conduct supporting a finding of negligence liability may also support a finding of breach of contract.

Exposure for Breach of Contract, Tort Claims and Warranty Issues

More often than not, landowners, contractors or subsequent property owners sue design professionals under alternative theories of liability including breach of contract, breach of fiduciary duty, negligence, negligent misrepresentation, and breach of implied warranty. Design professionals may also find themselves liable to third parties based on third party beneficiary theories, personal injury claims, and unfair trade practices or interference with business relationships, as well as implied warranties and negligent misrepresntation claims. As discussed further, these potential avenues of liability will turn on the evidence presented which will require expert testimony and weighing of the evidence by the trier of fact.

Breach of Contract Claims

Breach of contract claims arise are the most common in Arizona as there are several avenues to pursue, including allegations of violation of general terms of the agreement for services. While the standard of performance is usually to perform with reasonable professional care, the same act, error or omission by a professional can constitute a breach of contract and professional negligence. Breach of contract claims arise from the actual terms of the agreement but also can inlcude duties that are implied from the commitments stated expressly in the contract even if the act is not explicity required by the contract. Additionally, the particular terms of the contract may impose more stringent quality standards, such as an obligation to achieve certain results, comply with schedules or budgets, warrant for a particular use, or promise to use certain technology.

Depending on the contract provisions, liability may be limited by a provision limiting liability to the amount of the retainer of the professional. These "limitation of liability clauses" are enforceable in Arizona. The Supreme Court in *1800 Ocotillo, LLC v. WLB Group, Inc.* (2008) 219 Ariz. 200, 196 P.3d 222, held that the state's anti-indemnity statute governing architect-engineer professional service contracts did not apply to render unenforceable liability limitation clauses, that liability limitation clauses are not contrary to public policy, and the liability limitation clause is not an "assumption of risk" within meaning of provision of State Constitution as the defense of assumption of risk is a question of fact. Additionally, since the building plans and design documents are considered part of the "contract documents," failure to adequately design the plans (such as failure to design the plans and specifications in accordance with city ordinances) may be a basis of such claims. Further, failure to complete the project in the time specified may be a basis for breach of contract.

Of particular concern for breach of contract allegations in Arizona are whether legal fees can be awarded if the claimant is found to be the prevailing party. Under A.R.S. 12-341.01, the court has discretion to award attorneys' fees to the successful party in a contested action arising out of a contract. Thus, even if the contract does not provide for an award of attorneys' fees to the prevailing party, the court can award legal fees if requested and good cause is found.

When drafting contracts for services, use caution and be careful not to simply go with a standard form document which may or may not provide the protection needed. The bottom line is that the language in the contract is critical, will define the potential scope of liability and is one area where risk and liability exposure can be managed, ast least to the extent that negotiations are possible with the owner or contractor who retains the professional. In addition to ensuring that the work is done with care, design professionals can also look to various defenses for breach of contract cases with all of the risks associated with such claims. Of these defenses

potentially available, it is important to consider whether there was any misrepresentation or if the other side prevented the professional from fulfilling the bargain, impossibility, or partial performance or acceptance of performance. Furthermore, under Arizona law, indemnity against a design professional is not available if the negligence is the sole responsibility of the contractor or owner (indemnitee). A.R.S. § 32-1159(A).

Professional Negligence & Negligent Misrepresentation Claims

Professional liability for negligence requires a finding of a duty, a breach of that duty, proximate cause, and actual damages. *Donnelly*, 139 Ariz. at 187, 677 P.2d at 1295; *Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (Ariz. 1983). Privity is not required to maintain an action in tort in Arizona. 139 Ariz. at 187, 677 P.2d at 1295. Therefore, a duty may be established without the determination of some kind of "special relationship." Foreseeability is a factor in determining proximate cause, but not in the determination of a duty. *Gipson*, 214 Ariz. at 144, 150 P.3d at 231. When design professionals fail to use ordinary skill, care, and diligence to provide plans and specifications that are sufficient and adequate and as a foreseeable result the party to whom the duty is owed suffers damages, the design professionals will be held liable for negligence.

In order to maintain a lawsuit for negligent misrepresentation, there must be a finding that the professional did not exercise reasonable care in obtaining or communication information and thereby supplied false or misleading information for the guidance of others, that there was justifiable reliance, and that there was a pecuniary loss as a result of the reliance. *Donnelly*, 139 Ariz. at 188, 677 P.2d at 1296; Restatement (Second) of Torts § 552. Illustration 9 of the comments to **§** 552 gives a good example of such a situation. City hires B, a company of engineers, to provide a report regarding soil conditions and informs B that the report will be relied upon as a basis for bids and will be used by the successful bidder. B then negligently prepares the report with misleading and false information. C successfully bids on the basis of B's report, and then hires subcontractor D to do part of the work. C and D then suffer pecuniary loss because of the misleading report and B company will be liable to C and D companies. The foreseeability and reasonableness elements of negigent misrepresntation claims can be used to argue limitations on liability of a design professional. ***

Warranty Claims

Breach of implied warranty means that the design professional failed to "exercis[e] their skills with care and diligence and in a reasonable, non-negligent manner." *Donnelly v. Oberg* 139 Ariz. at 189, 677 P.2d at 1297. The implied warranty does not require that the design professional's work be accurate. *Id.*

The contract language in the services agreement again is critical in regard to whether the contract will be interpreted as providing a higher standard than the ordinary care of warranted work by the design professional. Key terms may be interpreted to raise the design professional's applicable standard of care – when drafting or negotiating contracts be sure to look closely at terms such as "accomplish," "assure," "comply with," "certify," "be responsible for," and the like. Significantly, as discussed below, warranties generally are not covered by professional liability insurance policies. When negotiating the contracts, limiting the expansion of express and implied warranties can be accomplished by including general clauses to indicate that nothing in the agreement is to be constured to provided an express or implied warranty and that the services rendered will be performed in accordance with the standard of care in the industry under similar conditions or generally accepted principles

consistent with normal engeineering or architectural practices. It is important to ensure that all of the contract language, as well as any purchase order provisions, are consistent and that alternative language in the documents does not inadvertently create warranties or other bases for liability.

Fiduciary Duties

Another professional liability cause of action that arises is breach of a fiduciary duty. "A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." Restatement (Second) of Torts § 874, Comment a. Thus, an architect or engineer is under a fiduciary relationship to their clients, such that the architect or engineer is under a duty to act for the benefit of the client within the scope of their work for the client.

Economic Loss Rule

In Arizona, the economic loss rule prohibits recovery under tort unless there is personal injury or property damage. *Carstens v. City of Phoenix*, 206 Ariz. 123, 125-26, 75 P.3d 1081, 1083-84 (Ariz. Ct. App. 2003). It is a judicially created doctrine designed to distinguish between those claims properly brought under contract theories and those brought under tort theories. *Id.* at 2. "In Arizona, the economic loss doctrine has been applied in two categories of disputes: construction defects and products liability." *Id.*

A recent Arizona Court of Appeals case, *Flagstaff Affordable Housing Ltd. Partnership v. Design Alliance, Inc.*, reviewed de novo the issue of whether the economic loss doctrine applies to professional liability claims and held that the doctrine does not apply to professional liability claims. --- P.3d ----, 2009 WL 755285 (Ariz. Ct. App. 2009). The court found that because an engineer or "architect's professional duties arise independently of any contract, the purpose of the economic loss doctrine-maintaining a distinction between tort and contract actions-is not implicated." *Id.* at 3.

The court relied largely on *Donnelly*, which allowed negligence, negligent representation and implied warranty claims, despite the absence of physical injury, holding that "professionals are liable for foreseeable injuries to foreseeable victims which proximately result from their negligent performance of their professional services." *Flagstaff Affordable Housing Ltd. Partnership,* 2009 WL 755285, 3; *Donnelly*, 139 Ariz. at 188, 677 P.2d at 1296. The court explained that although professional liability claims were tort claims, if they "were to limit actions against architects to solely breach of contract in the absence of personal injury or physical harm to property, [they] would be ignoring the origin of the duty to use ordinary skill, care, and diligence. *Id.* They further reasoned that "[a]pplication of the economic loss doctrine in this context would have the effect of eroding this implied duty," and thus rejected applying the economic loss doctrine to professional liability claims. *Id.* Thus because of the nature of a professional's duties to clients, the economic loss doctrine is not applicable. Similarly, "the economic loss doctrine has not been applied to preclude actions against certain other professionals for purely economic damages," including actions against attorneys and accountants. *Flagstaff Affordable Housing Ltd. Partnership,* 2009 WL 755285, 4; *See, e.g., Glaze v. Larsen,* 207 Ariz. 26, 29, ¶¶ 12-13, 83 P.3d 26, 29 (2004) (discussing basic elements of attorney malpractice); *Sato v. Van Denburgh,* 123 Ariz. 225, 599 P.2d 181 (1979) (recognizing tort of professional negligence against accountant and applying two-year statute of limitations requirement applicable to tort claims). Precluding recovery against architects and engineers but not against attorneys and accountants would yield inconsistent results and be against public policy. *Flagstaff*

Affordable Housing Ltd. Partnership, 2009 WL 755285, 4.

A District of Arizona bankruptcy court case, *In re Gosnell Development Corp. of Arizona,* Nos. CV-04-998-PHX-RGS, BK-97-10778-PHX-CGC, partly relying on an unpublished Arizona case, *Pegasus Motion Control L.L.C.I. v. Heil Co.,* addressed whether Arizona's economic loss rule applies to fiduciary duty claims. The court reached the conclusion that because the plaintiff's breach of fiduciary claim arose out of the same set of facts as its breach of contract claim, and because there was no personal injury or property damage, the claim was barred by Arizona's economic loss rule. However, as this case was not directed at professionals performing their professional duties, as in *Flagstaff Affordable Housing Ltd. Partnership* and *Donnelly*, it is unclear whether the economic loss rule would bar a fiduciary duty claim when the sole damage is pecuniary loss for a claim against a design professional as a result of the performance of its professional duties. Based on the holding in *Flagstaff Affordable Housing Ltd. Partnership*, it appears that such a claim would not be barred.

Other states' courts are reaching similar findings as *In re Gosnell Development Corp. of Arizona*. Of note is a recent decision by the Nevada Supreme Court on March 26, 2009, where the court concluded that the economic loss doctrine bars professional negligence claims against design professionals in their services regarding commercial properties when the plaintiffs' damages are purely financial in nature. *Terracon Consultants Western, Inc., et al. v. Mandalay Resort Group, et al.* 2009 WL 790364 (March 26, 2009).

Tips for Avoidance of Claims and Lawsuits

Design professionals should do their upmost to satisfy their clients. Happy clients will be more amenable to resolving conflicts without filing suit. Design professionals may also avoid liability-prone projects in order to try to avoid potential professional liability claims. Sometimes projects can be spotted from the start as "problematic," which may entail a careful evaluation of risks versus benefits to taking on the project. Careful documenting of the file is another way that design professionals can help to protect themselves against professional liability. Finally design professionals should purchase professional liability insurance.

Tips for Responding to Claims and Lawsuits

Should architects or engineers face a professional liability claim they should raise the economic loss rule to potentially bar tort claims where there is no personal injury or property damage. Even though this argument may be unsuccessful based on Donnelly, it is still worth pursuing.

Design professionals faced with a lawsuit should also be sure to raise all applicable statute of limitations and repose arguments.

Filing a notice of non-party at fault may also help to spread the liability among other tortfeasors so as to limit the design professional's liability.

Finally, the architect or engineer may raise arguments based on a non-delegable duty, such that the owner of the project is liable because the duty being asserted, by its very nature, could not be delegated to another party.