

# WASHINGTON CASE UPDATE

## Court Finds Breach of Independent Duty Even without Actual Property Damage

case in point...

From the desk of Paul Sheely: The “independent duty doctrine,” also referred to as the “economic loss rule,” describes the law establishing what kinds of damages give rise to claims that are recoverable in tort (negligence) claims and which may only be sought in a breach of contract claim. Generally, what the rule boils down to is that claims arising out of injury to person or property are recoverable in a tort claim, whereas claims for “pure economic loss” (such as money owed on a loan) are recoverable only in a breach of contract claim. Over the past 15 years, Washington has, at least in the construction context, adhered to a strict interpretation of the rule that the ability to allocate risk by contract is so important to the construction industry that negligent construction claims are not allowed. Several cases over the past few years, however, have shown a trend towards allowing negligence claims, particularly against engineers and architects, where the professional failed to meet a duty and that failure results in property damage.

**Claims Pointer:** In this recent Washington Court of Appeals case, the court allowed a negligence claim against an engineering company which was involved in construction oversight where the construction defects were related to life safety even though no property damage had yet occurred. This case serves as notice to engineers, architects, their insurers, and their attorneys that courts are likely to allow tort claims arising from professional liability to proceed where the defects are related to life safety issues, even if no property damage has yet occurred.

The Pointe at Westport Harbor Homeowners’ Association v. Engineers Northwest, Inc., No. 458389-0-II, Washington Court of Appeals, Div. II. (May 3, 2016).

Dodson-Duus, LLC (“Dodson-Duus”) the developer of The Pointe, an upscale condominium in Westport, Washington, contracted with Steven P. Elkins Architects Inc. (“Elkins”) to carry out the architectural design work for the project. Elkins, in turn, contracted with Engineers Northwest Inc. (“ENW”) to perform structural engineering services. ENW worked on the structural calculations and designs and was responsible for construction administration, which involved reviewing shop drawings and answering questions from the building contractors. Construction took place during 2007 and 2008.

In August 2011, the Homeowners’ Association (“HOA”) brought suit against Dodson-Duus for construction defects and incomplete construction under the Condominium Act,

and against ENW for negligent design. The HOA claimed the building was “rendered unreasonably dangerous to its occupants,” and sought compensatory damages for the costs of investigating and repairing the defects. Dodson-Duus filed cross-claims against ENW for negligence, breach of contract, and implied indemnity, and ENW filed cross claims against Dodson-Duus and other involved contractors alleging negligence and implied indemnity. The developer later settled with the HOA, assigning its rights against ENW and other involved parties.

At trial, ENW moved for summary judgment, asserting that the independent duty doctrine barred negligence claims for harm that was in effect an economic loss. The trial court denied the motion, and the jury determined that ENW had been negligent and that its negligence caused the defects in the building, awarding over one million dollars in damages. ENW appealed.



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On appeal, ENW argued that the trial court erred in denying its motion for summary judgment and in ruling that ENW owed an independent duty to the developer and HOA. The Court of Appeals noted ENW's summary judgment motion was based on grounds that the developer's and HOA's claims were barred by the independent duty doctrine, which bars recovery in tort for economic losses suffered by parties to a contract unless the breaching party also owed a duty in tort independent of the contract. The test is not simply whether an injury is an economic loss arising from a breach of contract, but whether the injury is also traceable to a breach of a tort law duty of care arising independently of the contract.

The Washington Supreme Court has previously held that while generally the foundation of any liability analysis for design professionals rests in contract, design professionals also owe duties to their clients and the public to act with reasonable care, which can sometimes give rise to a duty in tort independent of the contract. Engineers owe such a duty of reasonable care to developers and contractors to whom they provide engineering services, as well as holders of legally protected interests in the property. To act in accordance with the duty, engineers must exercise the degree of care, skill, and learning expected of a reasonably prudent engineer in the state of Washington acting in the same or similar circumstances.

ENW argued that this tort duty was limited to cases where the engineer's failure to exercise reasonable care resulted in personal injury or actual physical damage to property, and because the HOA only presented evidence of potential damage to the condominium buildings, the trial court should have granted summary judgment.

The Court of Appeals disagreed, noting that the Washington Supreme Court had previously held that an engineer has a duty of care with

respect to safety risks of physical damage and that an engineer's tort duty with respect to safety risks was sufficient to state a claim. Accordingly, the Court of Appeals held that an engineer's duty of care encompassed the prevention of safety risks, and that even where such safety risks did not cause consequential damage to persons or property, the risk itself constituted an injury within the class of harm contemplated by a design professional's duty of care. Where an engineer's design services ultimately resulted in the construction of an unsound structure, the engineer had breached his duty of care. As such, ENW owed an independent duty to the developer and to members of the HOA, as holders of property interests in The Pointe, to take reasonable care to design a building that did not present safety risks to its residents or their property. Therefore, the trial court did not err in denying ENW's summary judgment motion under the independent duty doctrine.

Note: this case is a part published opinion. The issue discussed above constitutes the published portion.

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