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The New Jersey Appellate Division Holds that Statute of Repose Does Not Bar Allocating Damages to Non-Party Joint Tortfeasors in Architectural Malpractice Case

Wednesday, June 29th - While not an insurance dispute, yesterday's opinion by the Appellate Division in *Town of Kearney v. Brandt*, No. A-3612-08T2, (App. Div. Jun. 28, 2011) is instructive for professional liability underwriters and claims professionals alike because it explains how a damage award against one design professional can be reduced even where other design professionals who contributed to plaintiff's damages, are no longer in the case in chief due to application of New Jersey's Statute of Repose, *N.J.S.A*. 2A:14-1.1(a). [1] The opinion also provides guidance on whether a plaintiff's contributory negligence can be used to reduce its damage claim in a professional liability claim.

This particular claim for professional negligence arose from services rendered by various professionals in the design and construction of a police and fire facility. The Town contracted with an architect to design, plan and supervise the facility's construction. The Town also retained a geotechnical engineering firm ("geotech") to investigate subsurface soil conditions at the site, and to provide recommendations for the facility's foundation system. The architect had its outside structural engineer review various foundation options proposed by the Town's geotech.. The structural engineer selected and implemented one of three foundation options. Although the geotech had recommended that it review any final design to confirm that its recommendations were followed properly, the Town did not follow this recommendation. The Town also did not engage the geotech to observe the construction of the facility.

After the facility was constructed, and a certificate of occupancy was issued for a portion of the facility, settlement problems arose. The facility was never occupied, and the Town ultimately condemned it. Just two days before the Statute of Repose would have precluded suit against the architect, the Town sued the architect, the geotech and the structural engineer.

The trial court granted summary judgment to the geotech and structural engineer, finding that their work was performed more than ten years prior to the commencement of suit. As a result, the architects' cross-claims against the engineers also were dismissed, leaving the architect as the sole defendant. The trial court concluded that the Statute of Repose barred the architect from apportioning liability to the engineers under New Jersey's Comparative Negligence Act, *N.J.S.A.* 2A:15-5.1 to 5.8, because it concluded that dismissal of the engineers from the suit rendered them "non-parties" for purposes of allocating liability for the Town's damages.

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[1] The statute bars claims against those that design, plan, survey, supervise construction or construct improvements to real property more than 10 years after performance or furnishing of such services or construction.

The Appellate Division disagreed. In harmonizing the Statute of Repose, Comparative Negligence Act, and New Jersey's Joint Tortfeasor Contribution Law, N.J.S.A. 2A:53A-1 to 5, the Appellate Division held that non-parties to a suit can still be apportioned liability for purposes of determining the remaining defendant's allocable share of damages. The Appellate Division reasoned that the aim of the Statute of Repose is to protect professionals against stale claims. Since apportionment of liability to the engineers would not have the effect of reinstating claims against the engineers, the Court concluded that apportionment alone would not frustrate the Statute of Repose's intent.

The Court further reasoned that while the Joint Tortfeasors Contribution Law replaced a pro-rata apportionment of tortfeasors' liability with a fact finder's assessment of percentage of relative fault, that assessment can apportion liability to parties *as well as non-parties*. **Examples of non-parties included** defendants that have settled out prior to verdict or co-defendants that were dismissed because a plaintiff failed to comply with the affidavit of merit statute. The result of which is a plaintiff can be left holding the bag for these types of "non-parties" share of liability.

The case's outcome was not a total victory for the architect, who had attempted to further reduce the Town's damages by arguing that the Town was comparatively negligent by not following the geotech's advice (it's always the soil guy's fault!). The Court followed a bright (or slightly bright) line test as to when a plaintiff can avail itself to a comparative fault defense.

On the one hand, if the alleged negligence "relates to the tasks for which the professional was hired" - no dice. After all, how can a plaintiff be negligent for performing a service that was beyond its capabilities to perform in the first instance? If, however, a plaintiff actively disregards the professional's advice or, e.g., withholds information regarding the services for which the professional was retained, comparative fault of the plaintiff may be considered - unless the professional's scope of work included "an obligation to prevent such conduct..."

I'm still pondering why I would advise a design professional to sign a contract that affirmatively obligates the professional to ensure that its client has not deliberately withheld information related to the scope of work.....

In this instance, the Court found that even if the Town was negligent in not following the geotech's recommendations, those recommendations were part and parcel of the task for which the geotech was hired. It also noted that the architect had not pled that the Town withheld information or impeded the architect's ability to perform. Thus, no dice on apportioning liability to the Town/client.

This decision may well motivate plaintiff's counsel to sue first and ask questions later, since they will not want to see their client's, and their contingent fee, shrink if certain parties will be dismissed based upon the Statute of Repose. It may also ramp up early discovery efforts by plaintiffs to ensure that they get the information they will need to file an affidavit of merit to support claims against professionals.

A copy of the decision is available here.

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