

## Construction Law Update

11/18/2013

### **Door Opening to Allow Common Negligence Claims Against Construction Professionals**

For several years, design and construction professionals have been awaiting word from the Washington Supreme Court regarding whether aggrieved parties are limited to remedies set forth in their written contracts or whether they can pursue common law negligence claims. On November 14, the court decided *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, by suggesting that negligence claims could be pursued in certain circumstances unless the parties' clearly and specifically preclude them. The result demonstrates the importance of including specific terms in the contract which delineates claims that the parties intend to either limit or preclude.

The plaintiffs in *Donatelli* entered into a written contract with an engineering firm, D.R. Strong Consulting, to develop two short plats. King County issued a preliminary approval for the short plats that was good for five years, but the project was not completed during this period and the approvals expired. Subsequently, the engineering firm assisted the Donatelli's in obtaining new preliminary approvals, but the real estate market collapsed before they could obtain final approval. The Donatelli's ran out of money and lost the property to foreclosure. They sued the engineer for breach of contract, negligence, negligent misrepresentation and violation of the Washington Consumer Protection Act ("CPA"). The engineer moved for summary judgment on all of the negligence claims, asserting as its sole basis for the motion that the claims were barred by the economic loss rule and on the CPA claim. The trial court granted summary judgment on the CPA claim but denied summary judgment on the negligence claims.

The contract between the Donatelli's and the engineering company contained a limitation of liability provision that limited the engineer's liability to \$2,500 or the fee charged, whichever was greater. The limitation could be waived if the client agreed to pay an additional 5 percent of the fee or \$500, whichever was greater. The Donatelli's had chosen not to waive the liability limitation by paying the additional fee.

The Supreme Court upheld the trial court and Court of Appeal decisions denying summary judgment on the tort claims. On the plaintiffs' negligence claim, the court decided that it was unclear which duties the engineer assumed under the written contract. Because the record didn't adequately establish the scope of the professional obligations incorporated into the contract, the court refused to determine if any of the engineer's duties to the plaintiffs arose independently of the contract and sent the case back to the trial court.

The *Donatelli* case emphasizes the importance of clearly delineating in a contract the duties assumed in construction contracts, whether arising specifically from the contract or created by law.

This case should also serve as a reminder to include integration and limitation of liability clauses in all contracts. An integration clause is intended to preclude any claims that the parties orally modified the contract to include (or exclude) specific terms. Likewise, detailed limitation of liability clauses that incorporate potential negligence or professional liability damages are necessary to limit the potential exposure of design professionals to extra-contractual claims.

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