

THE BEST-LAID PLANS OF MICE AND MEN OFTEN GO AWRY: LOOKING BACK AND AHEAD

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THE LEGAL TOPICS DISCUSSED IN THIS 2007 SURVEY OF STATE AND FEDERAL CASE LAW ARE OF PARTICULAR INTEREST TO ATTORNEYS WHO REPRESENT DESIGN PROFESSIONALS. JURISDICTIONS WILL OFTEN VARY WITH RESPECT TO THE PARTICULAR APPLICATION OF THESE TOPICS, BUT THESE SUBJECTS ARE REPRESENTATIVE OF RECURRING THEMES. AN UNDERSTANDING OF THESE ISSUES WILL FACILITATE ATTORNEYS' EVALUATION OF THE LEGAL OBLIGATIONS AND POTENTIAL LIABILITY RISKS FOR THEIR DESIGN PROFESSIONAL CLIENTS.

“The best-laid plans of mice and mice often go awry.” This poignant proverb is adapted from a line in the poem “To a Mouse,” by Robert Burns, the national bard of Scotland (perhaps best known for having penned the traditional New Year’s anthem, “Auld Lang Syne”). It concisely encapsulates the notion that, regardless of the precautions taken in planning a project, something may still go wrong. This axiom is particularly true for design professionals, whose precisely-crafted plans, drawings, specifications, and reports are often subjected to countless twists and turns during the course of a construction project. As this survey of 2007 case law reveals, the legal issues which impact design professionals are diverse, challenging, and laden with risk. The lawyer with a solid understanding of those issues can more ably counsel and advocate on behalf of the design professional whose best-laid plans have unfortunately gone awry.

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ECONOMIC LOSS DOCTRINE/NEGLIGENT MISREPRESENTATION

***Plourde Sand & Gravel Co. v. JGI Eastern, Inc.*, 154 N.H. 791 (New Hampshire Supreme Court, 2007)**

The economic loss doctrine is a judicial rule which arises out of the fundamental notion that contract law is more appropriate than tort law to resolve claims for purely economic losses. “Purely economic losses” are those which do not result in personal injury or damage to property (other than the property which is the subject of the contract). In short, the economic loss doctrine gives parties the freedom to allocate the risk of loss and holds them to their agreements. In the absence of this rule, if a party were permitted to sue in tort when a project or venture fails to meet his expectations, that party would potentially obtain a benefit which was never part of the parties’ bargain. In effect, he would have unilaterally re-written the contract.

This case involved a construction project in which a paving subcontractor working on the base for a roadway project hired the plaintiff, a gravel supplier. Once the plaintiff had supplied the gravel, the government entity responsible for the project retained the defendant, an engineering firm, to render a professional opinion concerning whether the gravel met the applicable specifications. After performing tests on the gravel, the engineering firm determined that the gravel comprised “insufficient stone content and excessive fines.”¹ Consequently, the general contractor required the plaintiff to remove and replace the gravel at its own expense. Subsequently, the plaintiff performed its own tests on the original gravel and determined that it actually did meet the applicable specifications.

The plaintiff sued the engineering firm in tort, alleging that it had acted negligently, and that its negligence had caused the plaintiff’s losses, in terms of the cost to remove and replace the original gravel. The defendant filed a motion to dismiss the action, asserting that a plaintiff cannot recover in tort for damages that were purely economic. The trial court agreed, and granted the motion. On appeal, the plaintiff argued that the economic loss doctrine should not apply for two reasons: (1) there was no contract between the plaintiff and the defendant, and (2) there is an exception to the economic loss doctrine for negligent misrepresentation by a party which is “in the business of supplying information.”²

The New Hampshire Supreme Court rejected the first argument summarily, holding that it had never applied such an exception to the economic loss doctrine. However, the Court noted that several jurisdictions have recognized a negligent misrepresentation exception to the doctrine. Nevertheless, the Court observed that the exception is typically limited in application to those for whom the information was “intended” to provide “benefit and guidance,”³ and who accordingly relied on it. In this instance, since the defendant’s only communication about the quality of the gravel was to the government entity which hired it, the defendant did not intend for the plaintiff to rely on that information. The Court expressed an unwillingness to expand the negligent misrepresentation exception to the economic loss doctrine “to include a scenario where reliance by *anyone* directly or indirectly involved may be imputed to the plaintiff so as to maintain a cause of action.”⁴

***Association of Apartment Owners of Newton Meadows v. Liu Construction, Inc.*, 115 Haw. 232 (Supreme Court of Hawaii, 2007)**

The plaintiff Homeowners' Association filed a suit for the defective design and construction of a condominium project against numerous parties, including the developer, general contractor, and soils engineer. The plaintiffs alleged damages including cracked foundations, attributed to ground settlement, and defective floor slabs. 23 parties filed motions for summary judgment on various grounds, all of which were granted by the trial court. Among other reasons, the trial court determined that the allegedly defective concrete slabs had damaged nothing other than the slabs themselves, such that only purely economic losses were alleged, and the plaintiffs could not recover in tort.

The Supreme Court of Hawaii agreed. The court stressed the importance of not "providing open-ended tort recovery to parties who have negotiated a contractual relationship."⁵ However, the plaintiffs argued that the economic loss doctrine should not apply to its claim of negligent misrepresentation against the soils engineer. They argued that the Court had earlier recognized an exception to the doctrine for "information negligently supplied for the guidance of others"⁶ as codified in the RESTATEMENT (SECOND) OF TORTS § 552. However, the Court responded by observing that several jurisdictions which have considered this issue in the context of construction litigation have concluded that damages based purely on economic loss are not available to a party in privity of contract with a design professional. The Court agreed with that reasoning, and held that only contractual remedies were available to the plaintiff, which had a contract with the soils engineer.

Generally addressing the plaintiffs' negligence claims, the Court stressed that "a duty to use ordinary care and skill is not imposed in the abstract."⁷ Rather, it is imposed where a party's negligence impacts another's safety of freedom from physical harm. In contrast, if the damages claimed related only to "mere deterioration or loss of bargain,"⁸ a plaintiff's only complaint is that the subject of a contractual agreement did not meet his anticipated standard of quality. In such an instance, that standard must be defined by "that which the parties have agreed upon"⁹ in their contract.

The Court concluded that "damages sought, in tort, for economic losses from a defective building are just as offensive to tort law as damages sought for economic losses stemming from a defective product."¹⁰ In both instances, "the resulting failure to receive the benefit of the bargain is a core concern of contract, not tort, law."¹¹ Additionally, the Court was concerned about imposing a "societally imposed duty"¹² upon those involved in the design and construction of structures, when the duty should be defined only by the contractual relationships of the parties. This was true, the Court ruled, even if the allegations concerned violations of statutes—such as building codes—so long as only purely economic losses ensue.

ECONOMIC LOSS DOCTRINE/THIRD-PARTY BENEFICIARY

***F.H. Paschen/S.N. Neilson, Inc. v. Burnham Station, L.L.C.*, 372 Ill.App.3d 89 (Appellate Court of Illinois, 2007)**

The plaintiff was an investor who purchased a membership interest in a limited liability company (LLC) created for the purpose of purchasing and developing certain real property for the design, construction, and sale of condominiums and town homes. The LLC was composed of one individual and a company named JDL Development (JDL). The defendant is an architectural firm which entered into a contract with JDL and produced all architectural and design drawings, plans, and specifications for all structures to be built in connection with the subject project. Unfortunately, the venture “did not go as planned,”¹³ and the plaintiff lost every dollar of his investment. Consequently, he sued the LLC and the architect, among others involved with the project.

With respect to the architect, although the plaintiff and the architect had no contractual relationship, the plaintiff alleged a cause of action for “derivative breach of contract”¹⁴ and professional negligence, claiming that the defendant did not produce adequate drawings, plans, and specifications for the project, resulting in “losses of many millions of dollars.”¹⁵ The defendant filed a motion for summary judgment, arguing that the professional negligence count was barred by the economic loss doctrine, and the contract at issue was solely between itself and JDL. Accordingly, the plaintiff was not an intended third-party beneficiary of the contract. The trial court concurred, and granted the motion for summary judgment.

On appeal, the Appellate Court of Illinois stated that the intent of the parties determines whether someone who is not a party to the contract is a third-party beneficiary. It is insufficient that the third party “will only reap incidental benefits from the contract.”¹⁶ Rather, the contracting parties must have “manifested an intent to confer a benefit on the third party.”¹⁷ The law will presume that the parties did not intend a third party to be the beneficiary of a contract, and the evidence which might negate that presumption must be “so strong as to be practically an express declaration.”¹⁸ In this instance, the plaintiff presented no such evidence. In addition, the Court noted that, although the LLC ultimately paid the architect’s invoices, the architect submitted all those invoices to JDL. In addition, JDL and the architect had a pre-existing contractual relationship which pre-dated the formation of the LLC.

With respect to the claim of professional negligence, courts in several jurisdictions have created an exception to the economic loss doctrine for actions involving professional malpractice. Some courts apply the exception only to professionals such as doctors, lawyers, and accountants, while others apply the exception broadly, to include design professionals. Here, the Court noted that the Supreme Court of Illinois has previously held that no exception to the economic loss doctrine should be made for claims against a design professional under a theory of the negligent design of a building, since such actions concern the parties’ bargained-for expectations concerning the ultimate product. Those matters should appropriately be addressed solely by contract law.

LIMITATION OF LIABILITY

***Lanier at McEver, L.P. v. Planners & Engineering Collaborative, Inc.*, 285 Ga.App. 411 (Court of Appeals of Georgia, 2007)**

Many design professional agreements contain a limitation of liability clause. Such a clause does not shield a design professional from liability in the event of a professional error; it merely caps the potential financial exposure of the design professional in the event such liability is found to exist.

Here, the owner/developer of an apartment complex constructed the complex in accordance with the plans and specifications of the defendant, a professional engineering firm. Less than a year after completion, the owner noticed settling and cracking pavement, erosion, and subsidence. He determined that the damages were attributable to the negligent design of the storm drain system, and brought suit against the engineering firm. The engineering firm brought a motion for partial summary judgment in which it asserted that under the terms of the parties' written contract its potential damages were limited to the sums paid by the owner to the engineering firm for services rendered in connection with the project. The owner alleged potential damages in excess of \$500,000, but the total amount it had paid for the engineer's services was \$80,514.

The owner contended that the limitation of liability provision was against public policy, because the engineer's work "necessarily impacts upon public safety and welfare,"¹⁹ and one who provides such services should not be shielded "from the full consequences of its failure to exercise reasonable care and skill in the performance of its practice."²⁰ The Court of Appeals disagreed.

The Court noted that parties are generally free to enter into a contract on any terms, unless such terms are prohibited by statute or public policy. The presumption is that the contract is valid unless the affront to public policy is clear, based upon a declaration of the legislature, or if the contract was made "for the purpose of effecting an illegal or immoral agreement or doing something which is in violation of the law."²¹

The plaintiff argued that this case was similar to one in which the Georgia Supreme Court had struck down, as against public policy, an exculpatory clause contained in a professional services contract entered into between a dental clinic and its patient. In that case, the Georgia Supreme Court had ruled that the clause entirely excused the dentist from the obligation to exercise reasonable care, which violated the public policy of maintaining health and safety. However, the Court of Appeals found the present case distinguishable, because the engineering firm was not relieved from all liability. Rather, the contract simply limited the extent of that liability to the amount paid under the contract. Since the provision did not completely exculpate the engineering firm from liability, the Court found that the engineer still had the incentive to exercise care in the practice of its profession, and therefore the clause was properly enforced.

GOOD FAITH SETTLEMENT/LIMITATION OF LIABILITY

***TSI Seismic Tenant Space, Inc. v. Superior Court*, 149 Cal.App.4th 159 (California Court of Appeal, 2007)**

Litigation involving allegations of construction and/or design defects often involves numerous parties, and many of those parties seek indemnity and/or contribution from others involved in the design and/or construction of the project at issue. Some of those named as defendants or cross-defendants in such litigation may hesitate to pay any sums in a non-“global” settlement of those claims out of a concern that a non-settling party involved with the project might later seek to recover additional damages from the settling party or parties. Many jurisdictions, in the interest of promoting settlement under such circumstances, have instituted the concept of the “good faith” settlement. In California, if a court determines that a settlement was made in good faith, any further claims against the settling party for equitable (non-contractual) contribution or indemnity based on comparative negligence or comparative fault are barred. In addition, a finding that the settlement was made in good faith reduces the claims against non-settling defendants.

In this action, the owner of an apartment project brought an action for defective construction and design against a geotechnical engineer, general contractor, and structural engineer, and the general contractor cross-complained against the geotechnical engineer. Although the owners’ experts alleged that the owners’ damages—which were incurred due to the allegedly negligent services by the geotechnical engineer—exceeded \$3.4 million, the geotechnical engineer’s contract with the owner contained a clause that limited its liability to the owner to \$50,000. The owner and the geotechnical engineer accordingly entered into a settlement for that amount, but the general contractor and structural engineer argued that the settlement was not made in good faith because it was “grossly disproportionate” to the geotechnical engineer’s share of liability. Based upon the limitation of liability provision in the contract, the trial court found that the settlement had been made in good faith.

The Court of Appeal disagreed. The Court noted that a finding that a settlement was made in good faith must be based upon an examination of several factors. Although one of those factors is the allegedly culpable party’s potential liability to the plaintiff, a court must also contemplate its potential liability to “other parties alleged to be responsible for the same injury.”²² Accordingly, the Court determined that the lower court had abused its discretion by only considering what the geotechnical engineer would pay to the owner as a consequence of the contractual limitation of liability. None of the other parties had agreed to that limitation, and the Court held that the geotechnical engineer’s potential liability to those other parties must also be taken into consideration.

Additionally, the Court found that, although the settlement itself was not intended to harm the non-settling defendants, the decision to seek a finding of good faith manifested such an intent. The geotechnical engineer had no need for such a finding, since the owner had agreed to indemnify it for any losses suffered

in excess of \$50,000. However, the owner would have substantially benefitted from such a finding, since it would then be free to seek the entire balance of its alleged damages from the non-settling parties, without any offset for any amounts found to be attributable to the services of the geotechnical engineer. Accordingly, the Court directed the lower court to vacate its ruling.

GOOD FAITH SETTLEMENT

***Willdan v. Sialic Contractors Corporation*, 158 Cal.App.4th 47 (California Court of Appeal, 2007)**

A city decided to refurbish a boulevard which had fallen into disrepair and retained an engineering consulting firm to design the roadway, prepare construction documents for street improvements, and provide construction management services. The city also contracted with other consultants and with the general contractor. During construction, several serious problems caused projected construction costs to increase by over \$6 million. The general contractor submitted claims to the city for the increased costs, which the city disputed. The parties participated in multiple mediation sessions, one of which was also attended by the engineering firm, but the firm was instructed not to return for further sessions. The city and general contractor eventually agreed to a settlement, which included an agreement by the general contractor to release all claims against the engineer regarding the project, except for claims arising out of enforcement of the settlement agreement, breach of warranties, and latent defects. The settlement agreement also stated that it would not affect any claims between the city and the engineering firm.

Over a year later, the city filed an action against the engineering firm for breach of contract, express contractual indemnity, implied contractual indemnity, and negligence, alleging improper design of the roadway and inaccurate plans. The engineering firm filed a cross-complaint against the city and the soils engineer, and then later sought to amend the cross-complaint to name the general contractor as a cross-defendant, alleging claims for indemnity and declaratory relief. Nearly two years later (just weeks before trial was scheduled to commence), the general contractor moved the court for a determination that its prior settlement with the city had been made in good faith, thereby barring the engineering firm's indemnity and declaratory relief actions. It contended that, although the original dispute had at first concerned only issues relating to increased construction costs, during mediation a number of construction defect allegations were made, and the settlement purportedly resolved those claims as well. On the first day of trial, the trial court granted the motion, and dismissed the engineering firm's cross-complaint against the general contractor. At trial, the city obtained a judgment for over \$5 million against the engineering firm, and the engineering firm recovered nothing on its cross-complaint.

On appeal, the engineering firm argued that the trial court should not have dismissed its cross-complaint because the settlement agreement expressly excluded claims related to latent defects. However, the general contractor argued that there was no allegation of latent defects attributable to itself, only latent

deficiencies attributable to the engineering firm. The Court held that, regardless of the manner in which the city's complaint was framed, the engineering firm should not have been precluded from arguing that those latent deficiencies were actually attributable to the general contractor.

Alternatively, the general contractor argued that the engineering firm's cross-complaint was properly dismissed because the engineering firm's liability to the city was based on its breach of contract, not negligence. The Court agreed that there can be no indemnity based upon breach of contract, but noted that the city had proceeded to trial on both breach of contract and professional negligence causes of action, and the presumption is that the jury found merit in both theories. Therefore, the Court ruled that the engineering firm's cross-complaint should not have been dismissed.

DISCLAIMER OF LIABILITY

Lyndon Property Insurance Co. v. Duke Levy and Associates, LLC, 475 F.3d 268 (United States Court of Appeals, Fifth Circuit, 2007)

A water and sewer district entered into a contract with a contractor to construct a sewage collection system and a contract with a professional engineer to serve as engineer of record for the project. The project did not go as planned and the district fired the contractor and hired another to complete the job. The original contractor's surety sued the engineer for negligence, breach of contract, and breach of warranty, alleging that it had paid over \$900,000 to fix and test work done by the original contractor which had been inspected and approved by the engineer.

The trial court granted the engineer's motion for summary judgment based upon an exculpatory clause contained in the general conditions of the construction contract. That clause stated that no decision made by the engineer "in good faith"²³ shall give rise to any duty or responsibility on the part of the engineer to the contractor, or to the contractor's surety.

The Court of Appeals observed that a design professional owes a duty to exercise ordinary professional skills and diligence, and that such duty is non-delegable. The Court also noted that "the law does not look with favor on contracts intended to exculpate a party from the liability of his or her own negligence."²⁴ The Court also stated that courts are even less inclined to look with favor upon such provisions "when a project implicates the public interest."²⁵ Further, the Court held that the district had no power to "bargain away" the engineer's potential duty to a surety that would "step into the District's shoes."²⁶ Therefore, the Court found the exculpatory clause unenforceable.

Alternatively, the engineer argued that the surety's action was barred by the economic loss doctrine. However, the case was governed by Mississippi law, and the Court noted that in Mississippi (unlike other jurisdictions with a broader application of the economic loss doctrine) the economic loss doctrine had never been applied outside the context of products liability. Therefore, the Court reversed the trial court's entry of summary judgment.

CERTIFICATE OF MERIT

***Dockens v. Runkle Consulting, Inc.*, 285 Ga.App. 896 (Court of Appeals of Georgia, 2007)**

Some states mandate that an action alleging professional negligence and/or malpractice against a design professional must be accompanied by a “certificate of merit” certifying that there is a valid basis for the action. In Georgia, the complaint against a design professional must be filed with an affidavit “of an expert competent to testify,” which “shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.”²⁷ The affidavit is required whenever “the claim is based upon the failure of the professional to meet the requisite standards of the profession.”

The plaintiff, a licensed realtor, purchased real property which was located near a timber retaining wall. The defendant is an engineer and the president of a firm which provides structural engineering, inspections, and other services to builders and developers. One such client hired the defendant to inspect the subject wall and determine whether it complied with the applicable building codes and generally accepted engineering practices. The defendant issued a letter to his client in which he opined that the construction of the wall “is acceptable, and will provide adequate resistance from sliding and overturning.”²⁸

Before the plaintiff purchased the subject property, she observed that soil in the vicinity of the retaining wall appeared to be soft. She notified the builder, who responded that it had been inspected by an engineer and certified. There is no evidence that the plaintiff herself ever had any contact or communication with the defendant before close of escrow on the property. Approximately four years later, a portion of the retaining wall collapsed, resulting in damage to the plaintiff’s property. The plaintiff filed a pro se complaint, alleging causes of action for fraud and negligence against the defendant. The defendant moved for summary judgment on the grounds that the action was barred by applicable statutes of limitation, and that the negligence cause of action was not accompanied by the required affidavit.

The plaintiff contended on appeal that her action was for “ordinary” negligence,²⁹ which the Court of Appeals rejected on its face. She also argued that she should be exempt from the requirement as a pro se litigant. However, although the Court recognized the “perils attendant pro se litigation,”³⁰ it found no basis for creating an exemption for the certificate of merit requirement, and upheld the dismissal of the plaintiff’s action.

***Merlini v. Gallitzin Water Authority*, 934 A.2d 100 (Superior Court of Pennsylvania, 2007)**

The plaintiff filed a complaint against a water utility, a contractor, and an engineer, alleging that the contractor, working under contract with the utility, and under the direction and supervision of the engineer, had constructed a water line across her property without an easement or her permission. The engineer petitioned to dismiss the complaint against him on the ground that the plaintiff had not filed a certificate of merit within 60 days of filing her

complaint, as required by a Pennsylvania statute. The statute in question required a certificate of merit for any liability claim “based upon an allegation that a licensed professional deviated from an acceptable professional standard.”³¹ The plaintiff opposed the petition by arguing that her cause of action was based upon “simple negligence,”³² not professional negligence, and that no certificate of merit was therefore required. The trial court concurred with the engineer, and granted the engineer’s petition.

The plaintiff’s position was that all parties, regardless of whether they are professionals, owe a duty not to trespass on the property of another. The engineer, in contrast, argued that the plaintiff’s complaint raised the issue of whether the engineer had properly designed the placement of the water line within an existing right-of-way, and that such a determination is an integral part of the professional services the engineer was rendering in connection with the project.

The Court discussed the difference between ordinary negligence and professional negligence. To prove a claim of ordinary negligence, a plaintiff must show that the defendant owed her a duty of care, that the defendant breached that duty, that the plaintiff suffered actual harm, and that there was a causal connection between the breach of duty and the harm. In a professional negligence action, the breach of duty element requires a showing “that the defendant’s conduct fell below the relevant standard of care applicable to the rendition of professional services at the time.”³³ Typically, such a determination requires expert testimony, because the negligence of a professional “encompasses matters not within the ordinary knowledge and experience of laypersons.”³⁴

The Court concluded that although the engineer’s actions occurred during his performance of professional services, his alleged breach of duty did not “raise questions of professional judgment beyond the realm of common knowledge and experience.”³⁵ Rather, the duty he owed not to trespass on the plaintiff’s property is a duty owed by any third party to any property owner. Although the Court conceded that expert testimony may be necessary to establish the property rights at issue, it concluded that no expert testimony was necessary to determine whether those rights had been breached. Therefore, it held that only ordinary negligence was at issue, and affirmed the trial court’s ruling.

CERTIFICATE OF MERIT/ECONOMIC LOSS DOCTRINE

McElwee Group, LLC v. Municipal Authority of the Borough of Elverson, 476 F.Supp.2d 472 (United States District Court, Eastern District of Pennsylvania, 2007)

The plaintiff general contractor brought suit against a municipality and an engineering firm. The municipality entered into contracts with the engineering firm and the plaintiff to perform, respectively, engineering services and construction work related to the draining of a lagoon and the construction of a wastewater facility. The plaintiff and the engineering firm had no contractual relationship with each other. The plaintiff claimed that both defendants

fraudulently misrepresented the complexity of the drainage and construction project. For example, the plaintiffs alleged that the defendants represented that the plaintiff would have to remove only 100 tons of sludge from the lagoon, whereas the plaintiff ultimately had to remove over 4,400 tons of sludge.

The only cause of action alleged against the engineering firm was for misrepresentation/fraud, which the engineering firm moved to dismiss on the grounds that: (1) the plaintiff failed to comply with Pennsylvania's certificate of merit requirement; and (2) the plaintiff's claim is barred by the economic loss rule. The district court found no merit to the first contention because the certificate of merit requirement, by its own terms, applies only to negligence in the performance of one's professional duties (i.e. professional malpractice). The Court found no authority for the proposition that a certificate of merit was required for an alleged intentional tort such as fraud.

With respect to the engineering firm's argument concerning the economic loss doctrine, the Court first observed that "[t]he contours of the economic loss doctrine in Pennsylvania are, to put it mildly, presently unclear."³⁶ The Court noted that there was a split of authority in Pennsylvania over whether the economic loss doctrine applies to intentional torts. However, one aspect of the doctrine's application in Pennsylvania which the Court found to be clear was that it did not preclude actions for negligent misrepresentation brought against a party who "supplies false information for the guidance of others in their business transactions."³⁷

The Court held that the engineering firm should reasonably have known that the general contractor would rely upon its engineering plans, and that the firm was therefore liable for any misrepresentations in those plans. The Court held that this conclusion applies both to claims for negligent misrepresentation, and "even more forcefully"³⁸ to claims of intentional misrepresentation/fraud. It therefore denied the motion to dismiss.

SUIT AGAINST PUBLIC ENTITY

***Katsura v. City of San Buenaventura*, 155 Cal.App.4th 104 (California Court of Appeal, 2007)**

Under the common law, a party can often recover the value of services performed for another which are not expressly the subject of a written contract, pursuant to the doctrine of quasi-contract, or "quantum meruit," a Latin term meaning "as much as is deserved." The concept behind this doctrine is that no one should be unjustly enriched as a result of work performed on their behalf. It often arises in the context of construction projects when services are rendered for a project which was not specified in the contractual agreement(s). Alternatively, the party providing the services often sues on an "open book account," which refers to a contractual agreement which has been subsequently modified by oral agreement or the conduct of the parties. Cumulatively, these doctrines are often referred to as "common counts". These doctrines, however, are typically inapplicable to suits against public entities.

The plaintiff, a consulting engineer, entered into a written contract with the defending city. The contract specified a maximum amount the city would pay

for the consultants' services, and stated that any modifications could only be made with the written mutual consent of the parties. It also stated that any "special work" required a written notice to proceed, executed by the city engineer. The city paid several of the engineer's invoices, but refused to pay his final invoice on the grounds that it both exceeded the contract's stated maximum price and included services which were not expressly authorized by the contract. The plaintiff brought suit for common counts, alleging the contract had been orally modified to authorize the special work. He conceded that he did not follow the contractual procedure for obtaining authorization for special work, but claimed that a city engineer and one of the city's outside consultants requested him to perform the extra work.

The defending city is a charter city, and the city's charter contains a provision stating that the city shall not be bound by any contract, unless that contract was in writing, signed by an officer designated by the city council. The Court of Appeal noted that prior California case law has held that a charter city may not perform any act in conflict with its charter, and any such act is void. More broadly, the Court stated that, with respect to all municipal contracts, "a contract made in disregard of the prescribed mode is unenforceable."³⁹ Further, anyone who deals with a public agency is "presumed to know the law with respect to any agency's authority to contract."⁴⁰

Finally, the Court concluded that private parties are prohibited from suing public entities under any theories based upon quantum meruit, because such doctrines are "outweighed by the need to protect and limit a public entity's contractual obligations."⁴¹ In short, public entity contracts which vary from the applicable statutes "are beyond the power of the city to make."⁴² Therefore, the Court denied the plaintiff any recovery for his additional services.

BREACH OF CONTRACT/UNJUST ENRICHMENT

***Rambo Associates, Inc. v. South Tama County Community School District*, 487 F.3d 1178 (United States Court of Appeals, Eighth Circuit, 2007)**

The defending school district was considering building a new school and refurbishing several older buildings. The defendant's superintendent contacted various architectural firms to determine whether they would be interested in conducting a study to determine what new construction might be needed and what could be done to put the existing buildings in a better condition. The plaintiff was one such firm, and the plaintiff made a presentation to the district's board about its services and business model. Eventually, the parties entered into a contract whereby the plaintiff would perform the study, and to assist the district in passing a bond issue to fund a new building. The defendant contended that the contract was limited to that scope, but the plaintiff contended that the contract obligated the school district to either use the plaintiff's architectural services through the completion of any implemented project which was proposed in the study, or to compensate the plaintiff for the reasonable value of all its services.

The Court of Appeals described the contract as being "far from a model of clarity,"⁴³ consisting of a single title page, and two attachments: one describing

the work included in the study and the fees for that work, and the other a standard form contract between architect and owner, which the parties had modified. The two attachments were frequently inconsistent with each other, including a description of the plaintiff's services for the study in Attachment A as "Phase One," which was not reflected in Attachment B. Attachment A also referred to the plaintiff's fee "as a retainer for [the plaintiff's] work as outlined through presentation of study to the board," but Attachment B made no such reference. The description of the plaintiff's scope of services differed in each attachment, and Attachment B referred to the plaintiff as "the Architect," whereas Attachment A called the plaintiff "the Educational Facilities Consultant."⁴⁴

The plaintiff and the defendant worked together in an effort to get the bond measure passed, but voters rejected that measure three years after the contract was executed. The plaintiff subsequently performed substantial services for the defendant developing a financing plan for the proposed school and assisting the defendant in another effort to pass a bond issue. However, the bond issue was again rejected, and the district's board decided not to continue working with the plaintiff and began negotiating an agreement with another architect and a construction manager. The plaintiff sued the defendant to recover the value of services rendered, but the trial court found there was ambiguity in the contract as to the scope of services authorized, and concluded that the evidence showed only an agreement by the defendant to authorize "the Phase One work and services."⁴⁵ Further, since Attachment B to the contract only authorized \$2,500 compensation for the defendant's efforts in obtaining passage of the bond issue, the court found the defendant was not entitled to additional compensation.

The Court of Appeals agreed that the written contract only obligated the defendant to hire the plaintiff to perform the study. It noted that the signature page endorsed "the work outlined in Attachment A,"⁴⁶ and did not mention the additional scope described in Attachment B. The Court noted that, although the plaintiff subsequently performed services outside the scope of Attachment A, there was no documentation of "either party's concern that [the plaintiff] may have exceeded the scope of work contemplated by Phase One,"⁴⁷ nor had anyone on behalf of the plaintiff "ever said that Phase One was complete or that services being requested by the Board fell outside of Phase One."⁴⁸ Accordingly, the Court agreed with the Trial Court that the parties had not negotiated a fee for the plaintiff's additional services, and that the plaintiff had merely provided those services in the hope that the bond issue would be passed and the plaintiff would be selected as the architect for the new school.

The plaintiff's final contention—that it was entitled to recover based on quasi-contract and unjust enrichment—was only partially rejected by the Court. It stated that quasi-contractual recovery is barred when allowing such a recovery "would conflict with a specific provision of an express contract."⁴⁹ The Court concluded that since Attachment B specified a fee to compensate the plaintiff for its efforts to obtain passage of a bond measure, any additional recovery for services of that nature would conflict with the express terms of the parties' contract. However, the Court noted that the plaintiff also performed additional services which were not related to a bond measure, and held that the

plaintiff could recover for those services under the doctrine of quantum meruit, so long as the plaintiff could prove the value of those services. The Court therefore remanded the case to the trial court for a determination of the amount the plaintiff could recover for its additional services.

CONTROL OF PREMISES

***Fernandez v. CMB Contracting*, 487 F.Supp.2d 281 (United States District Court, Eastern District of New York, 2007)**

The plaintiff, an employee of a general contractor, was performing work relating to the construction of a second-floor addition to a single-family residence. In the course of that work, the plaintiff was laying out ceiling joists at the top of a wall when he fell, resulting in injuries to his neck and back. The plaintiff sued his employer, the owner of the residence, and the architect (hired by the owner) who prepared the plans for the addition. The plaintiff contended that he was not provided with the proper safety equipment for the job, including a scaffold, and alleged causes of action for both negligence and the violation of statutory safety requirements.

The architect moved for summary judgment on the grounds that he did not supervise, direct, or control the work at the premises. The District Court agreed, noting that the undisputed evidence demonstrated that the architect's only involvement with the project was to provide design services, and that he did not perform any supervision nor exercise any control over the construction work. Under New York law, all contractors, owners, "and their agents" involved in the construction or demolition of buildings, or performing any excavation in connection with such work, are protected from liability based upon failure to provide a safe workplace, so long as such parties did not "direct or control work"⁵⁰ at the premises in question.

Since a party cannot defeat a motion for summary judgment based upon "unsupported assertions,"⁵¹ the Court held that the architect's summary judgment motion was properly granted. For the same reasons, the Court reasoned that the architect was also entitled to summary judgment on the property owner's cross-claim for indemnity and contribution.

DUTY TO NON-CLIENT

***27 Jefferson Avenue, Inc. v. Emergi*, 18 Misc.3d 336 (Supreme Court, Kings County New York, 2007)**

The plaintiff property owner brought suit to recover for damages allegedly sustained to its building during the construction of a new building on an adjacent lot. The defending architect entered into a contractual agreement to provide architectural services in connection with the new building project, including filing plans with, and obtaining a permit from, the New York City Department of Buildings to conduct excavation operations at the premises. Although the plans called for the new building's footings to be aligned with and at the same depth of the footings in the plaintiff's building, the plaintiff alleged the excavation for those footings was made below the level of the plaintiff's

footings, which resulted in settlement.

The defendant moved for summary judgment on the grounds that: (1) he owed no duty of care to a non-client, (2) that his services were not the proximate cause of the plaintiff's alleged damages, and (3) he did not perform or supervise any construction. The Court concurred that the architect did not contractually agree to supervise or inspect the construction, or to exercise control over the construction. However, the architect admitted that he "self-certified" the project, meaning that he certified to the Department of Buildings that the plans he prepared and submitted complied with "applicable laws, including the rule of the Department of Buildings,"⁵² which the Court found to include the requirements related to underpinning adjacent buildings. Therefore, the Court concluded that the architect had certified that no underpinning was required for this project since a section of the Administrative Code deals with construction that affects the support of adjacent buildings and states that "the person who causes such excavation to be made shall . . . preserve and protect from injury any adjoining structures."⁵³ The Court concluded that, by certifying that no underpinning was necessary, he undertook a duty not only to the Department of Buildings, but to adjacent property owners for any injury they suffered due to failure to provide proper underpinning.

The defendant also contended that even if underpinning was required, he was not liable because he was never notified of the deviation from his plans. The Court confirmed that the defendant would not be liable if he had no knowledge of the deviation. However, the Court noted that the defendant had signed off on a report indicating that he had completed a subgrade inspection. The Court reasoned that since the subgrade inspection necessarily occurred after the excavation was performed, the defendant would have observed that the excavation deviated from his plans. Therefore, the Court concluded that he either falsely certified that he performed the inspection, or falsely certified that the inspection conformed to his plans such that no underpinning was required. The Court accordingly denied the motion to dismiss.

ACCRUAL OF ACTIONS/RES JUDICATA

***Kizer v. Meyer, Lytton, Alen & Whitaker, Inc.*, 228 S.W.3d 384 (Court of Appeals of Texas, 2007)**

Causes of action are governed by various statutes of limitation which specify a period of time beyond which a lawsuit cannot be filed. "Accrual" refers to the commencement of such limitation period, generally identified by a particular event which "starts the clock running." In many jurisdictions accrual of defective construction or defective design cases are governed by the "discovery rule," under which the applicable statutes of limitation do not accrue until the owner of the property in question discovers (or reasonably should have discovered) the nature of the damage to his property. *Res Judicata* is a legal doctrine under which issues that have been conclusively litigated cannot be re-litigated in a subsequent action.

The plaintiff, a homeowner, discovered extensive cracks in the tile flooring of his home and filed a breach of warranty action in 2001 against the defendant, a

structural engineer who had designed the foundation of the house. The plaintiff's theory was that the engineer had neglected to install a "capping slab" upon the foundation.⁵⁴ The matter went to trial, and a jury found no liability on the part of the engineer. In 2004, the plaintiff discovered additional cracking in the exterior rock, sheetrock, crown molding, and wall tile of his house. He sued the structural engineer, once again alleging negligence and breach of contract relating to the overall design of the home's foundation. The defendant moved for summary judgment on the grounds that: (1) the plaintiff's causes of action were precluded by the applicable statutes of limitation, and (2) the plaintiff's claims were barred under the doctrine of res judicata. The trial court granted summary judgment on both grounds, and the plaintiff appealed.

The plaintiff contended that he had no knowledge that the alleged design defects concerning the foundation went beyond the lack of the capping slab until a consulting engineer he retained rendered those opinions in March, 2004. Accordingly, he contended that the statutes of limitation for the present causes of action did not accrue until that date, pursuant to the discovery rule. The Court of Appeals concluded that the discovery rule does not "linger" until a potential plaintiff learns of all actual causes of his damage.⁵⁵ Rather, the clock starts running even if he does not know the specific cause of the damage, who caused it, or its full extent. Further, the discovery rule imposes a duty of reasonable diligence upon a plaintiff to seek to discover any act or omission which caused his damages. Accordingly, the applicable limitations period accrued in 2001, not 2004. However, although the Court ruled that the plaintiff's negligence claim was barred, his breach of contract action, which was governed by a longer four-year limitations period, was not.

With respect to the res judicata argument, the Court held that the plaintiff's breach of contract action was not litigated in the prior action. It compared the allegations in the pleadings filed in each action and determined that although both actions involved allegations regarding the design of the foundation, the prior breach of warranty claim and the present breach of contract claim "are distinct and require proof of different elements."⁵⁶ Since res judicata only bars litigation of claims which were actually brought previously—and not those which could have been brought—the Court permitted the breach of contract action to proceed.

ACCRUAL OF ACTIONS

***Grimme v. Twin Valley Community Local School District Board of Education*, 173 Ohio App.3d 460 (Court of Appeals of Ohio, 2007)**

The plaintiffs are an elementary school teacher and her husband. The teacher noticed a persistent and intense odor in her classroom and she and her students started to experience health problems. She documented the odors and symptoms in a journal. After she complained to the school district several times, it hired an environmental firm to perform air-quality tests in the classroom. The school later announced at a school board meeting that there was a Freon leak and the school undertook remedial measures. Over a year later, the school contended there were design and construction defects in the school building and

the plaintiffs filed suit against the district and others, including an architectural firm, general contractor, and mechanical contractor. Those parties each filed separate motions for summary judgment on the grounds that the suit was untimely, and after each motion was granted by the trial court, the plaintiffs appealed.

The Court of Appeals of Ohio noted that the statute of limitations for a personal injury action is two years and that Ohio utilizes a version of the discovery rule. The plaintiffs argued that the statute of limitations did not begin to run until the school teacher connected her health problems to the source of the odor in her classroom, which they contended did not occur until the night of the school board meeting when the Freon leak was announced. Alternatively, they argued that the statute did not begin to run until the school teacher's doctor advised her "that her symptoms were consistent with defective building construction."⁵⁷ The defendants, in contrast, argued that the statute began to run much earlier, at least as early as the date she began her journal entries.

The Court of Appeals further stated that under the Ohio version of the discovery rule, the plaintiff must both be aware of her injury and its cause (or reasonably should have known). Prior Ohio decisions held that it is not necessarily sufficient to merely suspect the cause. The teacher's journal entries revealed that she was aware at that time of a link between the odors and her injuries, and suspected that the ventilation system was the source of the odors. However, the Court concluded that those suspicions were not confirmed until the date of the school board meeting. Therefore, the Court held that the statute of limitations had not accrued until that later date, and reversed the trial court's summary judgment orders.

STATUTE OF REPOSE

***Daidone v. Buterick Bulkheading*, 191 N.J. 557 (Supreme Court of New Jersey, 2007)**

Although similar to a statute of limitation in that it defines a deadline by which an action must be brought, a statute of repose applies an "ultimate" deadline for an action, regardless of when a plaintiff discovered his or her damages. An action which would otherwise be timely under a statute of limitation may therefore still be barred by a statute of repose. Typically, for construction/design defect suits, states have established statutes of repose which run from the date of substantial completion of the subject project. In New Jersey, as in many states, the statute of repose for such actions is ten years.

The plaintiffs, owners of a single family home who acted as their own general contractor, experienced settlement problems approximately five years after they moved into their home. They did not seek expert analysis of the problem until two years later, and undertook repairs which were completed the year afterward. Two years later, they sued the architect who designed their home and the subcontractor who installed the pilings for the home's foundation. As of the date the complaint was filed, more than ten years had elapsed since both the architect and subcontractor had performed their respective design and construction services on the property, but less than ten years had passed from

the date the certificate of occupancy had been issued. The New Jersey statute which established the statute of repose for deficient design or construction of real property stated that no action may be brought “more than 10 years after the performance or furnishing of such services and construction.”⁵⁸

The Supreme Court of New Jersey stated that the issuance of the certificate of occupancy could potentially be the date upon which the statute of repose commenced to run, but only if “the design and construction services provided continue up to and including”⁵⁹ that date. However, if those services were completed at a prior date, the statute of repose would begin running at that earlier date.

The plaintiffs argued that several New Jersey statutes had expressed a strong public policy favoring the protection of homeowners, and additionally that the statute of repose was impermissibly vague because it did not create “a uniform, indisputable date”⁶⁰ from which the statute of repose commenced to run. The Court rejected those arguments, explaining that a court must construe a statute as it is written, so long as it is unambiguous. It found the Legislature’s statutory language that the statute runs from “the performance or furnishing of such services and construction”⁶¹ to be clear and subject to only one interpretation, and it affirmed the lower court’s dismissal of the plaintiff’s action.

ACCRUAL OF ACTIONS/WAIVER OF SUBROGATION PROVISION

***Great Northern Insurance Co. v. Architectural Environments, Inc.*, 514 F.Supp.2d 139 (United States District Court, District of Massachusetts, 2007)**

The plaintiff, an insurance company, paid claims related to a roof fire which broke out in a building owned by its insured. The plaintiff brought a subrogation action against various entities involved in the design and construction of the renovations to the building, including a mechanical and electrical engineer and an architectural firm which served as the construction manager. The plaintiff contended that the fire was able to ignite and spread rapidly due to the presence of an insulation and weatherproofing material called Alumaguard in the rooftop duct work, which was allegedly prohibited by the Massachusetts Building Code.

The consulting engineers moved for summary judgment on the grounds that the suit was barred by the applicable six-year statute of repose. The primary issue concerned when the statute of repose commenced to run. The applicable statute stated that the statute of repose runs from the earlier of: (1) “the opening of the improvement to use,” or (2) “[the] date of substantial completion of the improvement and the taking of possession for occupancy by the owner.”⁶² In this instance, a temporary certificate of occupancy was issued more than six years prior to the filing of the action, but the permanent certificate of occupancy was issued less than six years prior to the filing date.

The trial court found that, although the first certificate of occupancy was “temporary,” that fact did not alter the conclusion that building was open for use, since the language of the temporary certificate of occupancy did not place any limitations upon the use the building’s owner could make of the building.

Accordingly, the court ruled—and the District Court affirmed—that the plaintiff’s causes of action for negligence and breach of implied warranties were time-barred. However, the plaintiff’s cause of action for breach of express warranties was not barred, since the Massachusetts statute of repose did not pertain to express warranty claims.

Additionally, several defendants moved for summary judgment of all claims against them on the grounds that each contract between the building owner and the defendants contained a waiver of subrogation provision. The District Court observed that there are strong public policy reasons for allowing a waiver of subrogation in design and construction contracts, including “encouraging parties to anticipate risks and procure insurance...and facilitating and preserving economic relations and activity.”⁶³ However, there is a contrary public policy which precludes enforcement of contractual provisions that exculpate a party for “gross negligence or statutory violations.”⁶⁴ The Court drew a distinction between provisions which entirely preclude the “victim”—here, the building owner—from obtaining any compensation, and the subrogation waiver which bars a claim by the insurer, but allows the injured party to be compensated. It found that availability of a remedy for the injured party to be “of critical import.”⁶⁵ Therefore, the Court upheld the trial court’s ruling that the waiver of subrogation was enforceable.

ARBITRATION PROVISION IN PRIOR CONTRACT

***Town of Homer, Inc. v. General Design, Inc.*, 960 So.2d 310 (Court of Appeal of Louisiana, 2007)**

In 1984, the town of Homer, LA decided to modernize and upgrade a hospital facility it owned, and retained the defendant architectural firm to conduct a feasibility study encompassing “programming, consultant services, financial search and architectural services.”⁶⁶ In 1985, it again retained the defendant to perform further architectural services in connection with the renovation. Both times, the parties executed Standard Forms of Agreement Between Owner and Architect, AIA Document B141-1977. Those agreements each contained a provision under which the parties agreed to arbitrate any disputes arising out of or relating to the agreement. Concurrently, the town entered into a contract with a general contractor for the renovation of the hospital, which identified the defendant as the project architect. The architect submitted its concluding billing statement in 1989.

In 1991, planning began on a project for an adjacent medical supply building, and the town again retained the defendant to prepare construction drawings for that facility. Again, the town’s contract with the general contractor identified the defendant as the architect, but this time the town did not enter into a written contract. During construction, the state fire marshal objected that the new facility was too close to the existing hospital structure to permit sufficient ingress and egress. The defendant prepared plans for a “Corridor Revision” which called for destruction of a substantial part of the previously-existing brick façade. Subsequently, the opening of the façade resulted in a “negative pressure environment”⁶⁷ which led to humid air being drawn into the ceiling space and

condensing on various pipes and structures, causing mold and fungus growth. The town sued the defendant, who invoked the arbitration provisions in the AIA Agreements. The trial court ruled that the provision controlled, and ordered the parties to arbitration.

On appeal, the Court of Appeal of Louisiana noted that a court shall order a matter to arbitration if it is satisfied that the parties contractually agreed that the issue involved would be arbitrated. However, it stated that the 1984 and 1985 contracts did not create “a perpetual contractual relationship between the parties for all future construction of hospital additions.”⁶⁸ The prior contracts defined the scope of their respective services, which differed from the services later rendered by the defendant in connection with the medical supply building and corridor revision. It ruled that, although the parties’ pattern of dealings may have been similar for each job, some authorization by the parties was required in order for the prior contracts to govern the later services. Accordingly, the Court found that no agreement to arbitrate governed the present action.

WAIVER OF RIGHT TO ARBITRATION

Hubbard Construction Company v. Jacobs Civil, Inc., 969 So.2d 1069 (District Court of Appeal of Florida, 2007)

The defendant, a contractor, entered into a written contract with the plaintiff, a professional engineer, whereby the plaintiff agreed to provide services in connection with the design and construction of an interstate highway. The contract contained a provision whereby any dispute which arose under the contract would be decided by the contractor, which would reduce its decision to writing and provide a copy of that decision to the engineer. The contractor’s decision would be final unless the engineer made a written demand for arbitration within 20 days of the engineer’s receipt of the contractor’s decision.

The engineer filed a motion to compel arbitration in a Florida trial court, alleging that the contractor owed it over \$600,000 for services rendered in connection with the highway project. The contractor answered and counterclaimed, alleging that the engineer’s performance had been defective, and that the engineer had waived its right to arbitrate by failing to comply with the 20-day time limitation in the contract. The contractor submitted evidence that, on January 18, 2006, it had submitted a letter to the engineer constituting its “final decision” regarding the parties’ disputes.⁶⁹ The letter made reference to the paragraph in the parties’ contract relating to the contractor’s right to render written decisions concerning disputes. However, the letter stated that if the engineer disagreed with the decision and desired to meet “in an attempt to resolve these issues without resorting to arbitration,”⁷⁰ it should advise the contractor and the contractor would “discuss with you the possibility of the parties agreeing in writing to extend the deadline for initiating arbitration proceedings.”⁷¹ On the twentieth day after receipt of the letter, the engineer responded in writing that it needed more time and requested an extension of the time limitation to seek arbitration. No demand for arbitration was made, and the contractor later responded that the time to seek arbitration had expired.

The trial court granted the motion to compel arbitration, but the Court of

Appeal held that the engineer had waived its right to seek arbitration because it failed to comply with a condition precedent. The engineer argued that Florida courts have consistently held that the question of whether a demand for arbitration was timely made was one for the arbitrator, not the court. However, the Court of Appeal responded that the engineer was confusing the concepts of timeliness and the failure to meet a condition precedent, and that the latter question was one for the trial court. Therefore, the Court of Appeal reversed the decision of the lower court.

ANTI-SLAPP STATUTE

***Wang v. Wal-Mart*, 153 Cal.App.4th 790 (California Court of Appeal, 2007)**

SLAPP is an acronym for “Strategic Lawsuits Against Public Participation,” and an “anti-SLAPP” statute is designed to provide an early and efficient method for disposing of meritless claims which challenge speech and petitioning activities protected by the First Amendment. Such petitioning activities have been held to include applications for development permits. Although only a few states have anti-SLAPP statutes, one such state is California, and the scope and application of its anti-SLAPP statute is frequently litigated.

The plaintiffs sold two parcels to a retailer which intended to develop the property for use as a shopping center. The plaintiffs retained ownership of adjacent parcels, and contended that the developer, developer’s civil engineer and traffic consultant, and the city which approved the development conspired to defraud the plaintiffs by depriving them of street access to the remaining parcels. The defendants filed a special motion to strike the complaint pursuant to the anti-SLAPP statute, arguing that each of the plaintiff’s causes of action arose from protected petitioning activity since actions by the defendants which were challenged in the plaintiff’s complaint arose as part of the development application process. The plaintiffs responded by arguing that their causes of action did not arise out of protected petitioning activity, but rather were “garden variety”⁷² fraud and breach of contract claims. The trial court agreed with the defendants, and ordered the plaintiffs’ complaint stricken.

The Court of Appeal stated that, in order for a cause of action to arise from protected activity, a court must look to “whether the allegations referring to arguably unprotected activity are only incidental or collateral to a cause of action based essentially on protected activity.”⁷³ The defendants cited prior case law from the same Court of Appeal concerning the commercial development of bayside property in which the plaintiff developer contended that public officials interfered with the exclusive negotiating agreement between itself and other entities. In that prior case, the Court held that the complaint was properly stricken because all the challenged communications were made in connection with an issue under consideration by a public body. However, in the present case, the Court stated that “there is no bright line rule that all cases involving developments and applications for public permits always involve the type of petitioning conduct protected by the anti-SLAPP statutory scheme.”⁷⁴ Further, it ruled that the “freeway-close” shopping center, unlike the bayside property,

did not necessarily constitute a “matter of public interest.”⁷⁵

The Court concluded that the plaintiffs’ complaint was “not based essentially on protected conduct.”⁷⁶ Rather, it found that the defendants’ actions were made in furtherance of “economic interests,” and that the applications to governmental authority “were made only in conjunction with the principal business transaction.”⁷⁷ Therefore, the Court decided that the “overall thrust”⁷⁸ of the complaint concerned the manner in which the parties dealt with each other, not the manner in which they dealt with the governmental entity. It therefore reversed the trial court’s ruling and reinstated the plaintiffs’ action.

EXPERT TESTIMONY

***Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426 (United States Court of Appeals, Sixth Circuit, 2007)**

The plaintiff was severely injured in a workplace accident in Tennessee involving a truck-mounted crane manufactured by the defendant. Throughout much of the day the crane’s operator had partially retracted one of the crane’s four outriggers at the plaintiff’s request, since the outrigger was blocking the plaintiff’s sport-utility vehicle and the plaintiff wanted to leave the job site. However, a new crane operator attempted to use the crane at that moment and it toppled, severely injuring the plaintiff.

The plaintiff’s primary allegations were that the crane was defective and/or unreasonably dangerous, both because of an unsafe design and inadequate warnings. The plaintiff retained only one expert consultant in connection with this matter: a registered professional engineer in Illinois and Missouri, who received an engineering degree and taught engineering at a community college for ten years. For over 25 years, the expert had been employed exclusively as an engineering consultant, and had testified in numerous design defect cases, rendering opinions concerning the design of numerous pieces of machinery. In preparation for his testimony in this matter, the consulting engineer reviewed deposition testimony, discovery responses, owners’ and operators’ manuals and brochures for a variety of cranes, American National Standards Institute (ANSI) standards for various mobile boom trucks, witness statements made by persons in the vicinity of the accident, and an accident report and accompanying photographs prepared by the Tennessee Occupational Safety and Health Administration. Based upon his research, the consulting engineer opined that the crane was defectively designed because the outriggers were not linked to the crane operation in an interlocking manner which would cause the crane to become inoperable if all outriggers were not on firm ground.

The defendant moved to exclude the consultant’s expert testimony on the grounds that it was unreliable. The trial court granted the motion, and then granted the defendant’s motion for summary judgment on the ground that expert testimony is required under Tennessee law in order to prevail in a products liability action. On appeal, the Sixth Circuit upheld the lower court’s ruling, finding that the expert’s opinions were unreliable for several reasons. First, although the consulting engineer prepared a schematic drawing which showed how an interlocking system from a smaller truck might be integrated

into a crane, he performed no testing to determine how easily such a system could be installed on a crane, nor whether such an installation could produce adverse consequences in function or safety. Second, the consulting engineer made no showing that interlocking systems on such cranes were a generally-accepted industry standard. Under federal law, a court which considers the qualifications of an expert must consider the extent in which an expert's opinions have been tested and have gained acceptance in the relevant community, and the Sixth Circuit found the consultant's opinions lacking on both counts.

Additionally, the trial court examined the extent to which the consultant's opinions "were prepared in the context of litigation."⁷⁹ The Sixth Circuit noted that testimony prepared under such circumstances—as opposed to testimony "flowing naturally from an expert's line of scientific research or technical work"⁸⁰—should be viewed with some caution by a court. Here, the Court noted that the consultant appeared to be "the quintessential expert for hire"⁸¹ having rendered opinions "solely in the context of . . . litigation"⁸² for over 20 years. The Court concluded that, since there was no evidence that the consultant's opinion arose "naturally from his own current or prior research (or field work),"⁸³ the trial court had reasonably concluded that his opinions were not objective. Accordingly, the Court affirmed the exclusion of the expert's opinions and upheld the defendant's summary judgment.

COPYRIGHT

***Christopher Phelps & Associates, LLC v. Galloway*, 492 F.3d 532 (United States Court of Appeals, Fourth Circuit, 2007)**

The defendant planned to build his dream retirement home on a lot he owned in North Carolina. On a tour of an expensive residential area which was under construction, the defendant noticed a French-country style house that he liked. His son-in-law, who was working as an iron-work subcontractor on the project, approached the builder of the house and asked for a copy of the plans. The builder advised him that he would have to speak with the owner of the home because "she purchased the plans, they were actually drawn for her."⁸⁴ The owner consented to the defendant's use of the plans, under the belief that she owned them. With the owner's permission, the builder provided the plans to the defendant. Each page of the plans stated that they were protected by federal copyright laws and identified the plaintiff as the copyright holder. They expressly stated that "[t]he original purchaser of this plan is authorized to construct one and only one home using this plan. Modifications or reuse of this plan is prohibited."⁸⁵

The defendant altered the plans to cover the owner's name and address and then copied them. Acting as his own general contractor, the defendant began construction of his house using the plaintiff's plans. Through rumors from subcontractors, the plaintiff learned that the defendant was constructing a house using the plaintiff's designs. The plaintiff sent the defendant a cease and desist letter, then registered its plans with the copyright office and commenced an action against the defendant for copyright infringement. At trial, the plaintiff

presented expert testimony that the defendant would realize over \$200,000 in profits if he were to sell the completed house. However, the jury returned a verdict of only \$20,000. Additionally, the trial court denied the plaintiff's request for an injunction prohibiting completion and/or sale of the home and requiring return of the plans to the plaintiff. On appeal, the plaintiff contended that he was entitled to a new trial on damages because the trial court erroneously instructed the jury that the plaintiff's design was "a derivative work."⁸⁶

The design in question was a variation of an earlier design by the plaintiff which differed from the first design by moving a window, changing the front entry, and removing the basement. The trial court instructed the jury that the plaintiffs' recovery "is limited by the scope of copyright protection afforded a derivative work. You are instructed that the copyright protection in a derivative work covers only the additions, changes, or other new material appearing for the first time in the work."⁸⁷ The Court of Appeals held that the jury instruction was erroneous. It stated that, although the copyright in a derivative work extends only to its new elements, when the author of the derivative work also has a copyright on the underlying work, there is no need to protect the original author, since they are one and the same.

Nevertheless, the Court found that the lower court's instruction was harmless. It found that, based upon other jury instructions, the jury understood that it was to award damages based upon the entire house as an infringement. For example, the lower court had instructed that jury that the plaintiff was entitled to recover both actual damages for infringement and all profits of the infringer. \$20,000 was the amount of the plaintiff's fee for the design, and the plaintiff had testified that he would have charged the same fee to the defendant. The amount of the defendant's potential profits was disputed, and the Court held that the jury could reasonably have concluded that there were no profits. Therefore, the Court rejected the plaintiff's request for a new trial on damages.


However, the Court found that the trial court had erred in refusing to grant the plaintiff's request for injunctive relief. The house had subsequently been completed, such that the only injunctive relief specifically requested by the plaintiff was to preclude a sale of the house. A copyright holder has the exclusive right to distribute its copyrighted work "by sale or other transfer of ownership."⁸⁸ Nevertheless, it felt that an injunction against sale of the house would be overbroad since it would encumber property which was unrelated to the infringement, including additions such as a swimming pool and a fence. As such, that particular injunction would be "fundamentally punitive,"⁸⁹ and would violate the public policy in favor of the alienability of real property. The Court therefore upheld the lower court despite the erroneous ruling.

The Court did, however, remand the matter on the question of the plaintiff's request for a return of the plans. Federal law mandates that infringed plans be returned or destroyed where there is a risk of future infringement, and the Court concluded that the lower court had not properly considered whether such a risk existed.

CONCLUSION

Although the past year saw few dramatic changes in the legal doctrines which

impact design professionals, the first three decisions cited herein appear to reflect some resistance to the recent erosion of the economic loss doctrine. Courts continue to grapple with the important issue of whether there should be an exception to the economic loss doctrine for claims against design professionals. Attorneys for design professionals must be aware of the current scope of that doctrine in the jurisdiction(s) in which they practice. A positive trend for design professionals is the increasing number of jurisdictions which have fashioned some type of certificate of merit prerequisite for claims alleging professional negligence.

A common theme which runs through many of the cases discussed in this article is the emphasis courts place upon holding parties to the terms of their contracts. Unambiguous contractual terms, limitations of liability, waivers of subrogation, and contracts which clearly preclude a duty of care to third parties are just some of the topics which attorneys must consider, both when counseling their design professional clients during contract negotiations, and when assessing potential exposure if litigation ensues. 

ENDNOTES

¹*Id.* at 793.

²*Id.* at 795 (quoting RESTATEMENT (SECOND) OF TORTS § 552(1), at 126 (1976) (“Information Negligently Supplied for the Guidance of Others”).

³*Id.* at 800 (quoting *Demetracopoulos v. Wilson*, 138 N.H. 371, 375 (1994)).

⁴*Id.* at 800 (emphasis in original).

⁵*Id.* at 286.

⁶*Id.*

⁷*Id.* at 290.

⁸*Id.*

⁹*Id.*

¹⁰*Id.* at 291.

¹¹*Id.*

¹²*Id.* at 292.

¹³*Id.* at 90.

¹⁴*Id.*

¹⁵*Id.* at 91.

¹⁶*Id.* at 96 (quoting *155 Harbor Drive Condominium Ass'n v. Harbor Point Inc.*, 209 Ill.App.3d 631, 646 (1991)).

¹⁷*Id.* (quoting *155 Harbor Drive*, *supra*, 209 Ill.App.3d at 646).

¹⁸*Id.* (quoting *155 Harbor Drive*, *supra*, 209 Ill.App.3d at 647).

¹⁹*Id.* at 413.

²⁰*Id.*

²¹*Id.* (quoting *Hartford Ins. Co. v. Franklin*, 206 Ga.App. 193, 195 (1992)).

²²*Id.* at 166.

²³*Id.* at 271.

²⁴*Id.* at 272.

²⁵*Id.*

²⁶*Id.*

²⁷*Id.* at 898 (quoting OCGA § 9-11-9.1(a)),

²⁸*Id.* at 897.

²⁹*Id.* at 899.

³⁰*Id.* (quoting *Hardwick v. Atkins*, 278 Ga.App. 79, 80 (2006)).

³¹*Id.* at 102 (quoting Pa.R.C.P. 1042.3(a)).

³²*Id.* at 102.

³³*Id.* at 104.

³⁴*Id.*

³⁵*Id.* at 105.

³⁶*Id.* at 476.

³⁷*Id.* at 476, n.6 (quoting RESTATEMENT (SECOND) OF TORTS 552(1)).

³⁸*Id.* at 477.

³⁹*Id.* at 109 (quoting *Amelco Electric v. City of Thousand Oaks*, 27 Cal.4th 228,

242 (2002).

⁴⁰*Id.* at 109.

⁴¹*Id.* at 109-110 (quoting *Janis v. California State Lottery Com.*, 68 Cal.App.4th 824, 830 (1998)).

⁴²*Id.* at 110.

⁴³*Id.* at 1181.

⁴⁴*Id.* at 1181-1182.

⁴⁵*Id.* at 1184.

⁴⁶*Id.* at 1181.

⁴⁷*Id.* at 1186.

⁴⁸*Id.*

⁴⁹*Id.* at 1188.

⁵⁰*Id.* at 287.

⁵¹*Id.* at 285 (quoting *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir.1995)).

⁵²*Id.* at 339.

⁵³*Id.* (quoting NY ADMIN. CODE § 27-1031 (b)(1)).

⁵⁴*Id.* at 386.

⁵⁵*Id.* at 388 (quoting *PPG Indus. v. JMB/Houston Ctrs. Ltd. P'ship*, 146 S.W.3d 79, 93-94 (Tex. 2004)).

⁵⁶*Id.* at 392.

⁵⁷*Id.* at 463.

⁵⁸*Id.* at 560 (quoting N.J.S.A. 2A:14-1.1(a)).

⁵⁹*Id.* at 560.

⁶⁰*Id.* at 567.

⁶¹*Id.* at 560.

⁶²*Id.* at 141.

⁶³*Id.* at 143 (quoting *Acadia Ins. Co. v. Buck Constr. Co.*, 756 A.2d 515, 520 (2000)).

⁶⁴*Id.* at 143.

⁶⁵*Id.*

⁶⁶*Id.* at 312.

⁶⁷*Id.* at 314.

⁶⁸*Id.* at 316.

⁶⁹*Id.* at 1071.

⁷⁰*Id.*

⁷¹*Id.*

⁷²*Id.* at 801.

⁷³*Id.* at 802.

⁷⁴*Id.* at 804.

⁷⁵*Id.*

⁷⁶*Id.* at 807.

⁷⁷*Id.* at 809.

⁷⁸*Id.*

⁷⁹*Id.* at 430.

⁸⁰*Id.* at 434.

⁸¹*Id.* at 435.

⁸²*Id.*

⁸³*Id.*

⁸⁴*Id.* at 536.

⁸⁵*Id.*

⁸⁶*Id.* at 537.

⁸⁷*Id.* at 538.

⁸⁸*Id.* at 543.

⁸⁹*Id.* at 545.