

ENGINEERS AND DESIGN PROFESSIONALS EXPOSED TO LIABILITY IN WASHINGTON

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The independent duty doctrine continues to evolve as the Washington Supreme Court recently denied protection for a design professional from tort liability. The Supreme Court's decision represents a change in the law that significantly exposes design professionals to tort liability in construction cases. *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 2013 Wash. LEXIS 934 (2013).

Facts.

In 2002, Steve and Karen Donatelli hired D.R. Strong Consulting Engineers, Inc. ("D.R. Strong") to help develop their property into two short plats. According to Mr. Donatelli, D.R. Strong's representatives verbally agreed to assist with the King County permitting process and manage the project through final plat recording. Allegedly, D.R. Strong told the Donatellis it could finish the project within one and one-half years.

The contract between D.R. Strong and the Donatellis required it to perform engineering services for an estimated fee of \$33,150.00. The contract did not reflect an agreement for providing managerial services or day to day oversight of the operation. Further, D.R. Strong's contract limited the firm's professional liability to \$2,500.00 or its professional fee, whichever was greater.

The Donatellis claimed that from 2002 through 2007, D.R. Strong assumed a managerial role through affirmative actions and worked closely with other contractors, builders, and vendors at the project. Despite the written fee estimate, the Donatellis claimed that D.R. Strong charged them approximately \$120,000.00 for work at the project.

In October 2007, preliminary plat approval expired prior to completion of the project. Before D.R. Strong could obtain a new preliminary approval, the Donatellis lost their property in foreclosure. The Donatellis sued D.R. Strong for roughly \$1.5 million, alleging claims of breach of contract, CPA violations, negligence, and negligent misrepresentation. D.R. Strong moved for summary judgment dismissal on the basis the negligence claims were barred by the economic loss rule. The Superior Court and the Court of Appeals disagreed and D.R. Strong appealed.

Washington's Application of the Independent Duty Doctrine.

In 2010, the Washington Supreme Court essentially abandoned the economic loss rule and adopted the independent duty doctrine in what has been an ongoing effort to establish boundaries between tort and contract claims. Under the independent duty doctrine, a claim can be brought in tort so long as it can be traced back to the breach of a tort duty arising independently from the terms of a contract. *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380 at 389, 241 P.3d 1256 (2010). The court was charged with determining what duties the parties assumed in the contract.

The *Donatelli* case set the precedent for the application of independent duty doctrine on design professionals. Historically, the economic loss rule protected design professionals from tort liability through the use of liability limiting provisions found in service agreements. The theory was that contracting parties could agree to limit their liability in contract for claims resulting in economic damages. Subsequently, design professionals face greater risk to claims such as professional malpractice and negligent misrepresentation when these duties and obligations are not completely memorialized in a written agreement.

Professional Malpractice.

The *Donatelli* Court states that it is difficult to apply the independent duty doctrine to professional malpractice claims when the contractual obligations of the parties are in dispute. Under common law, design professionals have a tort duty to exercise reasonable care. This duty is commonly written and assumed in contracts. However, when obligations are made outside of a written agreement, they can create tort liability independent of the writing.

The Donatellis' allegations concerning D.R. Strong's promise to manage the jobsite, and the significantly more expensive fee for its work raised questions of fact regarding D.R. Strong's contractual obligations. In light of such provisions, the Court could not determine whether D.R. Strong's duties arose independently from its contract with the Donatellis. Accordingly, the Court upheld the trial and appellate court's denial of summary judgment on the basis the independent duty doctrine cannot shield a party from liability when the contractual obligations of the parties are not established in the record.

Negligent Misrepresentation.

The Court explained that under the economic loss rule, the tort of negligent misrepresentation is typically barred. Under the independent duty doctrine, however, there are a narrow set of circumstances where the claim can independently arise in tort rather than contract. In this case, the Court determined that D.R. Strong had an independent tort duty **not** to make representations to the Donatellis which would induce them to enter into a professional services contract. The Court determined that the Donatellis' negligent misrepresentation claim was not barred in light of their allegation that D.R. Strong induced them to enter into the contract by representing that the project would cost no more than \$50,000.00 and approximately one and one-half years to complete.

The Takeaway.

The Washington Supreme Court's ruling in *Donatelli* held that design professionals who participate in the development of real property in Washington may no longer enjoy total immunity from negligence claims. To avoid liability going forward, prudent design professionals should consult with their counsel and draft well crafted service agreements as a means by which to protect themselves from claims arising out of contract.