Application Of The Economic Loss Rule In Construction Cases In Washington Is A Fact Intensive Inquiry

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In Donatelli v. D.R. Strong Consulting Engineers, Inc., 312 P.3d 620 (Wash. 2013), the Supreme Court of Washington, in a 5-4 decision, addressed the application of the economic loss rule – more properly considered the independent duty doctrine – in a case where the plaintiffs alleged that the defendant committed professional malpractice. Although the court concluded that the plaintiffs’ negligence and negligent misrepresentation claims were not barred by the economic loss rule, the analysis adopted by the Supreme Court requires trial courts to engage in an analysis of the applicable contract’s terms before analyzing whether the defendant-design professional owed the plaintiff or plaintiffs duties arising independent of the contract.

In Donatelli, the plaintiffs, Karen and Steve Donatelli, hired defendant D.R. Strong Consulting Engineers, Inc. (D.R. Strong) to assist them with developing their real property into two short plats. According to the Donatellis, D.R. Strong orally agreed to, among other things, prepare drainage and soil erosion plans, prepare necessary reports and County permit applications, and take all other actions necessary to get the plats recorded. D.R. Strong represented that it would be able to finish the project within one and one-half years at a cost of approximately $50,000. In October of 2002, D.R. Strong secured preliminary approval of the plats from the County. The approval was valid for a period of 60 months. After D.R. Strong secured the preliminary approval, it sent the Donatellis a “revised” proposal for engineering services. In the revised proposal, D.R. Strong agreed to perform six phases of engineering services for an estimated fee of $33,150. Mr. Donatelli signed the proposal. After Mr. Donatelli signed the revised proposal, D.R. Strong purportedly assumed a managerial role over the project and worked closely with other contractors, builders and vendors involved with the project. Ultimately, D.R. Strong charged the Donatellis a fee of approximately $120,000 for its services.

In October of 2007, the preliminary approval for the plats expired and the project was still not complete. Before D.R. Strong could obtain a new preliminary approval, however, the Donatellis suffered substantial financial losses and, eventually, lost the property in foreclosure. Consequently, the Donatellis sued D.R. Strong, claiming damages in excess of the sum of $1.5 million. In their complaint, the Donatellis asserted, among other things, negligence and negligent misrepresentation claims. D.R. Strong moved for partial summary judgment on the Donatellis’ negligence and negligent misrepresentation claims, arguing that these claims were barred by the economic loss rule. The trial court denied the motion and the Court of Appeals affirmed the trial court’s decision, holding, based on the independent duty doctrine, that because professional engineers owe duties to their clients independent of any contractual duty, the Donatellis’ negligence and negligent misrepresentation claims were not barred. The Supreme Court granted D.R. Strong’s petition for review.
To address D.R. Strong’s claims, the Supreme Court set forth a brief history of Washington’s application of the economic loss rule. As noted by the court, the state, historically, applied the rule to bar a plaintiff from recovering in tort when the defendant’s duty to the plaintiff was governed by contract and the plaintiff’s only damages were economic damages. In construction cases, however, the economic loss rule is considered a misnomer as the phrase “independent duty doctrine” more accurately describes how Washington courts determine whether a contracting party in a construction case can seek tort remedies from another party to the contract.

Pursuant to Washington’s independent duty doctrine, “an injury is remediable in tort if it traces back to the breach of a tort duty arising independent of the terms of the contract.” For example, a design professional may be sued in tort because, in addition to contractual duties, design professionals owe duties to their clients and to the public to act with reasonable care. However, in order to determine whether a design professional’s duties arise independent of his or her contractual duties, a court must first determine what terms the parties have agreed to, contractually, because, in some cases, a contract may address the professional’s common law duty to act with reasonable care. In addition, although design professionals generally have written contracts setting forth their obligations, engineers may assume additional professional obligations by their affirmative conduct. Thus, regardless of whether a plaintiff’s claims are framed in contract or in tort, the first step in analyzing a plaintiff’s professional malpractice claim is to determine the scope of the professional’s obligations.

Applying this analysis to the Donatellis’ negligence claim, the court held that questions of fact remained as to the scope of what D.R. Strong agreed to do contractually and what obligations it assumed by its affirmative conduct. Thus, it was impossible to determine, as a matter of law, what professional obligations D.R. Strong owed to the Donatellis, contractually or otherwise. Because the court could not determine the scope of D.R. Strong’s contractual obligations, it could not determine, as a matter of law, if any of D.R. Strong’s duties arose independent of the contract. Consequently, the court held that the trial court properly denied summary judgment in D.R. Strong’s favor with respect to the Donatellis’ negligence claim.

With respect to the Donatellis’ negligent misrepresentation claim, the court, applying an independent duty doctrine analysis, stated that a plaintiff seeking solely economic damages can pursue a negligent misrepresentation claim so long as the duty not to commit negligent misrepresentation is independent of the contract. The court found that D.R. Strong’s duty to avoid misrepresentations that induced the Donatellis to enter into a contract arose independent of the contract and that the Donatellis did not, in their subsequent contract, assume D.R. Strong’s duty to avoid misrepresentations. Thus, the court held that the Donatellis’ negligent misrepresentation claim was not barred by the independent duty doctrine.

In light of the foregoing, a defendant in a construction-related professional negligence action who seeks to preclude a plaintiff from pursuing tort claims based on the independent duty doctrine (formerly referred to as the economic loss rule) will need to, preliminarily, establish the terms of any contractual agreement between the parties. If the court cannot determine a contract’s terms as a matter of law, a defendant sued in the State of Washington should not be entitled to judgment as a matter of law with respect to a defense based on the independent duty doctrine.
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