

CONSTRUCTION DEFECT CASE UPDATE

The Independent Duty Doctrine Can Arise in the Context of Professional Relationships

case in point ...

From the desk of Paul Sheely: In negligence and negligent misrepresentation claims, the independent duty doctrine allows a party to bring a tort claim when the other party's duty is governed by contract if the injury traces back to a breach of a tort duty arising independently of the terms of the contract. The necessary inquiry is which duties exist independently of the terms of a contract. A recent Washington case provides valuable insight as to which duties are considered independent of the terms of a contract.

Claims Pointer: Insurers and their attorneys should be aware that with respect to negligence claims arising from professional liability, the foundation of the independent duty analysis is the scope of the duty one party owes to the other. Moreover, in some cases, a party to a contract has an independent duty to avoid negligent misrepresentations that induce the other party to enter into a contract. Professionals should be wary that even though the terms of a contract create contractual duties, an independent duty arising under tort law may arise, despite such contract.

Donatelli v. D.R. Strong Consulting Engineers, Inc., 2013 WL 6022171 (2013).

Steve and Karen Donatelli ("the Donatellis") hired D.R. Strong ("Strong") to help them develop real property. Based on the Donatellis account of events, Strong orally agreed to assist the Donatellis with the permit process and to manage the project through the final recording of the plats. Strong began work on the project by obtaining preliminary approval for the project with King County, which was granted on October 4, 2002. The preliminary approval was valid for 60 months. On October 11, 2002, Strong sent the Donatellis a written contract for engineering services entitled, "Revised Proposal for Engineering Services." In the contract Strong agreed to perform six phases of engineering services for \$33,150. However, the contract did not reflect whether Strong would provide managerial services or oversee the day-to-day operation of the project. The contract also limited Strong's professional liability to \$2,500 or its professional fee, whichever was greater. Steve Donatelli signed the contract on October 31, 2002.

According to the Donatellis, between October 2002 and 2007, Strong assumed a managerial role over the project and worked closely with other contractors, builders and vendors involved with the project. The Donatellis further alleged that Strong charged \$120,000 in costs and fees over the course of the project.

In October 2007, the preliminary approval expired while the project was incomplete. Strong began the process of obtaining new approval for the project but, before he could obtain such approval, the Donatellis suffered substantial financial losses and lost the

property in foreclosure.

The Donatellis sued Strong claiming breach of contract, violations of the Consumer Protection Act, negligence, and negligent misrepresentation. In the trial court, Strong argued that the economic loss rule barred the Donatellis negligence claims. The trial court granted summary judgment on the CPA claims but not on the negligence claims. The trial court held that "professional negligence claims can be stated even in the context of a contractual relationship." The Court of Appeals affirmed, holding that the independent duty doctrine did not bar negligence claims against Strong because professional engineers owe duties to their clients independent of any contractual relationship. The Washington Supreme Court granted Strong's petition for review.

The Court addressed (1) whether the trial court erred in denying summary judgment as to the negligence claim and (2) whether the trial court erred in denying summary judgment as to the negligent misrepresentation claim when such misrepresentation induced the Donatellis to enter into contract with Strong.

The Court held that the independent duty doctrine did not bar the Donatellis' claim for negligence, particularly since the record did not establish the scope of Strong's contractual duties. The Court explained that under the rule, an injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. The Court also noted that an independent duty can arise with regard to design professionals in the context of their duties to clients and to the public to act with reasonable care.



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With regard to the negligent misrepresentation claim, the Court held that the independent duty doctrine did not bar the Donatellis' claim for negligent misrepresentation because the duty to avoid misrepresentations that induce a party to enter into a contract arises independently of the contract. In reaching its holding, the Court noted that a party may have a duty to avoid negligent misrepresentations when such misrepresentations induce another party to enter into a contract with him. The Court also indicated it was not ruling on success of the Donatellis' substantive claim.



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