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Washington State Ruling Heightens Liability Risk for Design Professionals



By Ross Siler on October 4, 2016

 CONSTRUCTION

Recently, the Washington Court of Appeals potentially expanded the scope of tort duties owed by design professionals. In a May decision, the court held that an engineer's duty of care to developers and property owners encompasses "the prevention of safety risks" even when no personal injury or property damage has resulted from claimed deficiencies. See



Pointe at Westport Harbor Homeowners' Ass'n v. Eng'rs Nw., Inc., — P.3d —, 2016 WL 2643729, (Wash. Ct. App. May 3, 2016). As the court concluded in the published portion of its opinion: **"Where an engineer's design services ultimately result in the construction of an unsound structure, the engineer has breached his duty of care."** *Id.* at *5.

The case arose from the construction of an upscale condominium building in Westport, Washington, that turned out to have significant seismic deficiencies. Engineers Northwest, Inc. (ENW) provided structural engineering work on the project. The Court of Appeals reported that evidence connected the seismic deficiencies to ENW's structural calculations and design. *Id.* at *1. The homeowners' association (HOA) brought a negligence claim against ENW that ultimately went to trial, where a jury found ENW liable for more than \$1.1 million in damages. *Id.* at *2.

ENW argued on appeal that the trial court erred in denying its motion for summary judgment, in which ENW asserted that it owed no independent tort duties to the HOA or developer. *Id.* at *3. **The Washington Supreme Court has held that liability for design professionals is generally contract, not tort, based**, and the independent duty doctrine further "bars recovery in tort for economic losses suffered by parties to a contract unless the breaching party owed a duty in tort independent of the contract." *Id.* at *4 (citing *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 393-94 (2010)).

At the same time, Washington courts have recognized that design professionals owe a duty of reasonable care to developers, contractors, and holders of property interests. *Id.* at *4. ENW asserted that this tort duty is limited to cases in which the design professional's failure to exercise reasonable care results in personal injury or property damage. Because the HOA alleged only potential damage resulting from the seismic deficiencies, ENW contended the trial court should have granted summary judgment in its favor in the absence of any evidence of actual injury. *Id.*

But the Court of Appeals disagreed with this limitation to the scope of tort duties owed by ENW as structural engineer. *Id.* at *5. The Court held that the engineer's duty of care extends to "the prevention of safety risks." *Id.*

"Even where such safety risks do not cause consequential damage to persons or property, the risk itself constitutes an injury within the class of harm contemplated by a design professional's duty of care." *Id.* (citing *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 456-57 ()).

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ENW therefore owed a duty to the developer and HOA members “to take reasonable care to design a building that did not present safety risks to its residents or their property.” *Id.*

Chief Judge Thomas Bjorgen authored the opinion for a three-judge panel on Division II of the Court of Appeals. **The ruling seemingly increases the ability for property owners and developers to assert negligence claims against engineers, architects, and design professionals when structural deficiencies (particularly those connected to structural safety) are present, even though no actual injury has yet resulted.**



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