IN THE CIRCUIT COURT OF McDOWELL COUNTY, WEST VIRGINIA

SWOPE CONSTRUCTION COMPANY,

Plaintiff,

v.

Civil Action No. 16-C-87-S
Judge Stephens

McDOWELL COUNTY BOARD OF EDUCATION
And

MOUNTAINEER CONTRACTORS, INC.
And

E.T. BOGESS, ARCHITECT, INC.
And

ZMM, INC.
And

POTESTA & ASSOCIATES, INC.
And

THE THRASHER GROUP, INC.,

Defendants.

ANSWER AND MOTION TO DISMISS ON BEHALF OF E.T. BOGGESS ARCHITECT, INC.

Comes now, E.T. Boggess, Architect, Inc. ("E.T. Boggess"), by counsel, Robert H. Sweeney, Jr., Stephen F. Soltis and Jenkins Fenstermaker, PLLC, and for its answer to Plaintiff's Complaint, states as follows:

FIRST DEFENSE

The Complaint should be dismissed pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure on the grounds that it fails to state a claim or cause of action upon which relief can be granted.

I. Introduction and Statement of Facts as Plead

Swope Construction ("Swope") entered into a contract with the McDowell County Board of Education for the construction of the Iaeger/Panther Elementary School located in Iaeger, West Virginia (the "School"). Compl. at ¶¶ 2, 8. Prior to Swope entering such contract, Defendant Mountaineer Contractors, Inc. constructed the entrance road and building site for the School. Compl. at ¶ 12. Swope contends that Mountaineer's performance was unworkmanlike, defective, and negligent as evidenced by the unsuitably large earth materials found on site. *Id.* As a result of these unsuitable earth materials, Swope claims its contracted work for grading the site and installing foundations, utilities, pavement, and sidewalks was more costly and that the unsuitable materials extended the time for completion "substantially." Compl. at ¶ 13.

Swope filed its Complaint in the Circuit Court of McDowell County, West Virginia and asserted claims of negligence and negligent and/or intentional misrepresentation against E.T. Boggess. Compl. at Count II, III. Specifically, plaintiff alleges that E.T. Boggess was negligent in failing to investigate and/or discover Mountaineer's unworkmanlike performance, providing defective and/or incomplete plans, and failing and refusing to process Swope's requests for change orders in a timely manner.

II. Standard of Review

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure provides that a Complaint should be dismissed if it fails to state a claim upon which relief may be granted. W.Va. R. C. Proc. 12(b)(6). The underlying purpose of a Rule 12(b)(6) motion is to test the formal sufficiency of the complaint. *John W. Lodge Distributing Co. v. Texaco, Inc.*, 245 S.E.2d 157, 158 (W.Va. 1978). In assessing a Rule 12(b)(6) motion all facts asserted in the Complaint are taken as true. *Sedlock v. Moyle*, 668 S.E.2d 176 (W.Va. 2008). However, a party's legal

conclusions, opinions, or unwarranted averments of fact will not be deemed admitted. *Koppleman & Assoc. v. Collins*, 473 S.E.2d 910, 914 (W.Va. 1996).

The Court should dismiss the Complaint if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim. *Syl. pt. 3, Chapman v. Kane Transfer Co.*, 236 S.E.2d 207 (W.Va. 1977). Further, a Complaint should be dismissed pursuant to Rule 12(b)(6) if the Complaint on its face fails to state any facts in support of the plaintiff's claim which would entitle the plaintiff to relief. *Hill v. Stowers*, 680 S.E.2d 66 (W.Va. 2009).

In this case, the Complaint fails to state a claim upon which relief may be granted because E.T. Boggess, as a design professional, owed no duty to the plaintiff while performing its function as an agent of the owner, or as a quasi-judicial officer.

III. Argument

E.T. Boggess, at all times relevant to the allegations contained within plaintiff's Complaint, was acting within its capacity as the project owner's agent and, therefore, owed no duty of care to plaintiff. Plaintiff is bringing the instant action based upon purportedly negligent conduct by, among other defendants, E.T. Boggess. The allegedly negligent conduct by E.T. Boggess includes failure to investigate the workmanship of the project, providing defective plans, and failure to process change orders. However, such conduct does not constitute E.T. Boggess "work product." Rather, the conduct alleged within plaintiff's Complaint occurred while E.T. Boggess was supervising construction as the owner's agent. As the actions complained of do not constitute "work product," E.T. Boggess owed no duty to plaintiff. Accordingly, plaintiff's Complaint fails to state any facts under which plaintiff would be entitled to relief.

Traditionally, architects occupy three separate roles throughout the planning and construction of a project. *Huber, Hunt & Nichols, Inc. v. Moore*, 67 Cal.App.3d 278 (1977). The

architect operates as an independent contractor in the preparation of the initial plans and specifications. *Id.* at 302. Additionally, the architect acts as the owner's agent in supervising the construction work as it progresses. *Id.* Finally, the architect acts as quasi-judicial officer when he acts as an arbiter between the owner and contractor. *Id.* In the instant matter, plaintiff seeks to recover from E.T. Boggess, a design professional, under a negligence theory for work performed during the second of these roles, namely that of the owner's agent. *See* Compl. at ¶ 14 (alleging negligent investigation, refusing to process change orders).

The West Virginia Supreme Court of Appeals has established that a special relationship may exist between a design professional and contracts sufficient to create a duty of care on the part of the design professional, notwithstanding the lack of privity of contract between the contractor and professional. Syl. Pt. 6, *Eastern Steel Construction, Inc. v. City of Salem*, 549 S.E.2d 266 (W.Va. 2001). In this matter, however, no such special relationship exists between plaintiff and E.T. Boggess.

In *Eastern Steel*, the plaintiff contractor was retained by the City of Salem to perform improvements to the city's existing sewage system. *Eastern Steel*, 549 S.E.2d at 269. The defendant architect was separately retained by the city to provide architectural plans and services in furtherance of these improvements. *Id.* at 268. After beginning construction, the plaintiff determined that the subsurface rock conditions had not been disclosed in the documents prepared by the architect. *Id.* In reviewing the contractor's claims against the architect, the Court noted that determination of whether a defendant owes a duty to a plaintiff must be rendered by the court as a matter of law. *Id.* at 271 (citing Syl. Pt. 5, *Aikens v. Debow*, 541 S.E.2d 576 (W.Va. 2000)). In making this determination, the Court stated that "[a]bsent some special relationship, the confines of which will differ depending upon the facts of each relationship, there is simply no duty." *Id.* at 272 (citing *Aikens*, 541 S.E.2d at 590).

After reviewing pertinent case law from various jurisdictions, the Court concluded that

> a design professional owes a duty of care to a contractor, who has been employed by the same project owner as the design professional and who has relied upon the design professional's work product in carrying out his or her obligations to the owner, notwithstanding the absence of privity of contract between the contractor and the design professional due to the special relationship between the contractor and the design professional. Syl. Pt. 6, *Eastern Steel*, 549 S.E.2d 266.

The cases relied upon by the *Eastern Steel* Court in formulating this syllabus point make clear, however, that such a duty only arises from the architects acts or omissions as an independent contractor. In *Guardian Construction Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378 (Del.Super.Ct. 1990), relied upon for the position that lack of privity does not bar an action for negligence, the plaintiff brought suit based upon a design professional's miscalculations. *Id.* at 1382. The Court further noted that a requisite of any duty to run between a contractor and design professional is that the contractor would rely upon the information provided by the design professional in calculating the contractor's bids. *Id.* at 1386. In this matter, plaintiff is not alleging that it relied upon E.T. Boggess' investigation or change order processing in calculating its bid on the School.

Similarly, in *Donelly Construction Co. v. Obergl Hunt/Gilleland*, 677 P.2d 1292 (Ariz. 1984), the plaintiff sought to recover after a design professional's drawings were found to contain substantial errors that resulted in increased costs and delays. *Id.* at 1295. Importantly, the *Donelly* Court noted that the professional services for which the design professional may be found negligent included providing plans and specifications for a particular job. *Id.*

Plaintiff's claims center upon E.T. Boggess' actions while construction was ongoing, including supervision of the construction and the processing of change orders. These actions constitute architectural services rendered on behalf of the owner, and are not work product relied upon by the contractor in formulating its bid. Therefore, E.T. Boggess did not owe a duty of care

to the plaintiffs, and plaintiffs cannot maintain a cause of action under such a theory against E.T. Boggess.

IV. Conclusion

Plaintiff's Complaint fails to assert any allegations or state any claim upon which relief may be granted. Under West Virginia law, a design professional owes a duty to a contractor with whom it is not in privity only when both are working for the same project owner and the contractor relied upon the design professional's work product in carrying out its obligations to the owner. Any assertion that E.T. Boggess was under some duty to supervise the workmanship and/or process change orders is without adequate support.

For the foregoing reasons, Defendant E.T. Boggess respectfully requests this Court enter an Order dismissing all allegations against it contained within the Complaint.

SECOND DEFENSE

In response to the specific allegations contained within Plaintiff's Complaint, E.T. Boggess states as follows:

1. E.T. Boggess states that the allegations set forth in Paragraph 1 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof.

2. E.T. Boggess states that the allegations set forth in Paragraph 2 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof.

3. E.T. Boggess states that the allegations set forth in Paragraph 3 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient

to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof.

4. E.T. Boggess admits that it is a West Virginia corporation with an office located at 101 Rockledge Avenue, Princeton, West Virginia 24740. E.T. Boggess further admits that it is licensed in the state of West Virginia to provide architectural services, and that entered into a contract with the McDowell County Board of Education to provide such services in relation to the Iaeger/Panther Elementary School.

5. E.T. Boggess states that the allegations set forth in Paragraph 5 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof.

6. E.T. Boggess states that the allegations set forth in Paragraph 6 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof.

7. E.T. Boggess states that the allegations set forth in Paragraph 7 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof.

8. E.T. Boggess states that the allegations set forth in Paragraph 8 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof.

9. E.T. Boggess states that the allegations set forth in Paragraph 9 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

10. E.T. Boggess states that the allegations set forth in Paragraph 10 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

11. E.T. Boggess denies the allegations set forth in Paragraph 11 of Plaintiff's Complaint as they apply to it. E.T. Boggess is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein and, therefore, denies the same and demands strict proof thereof.

12. E.T. Boggess states that the allegations set forth in Paragraph 12 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

13. E.T. Boggess states that the allegations set forth in Paragraph 13 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient

to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

14. E.T. Boggess admits that it provided the architectural design of the Iager/Panther Elementary School, but denies that it provided any engineering services in relation thereto. E.T. Boggess further denies that refusing to process Swope's change orders constitutes unworkmanlike, defective, or negligent work. E.T. Boggess denies the remaining allegations set forth in Paragraph 14 of Plaintiff's Complaint, and demands strict proof thereof.

15. E.T. Boggess denies the allegations set forth in Paragraph 15 of Plaintiff's Complaint and demands strict proof thereof.

16. E.T. Boggess states that the allegations set forth in Paragraph 16 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

17. E.T. Boggess states that the allegations set forth in Paragraph 17 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

18. E.T. Boggess states that the allegations set forth in Paragraph 18 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

19. E.T. Boggess states that the allegations set forth in Paragraph 19 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

20. E.T. Boggess states that the allegations set forth in Paragraph 20 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

21. E.T. Boggess states that the allegations set forth in Paragraph 21 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

22. E.T. Boggess states that the allegations set forth in Paragraph 22 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

COUNT I

Breach of Contract Against McDowell BOE

23. In response to Paragraph 23 of Plaintiff's Complaint, E.T. Boggess re-alleges and incorporates by reference Paragraphs 1 through 26 of this Answer as if fully set forth herein.

24. E.T. Boggess states that the allegations set forth in Paragraph 24 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

25. E.T. Boggess states that the allegations set forth in Paragraph 25 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

26. E.T. Boggess states that the allegations set forth in Paragraph 26 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies

the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

27. E.T. Boggess states that the allegations set forth in Paragraph 27 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

28. E.T. Boggess states that the allegations set forth in Paragraph 28 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

29. E.T. Boggess states that the allegations set forth in Paragraph 29 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

30. E.T. Boggess states that the allegations set forth in Paragraph 30 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies

the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

31. E.T. Boggess states that the allegations set forth in Paragraph 31 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

WHEREFORE, E.T. Boggess states that plaintiff's request for relief for Count 1 of plaintiff's Complaint does not apply to E.T. Boggess and, therefore, plaintiff is not entitled to recovery against E.T. Boggess under the allegations set forth in Count 1. To the extent the request for relief may be construed, in any way, against it, E.T. Boggess denies that it is liable to plaintiff for any of the damages of relief set forth in the Complaint, including, but not limited to, compensatory damages, costs, attorney's fees, or any other type of relief.

COUNT II

Negligence claim against Defendants Mountaineer, Boggess, ZMM, Potesta, and Thrasher

32. In response to Paragraph 32 of plaintiff's Complaint, E.T. Boggess re-alleges and incorporates by reference Paragraphs 1 through 32 of this Answer as if fully set forth herein.

33. E.T. Boggess denies the allegations set forth in Paragraph 33 of plaintiff's Complaint as they apply to it. E.T. Boggess further states that the remaining allegations contained therein are legal conclusions and, accordingly, denies the same and demands strict proof thereof.

34. E.T. Boggess denies the allegations set forth in Paragraph 34 of plaintiff's Complaint as they apply to it. E.T. Boggess is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein and, therefore, denies the same and demands strict proof thereof.

35. E.T. Boggess denies the allegations set forth in Paragraph 35 of plaintiff's Complaint as they apply to it. E.T. Boggess is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein and, therefore, denies the same and demands strict proof thereof.

36. E.T. Boggess denies the allegations set forth in Paragraph 36 of plaintiff's Complaint as they apply to it. E.T. Boggess is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein and, therefore, denies the same and demands strict proof thereof.

37. E.T. Boggess states that the allegations set forth in Paragraph 37 of plaintiff's Complaint are legal conclusions and, accordingly, denies the same as they apply to E.T. Boggess. As to the remaining allegations contained therein, E.T. Boggess is without knowledge or information sufficient to form a belief as to the truth of such allegations and, therefore, denies the same and demands strict proof thereof.

38. E.T. Boggess states that the allegations set forth in Paragraph 38 of plaintiff's Complaint are legal conclusions and, accordingly, denies the same as they apply to E.T. Boggess. As to the remaining allegations contained therein, E.T. Boggess is without knowledge or information sufficient to form a belief as to the truth of such allegations and, therefore, denies the same and demands strict proof thereof.

39. E.T. Boggess denies the allegations set forth in Paragraph 39 of plaintiff's Complaint as they apply to it. E.T. Boggess is without knowledge or information sufficient to

form a belief as to the truth of the remaining allegations contained therein and, therefore, denies the same and demands strict proof thereof.

WHEREFORE, E.T. Boggess denies that it is liable to plaintiff for any damages or relief set forth in the Complaint, including, but not limited to, compensatory damages, costs, attorney's fees, pre- and post-judgment interest, or any other type of relief.

COUNT III

Negligent and/or intentional misrepresentation against Boggess and McDowell BOE

40. In response to Paragraph 32 of plaintiff's Complaint, E.T. Boggess re-alleges and incorporates by reference Paragraphs 1 through 32 of this Answer as if fully set forth herein.

41. E.T. Boggess denies the allegations set forth in Paragraph 41 of plaintiff's Complaint as they apply to it. E.T. Boggess is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein and, therefore, denies the same and demands strict proof thereof.

42. E.T. Boggess states that the allegations set forth in Paragraph 31 of Plaintiff's Complaint do not apply to it and, accordingly, it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein. Therefore, E.T. Boggess denies the same and demands strict proof thereof. To the extent any such allegations contained within this paragraph can in any way be construed against this Defendant, then such allegations are hereby denied and E.T. Boggess demands strict proof thereof.

43. E.T. Boggess denies the allegations set forth in Paragraph 43 and demands strict proof thereof.

44. E.T. Boggess states that it lacks knowledge or information sufficient to form a belief as to what information plaintiff relied upon in establishing its bid price and schedule and, therefore, denies the allegations related thereto and demands strict proof thereof. E.T. Boggess

denies the remaining allegations set forth in Paragraph 44 of plaintiff's Complaint and demands strict proof thereof.

45. E.T. Boggess states that the allegations set forth in Paragraph 45 of plaintiff's Complaint are legal conclusions and, accordingly, denies the same as they apply to E.T. Boggess and demands strict proof thereof.

46. E.T. Boggess denies the allegations set forth in Paragraph 46 of plaintiff's Complaint and demands strict proof thereof.

47. E.T. Boggess denies the allegations set forth in Paragraph 47 of plaintiff's Complaint and demands strict proof thereof.

WHEREFORE, E.T. Boggess denies that it is liable to plaintiff for any damages or relief set forth in the Complaint, including, but not limited to, compensatory damages, costs, attorney's fees, pre- and post-judgment interest, or any other type of relief.

THIRD DEFENSE

The Complaint should be dismissed as plaintiff's causes of action against E.T. Boggess are barred by the applicable statute of limitations.

FOURTH DEFENSE

Plaintiff's causes of action against E.T. Boggess are barred by the doctrine of laches.

FIFTH DEFENSE

Plaintiff, by its actions, has waived and/or is estopped from maintaining this action against E.T. Boggess.

SIXTH DEFENSE

Plaintiff's cause of action for negligence necessarily fails because E.T. Boggess owed no duty to Plaintiff.

SEVENTH DEFENSE

Plaintiff's cause of action for negligence necessarily fails because E.T. Boggess did not breach any duty that it may have owed to Plaintiff.

EIGHTH DEFENSE

The alleged damages, if any, suffered by plaintiff were not proximately caused by an act or omission of E.T. Boggess.

NINTH DEFENSE

Plaintiff's claims are barred by the affirmative defense of comparative negligence, in that the negligence of plaintiff equals or exceeds the negligence, if any, of E.T. Boggess.

TENTH DEFENSE

E.T. Boggess invokes the doctrine of comparative negligence or fault and alleges that the negligence of plaintiffs must be compared to the negligence, if any, of E.T. Boggess and the plaintiff's recovery, if any, must be reduced by plaintiff's corresponding degree of negligence.

ELEVENTH DEFENSE

Persons or entities other than E.T. Boggess were wholly or partially responsible for the damages sustained by Plaintiff and, therefore, no claim upon which relief can be granted has been stated.

TWELFTH DEFENSE

E.T. Boggess invokes the doctrine of mitigation of damages and alleges that the plaintiff failed to mitigate damages allegedly caused by E.T. Boggess, if any, and therefore plaintiff's recovery, if any, should be reduced by the amount of damages which might have been avoided through mitigation.

THIRTEENTH DEFENSE

E.T. Boggess incorporates by reference any and all affirmative defenses identified in Rules 8 and 12 of the West Virginia not previously stated above including accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver.

FOURTEENTH DEFENSE

E.T. Boggess denies any allegations set forth in the Complaint not specifically admitted.

FIFTEENTH DEFENSE

E.T. Boggess reserves the right to amend this answer and assert any and all affirmative defenses which discovery proceedings may hereinafter reveal to be appropriate.

WHEREFORE, E.T. Boggess respectfully requests that Plaintiff have and recover nothing, that E.T. Boggess be dismissed from this action with prejudice, and that it have and recover all costs and expenses, including reasonable attorneys' fees, expended in connection with the defense of this action, and that it receive such other and further relief as justice may require.

DEFENDANT DEMANDS A TRIAL BY JURY.

E.T. BOGGESS, INC.

By Counsel

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THE THRASHER GROUP, INC.,

Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Answer and Motion to Dismiss on Behalf of E. T. Boggess, Architect, Inc.* was served upon the following individual(s) by depositing the same in the U.S. Mail, postage prepaid, this __1__ day of September, 2016:

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(SIGNED W/ PERMISSION SFS 12818)

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HUBER, HUNT & NICHOLS, INC., Plaintiff and Appellant,
v.
RICHARD R. MOORE et al., Defendants, Cross-complainants and Appellants;
BRANDOW & JOHNSTON ASSOCIATES et al., Cross-defendants and Respondents

Civ. No. 2411.
Court of Appeal, Fifth District, California.
January 27, 1977.

SUMMARY

Plaintiff contractor sought damages for negligence from the architects who had prepared the plans and specifications for a convention center complex constructed by plaintiff. Defendants filed cross-complaints against engineering consultants for indemnity. The trial court refused plaintiff's request, made four and one-half years after the original complaint had been filed, to add a new cause of action against defendants for negligent misrepresentation and intentional interference with contractual relationship, although the court did not preclude plaintiff from proposing jury instructions on intentional interference with contractual relationship. The court refused to allow plaintiff's cost-accounting computer printout to be admitted into evidence, finding that it would be unintelligible to lay jurors, but did allow plaintiff's witnesses to base their testimony upon the document. Judgment was entered on a verdict in favor of the architects in the negligence action, and in favor of the engineers on the indemnity cross- complaint, and the court allowed the architects $2,000 cost for expert witness fees. (Superior Court of Fresno County, No. 146489, Hollis G. Best, Judge.)

On appeal by plaintiff, and cross-appeal by defendant architects on the indemnity issue, the Court of Appeal affirmed. The court held that the computer printout, which plaintiff conceded was the single piece of evidence tending to prove damages, was not only unintelligible to lay jurors, but also misleading, as it failed to specify the causal relationship between various cost overruns and defendants' alleged negligence, and also failed to distinguish between alleged acts of negligence by defendants in their capacity as independent contractors (for which they could be liable), and in their capacity as agents and arbiters (for which they could not be liable, in this situation, absent a showing of malice). The court rejected plaintiff's contention that a total cost concept (difference between estimated bid and actual cost), could be used to determine damages under these facts.(Opinion by Loring, J.,* with Brown (G. A.), P. J., and Gargano, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
Pleading § 71--Time to Amend--Unwarranted Delay--Discretion of Trial Court.
Even though a good amendment to pleadings is proposed in proper form, unwarranted delay in presenting it may be a reason for denial, and denial by the trial court will not be disturbed unless an abuse of discretion is clearly shown. Thus, in an action against architects for negligence, the trial court's denial of plaintiff contractor's attempt to amend the pretrial order to allege a cause of action for intentional interference with contractual relationship was not error, where the attempted amendment was proposed more than four and one-half years after the original complaint had been filed, more than eight years after the wrong alleged had occurred, and less than five months before the mandatory dismissal date, with no explanation, excuse or justification for the delay. The new cause of action was based upon a partially new set of facts and may thus have been barred by the statute of limitations.

(2)
Architects, Engineers, and Surveyors § 15--Pleadings, Issues, and Proof--Amendment Adding Cause of Action for Negligent Misrepresentation.
In an action against architects for negligence, the trial court did not err in denying plaintiff contractor leave to amend the pretrial order to allege a cause of action for negligent misrepresentation, where the attempted amendment was proposed more than four and one-half years after the original complaint had been filed and where the court did not preclude plaintiff from offering proposed jury instructions on intentional interference with contractual relationship if supported by proof at trial.

(3)
Architects, Engineers, and Surveyors § 16--Negligence--Evidence--Cost-accounting Computer Readout--Admissibility.
In an action against architects for negligence, the trial court's exclusion of plaintiff contractor's cost-accounting computer readout from evidence and allowing qualified witnesses to testify orally from it was proper, where the computer readout was unintelligible to lay jurors (Evid. Code, § 352), and presented a great risk of misinterpretation unless accompanied by explanatory testimony, and where the document was voluminous and complex, and was arranged without reference to or explanation of causation of various cost overruns, which would have required the jury to make significant assumptions of proof.

(4a, 4b, 4c)
Architects, Engineers, and Surveyors § 9--Employment--Liabilities--As Independent Contractor--As Agent or Arbiter.
An architect, in his capacity as an independent contractor, can be held liable to clients or third persons for negligence in the preparation of plans and specifications; however, in his capacity as an agent of the owner (supervising construction), he cannot be sued for simple negligence in a situation where the contractor has sued the owner, and, in his capacity as arbitrator of disputes between the owner and contractor, he has quasi-judicial immunity in the absence of proof of wilful misconduct or malice. Thus, in an action by plaintiff contractor against architects for professional negligence, documents that allegedly proved that defendants negligently delayed in approving change orders requested by plaintiff during the course of construction, as well as evidence of cost overruns which failed to indicate whether the additional costs were alleged to have resulted from defendants' negligence as independent contractors, or from negligence in supervision and arbitration, was properly excluded, where there was no evidence of wilful misconduct or malice.

[See **Cal.Jur.3d,** Architects, § 30; **Am.Jur.2d,** Architects, § 23.]

(5)
Negligence § 8--Professional Negligence--Liability.
A professional person may be held liable to third persons who suffer damage proximately caused by the negligence of the professional person as an independent contractor in the performance of his professional duties, even though there was no privity of contract between the third person and the professional person and even though the client does not complain about the quality of the professional service.

(6a, 6b)
Building and Construction Contracts § 3--Construction and Effect--Accord and Satisfaction Clause in Change Order.
Architects who prepared the plans and specifications for a convention center complex were not liable for damage caused by failure of the contractors to accurately estimate the costs involved in change orders approved by the architects, where the contractors accepted the change orders (which contained accord and satisfaction clauses) without first demanding additional cost allowances for the architects' delays in approving the change orders. Such action by the contractors constituted a waiver of any claim of damage resulting from the delays.

(7a, 7b)
Architects, Engineers, and Surveyors § 15--Pleading--Measure of Damages.
The proper measure of damages in an action by a contractor against an architect, whether the cause of action is for negligence or negligent misrepresentation, is actual damage proximately caused by breach of the duty of due care in the preparation of plans and specifications or by a misrepresentation. Thus, in an action against architects for professional negligence, the trial court did not err in refusing to allow plaintiff contractor to prove damage under a total cost concept (difference between initial bid estimate and total cost of project), notwithstanding the fact that plaintiff's computer accounting system, which did not distinguish between ordinary cost and cost increases proximately caused by the alleged negligence, was kept in accordance with standard business practices, where plaintiff did not explain his failure to provide more specific evidence of causation based upon the records of original entry that were the source for the data fed into the computer system.

(8)

Appellate Review § 179--Determination and Disposition of Cause-- Harmless Error--Exclusion of Evidence.
In an action against architects for professional negligence, plaintiff contractor's concession that a computer readout was "the single piece of evidence which proved or tended to prove that the effect of the architects' errors and omissions was to increase job costs," precluded a reversal based on exclusion of other evidence under Evid. Code, § 354, (no reversal for erroneous exclusion of evidence unless error resulted in miscarriage of justice), where the computer readout had been properly excluded from evidence, and where, therefore, exclusion of other evidence could not have resulted in a miscarriage of justice.

(9)
Appellate Review § 88--Record--Contents as Affecting Scope of Review-- Proposed Jury Instructions.
In an action against architects for professional negligence, it was incumbent upon plaintiff to make certain that the trial court's ruling against plaintiff's proposed instruction on negligent misrepresentation be disclosed in the record on appeal before assigning the alleged ruling as error, and the appellate court was required to presume that plaintiff had withdrawn his request for the instruction where the record disclosed only that the trial court had indicated, in a minute order, that it would grant plaintiff's request for an instruction on negligent misrepresentation if supported by the evidence, but did not disclose whether the instruction in question was ever discussed, given or refused.

(10)
Negligence § 105--Instructions--Negligent Misrepresentation.
In an action against architects for professional negligence in the preparation of plans for a convention center constructed by plaintiff contractor, the contractor's proposed instruction on negligent misrepresentation was an incorrect statement of the law, in not specifying alleged negligent conduct of defendants in supplying information in their capacity as independent contractors, rather than their capacities as agents or arbiters, and in not specifying that the architects would be liable only for damage proximately caused by alleged misrepresentations. Thus such instruction, if properly requested, would have been properly refused.

(11)
Evidence § 83--Expert Witnesses--Standard of Care--Actions for Professional Negligence.
In an action against a professional person accused of negligence in failing to adhere to accepted standards within his profession, such accepted standards must be established by expert evidence unless the standard is a matter of common knowledge. Thus, in such an action, a proposed instruction directing the jury to disregard the testimony of experts regarding the standard of care required by law, without proper guidelines regarding the circumstances under which the jury would be permitted to disregard such expert testimony, was erroneous and if properly requested was properly refused.

(12)
Costs § 8--Taxation and Award--Expert Witnesses.
In an unsuccessful action by a contractor seeking nearly a quarter of a million dollars in damages from architects for their professional negligence in the preparation of plans and specifications, as well as negligence in delaying approval of change orders, in connection with a convention center constructed by the contractor, the trial court was in a far better position than the reviewing court, on the contractor's appeal from the judgment, to exercise discretion under Code Civ. Proc., § 998, in determining the reasonable and necessary costs that the architects (as prevailing parties who had made a prior settlement offer), should be awarded for the services of their expert witnesses. Thus, though the trial court, on the architects' motion for such costs, had allowed only $2,000 of the more than $11,000 that they had actually paid, they did not establish an abuse of such discretion by merely asserting on appeal that the trial court was trying to punish them for the inadequacy of their earlier out-of-court settlement offer to the contractor (Code Civ. Proc., § 998), especially where it appeared from the record that at least one of the four "experts" they had paid was no more than a percipient witness.

COUNSEL
Rushing, Ames & Norman, Conrad L. Rushing and Steven Perryman for Plaintiff and Appellant.
Jones & Wilson and George W. Coleman for Defendants, Cross-complainants and Appellants.
Stanley H. Tibbs, Stammer, McKnight, Barnum & Bailey and Dean A. Bailey for Cross-defendants and Respondents.

LORING, J. *

Huber, Hunt & Nichols, Inc., an Indiana Corporation (Contractor) filed an action in Santa Clara County against The Fresno City-County Community and Convention Center Authority (Owner), the City of Fresco (City) and County of Fresno (County) and Richard R. Moore, Robert W. Stevens, Robert W. Stevens Associates and Robert Stevens Associates and Adrian Wilson Associates, a joint *284 venture (collectively Architects) to recover damages allegedly sustained as the result of the construction of a convention center complex in the City of Fresno. Defendant's motion for change of venue to Fresno County was granted. The demurrer of Architects was sustained as to all causes of action except causes of action seven (negligence) and ten (indemnity). Owner filed a cross-complaint against Robert W. Stevens Associates to recover any moneys owner was obligated to pay Contractor.

Architects filed a first amended cross-complaint against Brandow & Johnston Associates, structural engineering consultants (Structural Engineers) and McDougald & Leino, electrical engineering consultants (Electrical Engineers) for indemnity.

At the outset of trial, the case was settled by Contractor as to Owner, City and County and the action as to said defendants was dismissed with their consent with prejudice. Owner then dismissed its cross-complaint against Stevens Associates with prejudice. The case proceeded against Architects, Structural and Electrical Engineers. By informal agreement of counsel a judgment of nonsuit was rendered against Architects on their cross-complaint against Electrical Engineers for indemnity at the conclusion of plaintiff's case. After 74 trial days the jury returned a verdict in favor of Architects and against Contractor. The court declared a judgment in favor of Structural Engineers on Architects' cross-complaint. On Architects' motion to tax costs, the trial court disallowed certain items of costs claimed by Architects.

Contractor appeals from the judgment on the jury verdict in favor of Architects, the Architects appeal from the order and modification of order disallowing certain costs and from the judgment of nonsuit and judgment on jury verdict on their cross-complaints against Electrical and Structural Engineers.

Before defining the issues on appeal, it is first appropriate to consider the factual context out of which these cases arise.

Prior to February 1962, City decided to build a convention center complex consisting of three buildings connected by one roof - a convention center, a theatre and an ice rink - in the City of Fresno. City entered into a contract with Robert W. Stevens, dba Robert W. Stevens Associates, a licensed architect, to prepare the architectural plans and specifications. Later County joined City in the project and Fresno *285 City-County Convention Center Authority was created by a joint powers agreement between City and County executed under authority of Government Code, chapter 5, article 1, section 6500 et seq.

The architectural contract was assigned by City to Owner. As the magnitude of the project increased, Robert W. Stevens Associates entered into a joint venture agreement with Adrian Wilson Associates, a firm of licensed architects. After nine months of work by the Architects, the plans and specifications were approved and accepted by the Owner, checked and approved by city building department, building permits issued and public bids on them requested by the Owner. The bids were opened December 15, 1964, and Contractor's bid of $6,398,000 was the low bid. [1]

The low bid was approximately $1 million above the Architects' estimates. Owner was uncertain that it could finance the extra cost so it negotiated with Contractor on 50 or 60 possible modifications or alternatives which would reduce the overall cost of the project. The contract with the possible modifications or alternatives was awarded to Contractor and construction began January 25, 1965. The contract required completion within 500 days.

The contract contained a liquidated damages clause of $200 for each day's delay over 500. Owner took possession of the convention center in late September 1965 before the project was entirely completed.

The request for bids included the proposed contract which contained various provisions, some of the more relevant portions of which are set forth in the margin. [2] *286

"a. The Architect shall have the general supervision and direction of the construction operation. He shall have the right to accept or reject materials or workmanship, to decide the amount due at each payment period, and to determine when the Contractor has complied with the conditions of the Contract.

"a. The General and Special Conditions apply with equal force to all of the work, including extra work authorized.

"b. For convenience, these specifications are arranged in the several sections indicated, but such separation shall not be considered as the limits of the work required of any separate trade. The terms and conditions of such limitations are wholly between the Contractor and his subcontractors.

"c. Interpretation: In general the drawings will indicate dimensions, position and kind of construction, and the specifications will indicate qualities and methods. Any work indicated on the drawings and not mentioned in the specifications, or vice versa, shall be furnished as though fully set forth in both. Work not particularly detailed, marked or specified, shall be as similar parts that are detailed, marked or specified.

"d. Should an error appear in the drawings or specifications, or in the work done by others affecting this work, the Contractor shall notify the Architect at once and the Architect will issue instructions as to procedure. *If the Contractor proceeds with the work so affected without instructions from the Architect, he shall make good any resulting damage or defect.* This includes typographical errors in the specifications and notational errors on the drawings where doubtful of interpretation.

"

"a. The Architect will furnish additional details where necessary to more fully explain the work, and same shall be considered a part of the contract. Full size details shall take precedence over scale drawings. Any work done before receipt of such details, if not in accordance with same, shall be removed and replaced or adjusted, as directed, without expense to the Owner.

"b. Should any details be, in the opinion of the Contractor, more elaborate than scale drawings and specifications warrant, written notice thereof shall be given to the Architect within five (5) days of receipt of same. The claim will then be considered, and if justified, said drawings will be amended or the extra work authorized. Non-receipt of such notice relieves the Owner of any claim.

"c. Where the words 'or equal,' 'equal to,' 'as selected,' 'approved,' or other synonymous terms are used in reference to material, quality, methods or apparatus in lieu of or in addition to other specific references, *it is to be distinctly understood that the approval of any such substitutions is vested in the Architect whose decision shall be final and binding upon all concerned.*

"a. The Owner may, at any time during the progress of the work, request any alterations, deviations, additions, or omissions from the contract, specifications, or plans by change order as herein provided, and such changes shall in no way affect or make void the contract, but will be added to or deducted from the contract price by a fair and reasonable valuation. The value of any such extra work or change shall be determined in one or more of the following ways:

"(1) By estimate and acceptance in a lump sum.

"(2) By unit price named in the contract or subsequently agreed upon.

"(3) By cost and percentage or by cost and fixed fee.

"b. If none of the above methods is agreed upon, the Contractor, provided he receives an order as above, shall proceed with the work. In such case and also under (3) above, he shall keep and present, in such form as the Architect may direct, a correct account of the net cost of labor and materials, together with vouchers. In any case, the Architect shall certify to the amount, including a reasonable allowance for overhead and profit, due to the Contractor for extra work, or deductible for deletions or changes which reduce the value of the work. Pending final determination of value, payments on account of changes shall be made on the Architect's certificate. No extra work shall be performed or change be made unless in pursuance of a written order from the Owner, approved by the Architect, stating that the extra work or change is authorized and *no claim for an addition to the contract sum shall be valid unless so ordered.*

"c. *Changes, omissions or additions shall be made only through a standard written order of the Architect and approved by the Owner.*

"d. Change orders shall be issued only before or at the time of change, *and the expense or responsibility for any change or damage without said order shall rest entirely with the Contractor.*

"e. Any change in the work shall be performed according to the original drawings and specifications insofar as same may be applied without conflict to conditions set forth by the change order.

Under the proposed contract terms as incorporated in the bid forms, the Contractor was required to carefully examine and familiarize itself with the plans and specifications and site and call the Architects' ***287** attention prior to bid to any discrepancies in or omissions from the drawings or specifications and if appropriate, amendments would be issued to all bidders prior to bid. The contract documents contemplated ***288** that the Architects' plans or specifications might contain errors or omissions and as interpreted by the parties it provided for a process which would enable the Contractor to obtain additional or supplemental information (information request I.R.) and propose changes including estimates of the cost and time for performance (change estimate C.E.) and the Owner to issue change orders (C.O.) which would specify the work to be performed, the price to be paid and the time allowed for the additional or changed work. Each C.O. was approved by the city council. The form of change orders used included a clause[3] in which the Contractor approved the change order and agreed that the sum specified was in complete payment of all work to be performed and materials to be supplied and which approved the time as extended. The Architects were designated in the contract as the sole arbiter regarding disputes which might arise between the Contractor and the Owner during the performance of the work.[4] ***289**

"a. The Architect shall *decide all* questions which arise as to quality or acceptability of materials furnished and work performed and as to the manner of performance of the work; all questions as to acceptable fulfillment of the contract on the part of the Contractor; and all questions as to the amount of compensation due at each payment period. The Architect's decisions shall be final, and he shall have authority to enforce and make effective all such decisions and orders which the Contractor fails to carry out. The Architect neither warrants nor implies warranty of either materials or performance, relative to specified or selected materials and their total performance under the terms of this Contract.

"b. In the event of a dispute between the Owner or Architect and the Contractor as to any interpretation of any of the drawings and specifications, or as to the quality or sufficiency of material or workmanship, the decision of the Architect shall, for the time being, prevail, and the Contractor, without delaying the job, shall proceed as directed by the Arthitect [*sic*] without prejudice to a final determination by negotiation or litigation." (Italics ours.)

During the course of the work Contractor submitted 103 I.R.s, 187 C.E.s and the parties agreed on 25 C.O.s. However, the 25 C.O.s encompassed 124 C.E.s. The record is not clear as to what happened to the remaining 63 C.E.s, but presumably they were rejected by the Owner. Eight of the C.O.s[5] reduced the scope of the work resulting in deductions aggregating $152,544.41. Seventeen of the C.O.s increased or changed the scope of the work which resulted in additional charges to Owner aggregating $472,652.91. Certain of Contractor's records indicate that as of November 30, 1972, its total costs in connection with the convention center were $6,965,518 with an additional $72,500 estimated to complete the work.[6] Contractor's records[7] also indicate that as of November 30, 1972, its cost overrun was $337,505 which included a revised fee of $271,365.

At trial Contractor claimed that Architects' plans and specifications were negligently prepared, contained errors and omissions, and that as a consequence, Contractor was damaged. At trial Contractor also claimed that the Architects were dilatory and negligent in approving change orders, in approving shop drawings and in the overall supervision of the work, and, as a consequence, the overall project was delayed resulting in damages to Contractor.

Contractor sought to recover from Architects the sum of $732,521 which it claimed was its total damage.[8]

The issues to be tried by a jury had been framed by a pretrial order on August 1, 1972. By that pretrial order, the only cause of action asserted against Architects was a cause of action for simple negligence.[9] After the case had been called for trial and before the jury was empanelled, the trial court conducted hearings extending over several days to revise the ***290** pretrial order primarily to encompass issues raised by various cross-complainants. An amended pretrial order was signed on March 30, 1973. On that date counsel for Contractor and for Owner orally advised the court and counsel that the case of Contractor against Owner had been settled and a few days later, the action of Contractor against Owner was dismissed with prejudice. On April 6, 1973, during the course of further conferences, counsel for Contractor asserted that Contractor intended to make motions to include a cause of action against Architects for "negligent misrepresentation" and "intentional inference with contractual relationship." The court refused the request.[10] On April 10, 1973, counsel for Contractor made a formal motion to amend the pretrial order to include a cause of action against Architects for negligentmisrepresentation ***291** and an additional cause of action for interference with contractual relations. No proposed amended complaint was submitted.

"(a) Failure to properly, adequately and competently prepare plans and specifications for the Convention Center;

"(b) Failure to properly supervise the construction of the Convention Center;

"(c) Failure to properly advise the Builder with regard to changes in the drawings or the interpretation thereof;

"(d) Failure to make timely and proper responses to requests for information by Builder;

"(e) Failure to make themselves present at the job site;

"(f) Failure to promptly approve or disapprove change estimates submitted by Builder;

"(g) Failure to properly prepare structural steel drawings;

"(h) Failure to properly prepare electrical drawings;

"(i) Failure to properly prepare the plans for the cooling tower for the Convention Center;

"(j) Failure to properly prepare plans and specifications for the elevation of wall and footing foundations;

"(k) Failure to apply reasonable construction standards relating to tolerances for concrete;

"(l) Failure to coordinate the construction with segregated contractors, including contractors supplying seating and certain stage equipment;

A further amended pretrial order was signed on April 11, 1973, which did not include the requested causes of action for negligent misrepresentation and interference with contractual relations. The trial court's minute orders indicate that a jury panel had been originally called to try the case commencing on April 4, 1973, but this call was changed from time to time thereafter and the commencement of jury selection actually began on April 16, 1973.

Issues Raised by Contractor

A. The court erred in striking and excluding evidence of architectural errors and omissions.

B. The court erred in excluding exhibit "03," IBM cost records.

C. The court erred in excluding all evidence relating to acceleration and profit.

D. The court erred in excluding certain evidence of damages.

E. The court erred in excluding evidence relating to the ice rink.

F. The court erred in striking evidence relating to shop drawings.

G. The court erred in refusing to instruct the jury on negligent misrepresentation and in refusing to allow evidence that the plans and specifications were not as represented.

H. The court erred in refusing to add interference with contractual relations to the pretrial statement.

Discussion

Contractor's eight assignments of error can be grouped into four basic categories:

1. Alleged errors regarding the trial court's refusal to allow Contractor to amend its pleadings; *292

2. Alleged errors regarding the admission of evidence;

3. Alleged errors regarding the appropriate rule of damages; and

4. Alleged error in refusing a jury instruction regarding negligent misrepresentation.

We discuss the claims of error in that order.

Rulings on Pleadings

Contractor's initial complaint was filed in Santa Clara County on August 18, 1968.[11] On April 10, 1973, more than four and one-half years after the action had been filed and eight days after it had been called for trial and after a jury had been scheduled to be called, Contractor sought to amend the pretrial order to raise an entirely new cause of action - intentional interference with contractual relationship - without making any effort to explain, excuse or justify the delay. ([1]) Contractor's position here seems to be that it had an absolute right to amend to allege such new cause of action and the trial court had no discretion to consider the matter. Such is not the law.

"Even if a good amendment is proposed in proper form, unwarranted delay in presenting it may be a reason for denial.

"The cases do not always make it clear whether they rest upon (1) the subjective element of lack of diligence in discovering the facts or in offering the amendment after knowledge of them, or (2) the effect of the delay on the adverse party. But in most cases both factors are involved. ..." (3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, § 1048, p. 2623.)

In *Moss Estate Co. v. Adler* (1953) 41 Cal.2d 581 [261 P.2d 732], the court said at page 585: "Although it is true, as defendant contends, that amendments should be liberally allowed so that all of the issues may be properly presented, the question whether the filing of an amended pleading should be allowed at the time of trial is ordinarily committed to the sound discretion of the trial court. (Code Civ. Proc., § 473.)" *293

In *Hunt v. Smyth* (1972) 25 Cal.App.3d 807 at 828 [101 Cal.Rptr. 4], the court said: "'The policy of great liberality in permitting amendments at any time under section 473 is well established, but when an order granting or denying leave to amend is attacked on appeal an additional policy applies: the reviewing court will uphold the trial court's action unless an abuse of discretion is clearly shown. ...' In *People* ex rel. *Dept. Pub. Wks. v. Jarvis, supra* [274 Cal.App.2d 217 (79 Cal.Rptr. 175)], the court, in upholding a denial of leave to amend made 16 months after the complaint had been filed and after a pretrial conference, noted: 'The trial court is entitled to be "skeptical of late claims" (*Plummer v. Superior Court, supra*, [(1963) 212 Cal.App.2d 841 (28 Cal.Rptr. 294)] at p. 844); and long-deferred presentation of a proposed amendment, without a showing of excuse for the delay, is a significant factor in support of the trial court's discretionary denial of leave to amend. [Citation.]'. ..."

Contractor's attempt to amend the pretrial order to allege a cause of action for intentional interference with contractual relationship attempted to allege an entirely new and different cause of action for the first time after the case had been called for trial, more than four and one-half years after the original complaint was filed and more than eight years after the wrong complained of, without any explanation, excuse or justification for the delay. The attempted amendment was within less than five months of the mandatory dismissal date.

The alleged cause of action for intentional interference with contractual relationship which Contractor attempted to file more than eight years after the wrong complained of was based upon a set of facts which were at least partially new and the cause of action may well have been barred by the statute of limitations (3 Witkin, Cal. Procedure (2d ed. 1971) Pleadings, §§ 1079, 1080, pp. 2655-2658), a factor which the trial court could and presumably did consider. Obviously such an amendment would have required a delay in the trial with the consequent risk that the case might not be tried within the five-year-mandatory dismissal period. There is no showing here that the trial court abused its discretion in refusing the amendment. The claim of error is devoid of merit.

([2]) What we have said applies with equal force to the Contractor's attempt to amend the pretrial order to allege a cause of action for negligent misrepresentation with this exception - Contractor claims that this proposed amendment did not state a new cause of action because the ***294** original cause of action against Architects for negligence as alleged in the pleadings and in contemplation of law was also an allegation of negligent misrepresentation by the Architects. Assuming without deciding that Contractor's contention in this regard is correct, no prejudice could result from the denial since the proposed amendment added nothing to the cause of action. In the final analysis, therefore, this contention has no relevancy except in connection with the issues regarding the admission of evidence and with the issue of jury instructions which are discussed *infra* under separate headings.

Rulings on Admission of Evidence

We next consider Contractor's claims of error regarding the rulings of the trial court concerning the admission of evidence.

([3]) In its closing brief on appeal Contractor described plaintiff's exhibit 3 for identification as "... the *single* piece of evidence which proved or tended to prove that the effect of the architects' errors and omissions was to increase job costs in the categories used by plaintiff." (Italics ours.) In oral argument on appeal, Contractor made the same concession. In view of this concession by Contractor, we first examine the court's ruling excluding plaintiff's exhibit 3 for identification from evidence. Plaintiff's exhibit 3 is described in the margin. [12]

The court concluded that the computer read out (plaintiff's exhibit 3) would be unintelligible to the jurors without additional evidence such as oral testimony to explain it. The court indicated that it would permit any qualified witness to testify from the document orally. [13] Counsel forContractor ***295** conceded in the court below that there may be risk of "wrong conclusions ... about what it shows."

Evidence Code section 350 provides that "[n]o evidence is admissible except relevant evidence." Evidence Code section 352 [14] empowers the court to exclude evidence (otherwise admissible) if its probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or of misleading the jury. Even prior to the adoption of Evidence Code section 352, the trial court had wide discretion in determining the relevance and consequent admission of evidence. (*Adkins v. Brett* (1920) 184 Cal. 252 [193 P. 251]; *Broadbent* v. *Modern Imperial Cattle Co.* (1962) 208 Cal.App.2d 433 [25 Cal.Rptr. 92]; *People v. Hess* (1951) 104 Cal.App.2d 642 [234 P.2d 65], app. dism. 342 U.S. 880 [96 L.Ed. 661, 72 S.Ct. 177]; *Spolter* v. *Four-Wheel Brake* ***296** *Serv. Co.* (1950) 99 Cal.App.2d 690 [222 P.2d 307]; *Gladstone v. Fortier* (1937) 22 Cal.App.2d 1 [70 P.2d 255].)

In our view Contractor does not demonstrate here that the trial court abused its discretion in refusing to receive plaintiff's exhibit 3 for identification in evidence. We have examined plaintiff's exhibit 3 and we conclude that the document is unintelligible particularly with reference to its possible probative value as to the issues of this case without any oral evidence explaining how it relates to the issues in this case.

Aside from the obvious difficulty that a lay jury would have in reading and understanding such a complex document and correlating it with the issues involved in this case, there was great risk of misinterpretation as counsel for Contractor conceded. For example, we find in examining plaintiff's exhibit 3 for identification that as of "11/30/72" the total "costs" "to date" were "6,965,518" with "72,500" required "to complete." We also find what appears to be a separate set of calculations entitled "Detail Cost Sheet" which indicates that as of "11/30/72" the "Total Cost to Date" was $5,828,650.68." One month later on "12/31/72" the total "costs" "to date" were "5,132,173" with "72,500 " required "to complete." If a jury were to accept the latter two figures at face value it would appear obvious that Contractor suffered no damage in any manner whatsoever but made a very substantial profit in excess of its "fee" as originally budgeted. Presumably there is an appropriate accounting explanation for these various discrepancies and apparent conflicts, but they illustrate the point that the document was subject to possible misinterpretation without explanatory evidence and they demonstrate the wisdom of the trial court's ruling. We find no prejudice resulting from the ruling with reference to plaintiff's exhibit 3 for identification in any event inasmuch as the record is clear that Contractor was permitted to produce

any qualified witness to testify orally from plaintiff's exhibit 3. Contractor did produce a witness - Bruce Bennett, its contractor manager. Bennett attempted to testify from plaintiff's exhibit 3 for identification but the sum and substance of his proferred testimony was merely to attribute every cost overrun to the fault of the Architects without discrimination as to other possible causes. He was admittedly compelled to do this because plaintiff's exhibit 3 included extra costs within total costs without discrimination or segregation and without explanation as to causation. We note in the margin a ***297** colloquy between court and counsel which illustrates the problem.[15] It is manifest that counsel for Contractor merely wanted to dump into the record all data from the computer printout including cost overruns without reference to or any consideration whatsoever of the issue of causation.

We think the wisdom of the trial court's ruling is also illustrated by reference to Appendix A attached to Contractor's opening brief on appeal, a copy of which is appended to this opinion. Contractor represents to us that the material designated on Appendix A has been extrapolated from plaintiff's exhibit 3 and Contractor alleges that Appendix A in effect proves Contractor's case. A reference to Appendix A demonstrates the fallacy of Contractor's contention. Take for example, item "1525" "Drinking water." A reference to plaintiff's exhibit 3 for identification indicates that Contractor originally estimated the cost of drinking water at $1,000, but $2,293 was expended resulting in an overrun (OR) of $1,293 which Contractor alleges is one item of its damage which it seeks to recover from Architects. In order to arrive at that conclusion, the jury would have to assume at least four elements of proof:

1. That Contractor's original estimate of $1,000 for drinking water was an accurate estimate; ***298**

2. That the overrun of $1,293 in the cost of drinking water was proximately caused by errors and omissions in the Architects' plans and specifications;

3. That said errors and omissions in the Architects' plans and specifications were proximately caused by Architects' negligence; and

4. That the overrun of $1,293 was not due to other delays caused by change orders, inclement weather or strikes (of which there were several).

When we consider that Contractor concedes on appeal that it really did not take the time to plan check the plans and specifications prior to bid as it was required to do by the terms of the bid and as it represented to Owner by its bid that it had done, the jury would have been required to assume more than was justified by the facts if it was required to assume that Contractor's original estimate of $1,000 as the cost of drinking water was an accurate estimate. There was substantial evidence in the court below (defendants' witness Clarence Vernon Holder) that Contractor's initial bid on many items of labor or material or both was too low. We note in the margin some of the testimony.[16] When we also consider that 8 of the 25 C.O.s were designed to reduce the overall costs of the project, apparently pursuant to the alternatives and changes which Owner negotiated with Contractor before executing the contract, it is manifest that not all delays were attributable to the Architects' alleged negligence. Furthermore some of the delays were caused by Contractor's own mistakes or incompetence.[17] The same fallacy applies to most of the ***299** others items of claimed damage as shown by Appendix A. Appendix A demonstrates that Contractor is still, at this late date, oblivious to the basic issue of causation.

We think there is also a fifth element of proof that the jury would have to assume in order to award $1,293 damages to Contractor because of the overrun on the cost of drinking water, namely, that the Contractor's damage, if any, *was* not compensated for and *could* not be compensated for by the change order process. On each change estimate Contractor included direct costs of labor and material and a factor for administration and overhead (usually 10 percent although sometimes 15 percent) and a factor (usually 10 percent) for profit. We see no legal reason why Contractor could not include the cost of additional drinking water in effecting a specific change pursuant to a specific change order. Additional drinking water was either a direct cost or an indirect cost of the performance of each change order and in either event the estimated cost should have been included in the change order particularly where Contractor knew that it would be required to sign an acknowledgement in the nature of an accord and satisfaction on each change order accepting the amount thereof in full satisfaction

of the work. ([4a]) Furthermore, during the course of trial and in the briefs and record on appeal, Contractor has not segregated and has made no apparent effort to segregate delays and resulting damage, if any, which were attributable to Architects' alleged negligence in preparing the initial plans and specifications and the Architects' alleged negligence in supervising the work. There is a substantial legal difference. As the United States Court of Appeal, 9th Circuit, pointed out in *Lundgren v. Freeman* (9th Cir. 1962) 307 F.2d 104, 116, an architect occupies three different roles or legal positions in relation to the ordinary construction contract:

1. He is an independent contractor in the preparation of the initial plans and specifications. It is now well settled that in such capacity the architect may be sued for negligence in the preparations of plans and specifications either by his client or by third persons;

2. He is an agent of the owner in supervising the construction work as it progresses; and ***300**

3. He is a quasi-judicial officer with certain immunity when he acts as arbiter in resolving disputes between the owner and the contractor.

In *Lundgren, supra*, the court held that the architect could not be sued for simple negligence in supervising the construction work as it progresses, where the contractor sues and collects from the owner and the architect has judicial immunity for his decisions as arbiter because in that position he acts as a quasi-judicial officer. [18]

In *Lundgren* the court concluded that architects could be held liable if they acted fraudulently or with wilful or malicious intent to injure the contractor, none of which elements are alleged or even attempted to be alleged in the case at bar except by the attempted cause of action for intentional inference with contractual relationship (which we have already discussed). ***301**

In our view the Architects can be held liable for their negligent acts in the capacity of an independent contractor. ([5]) The general rule in California is that a professional person may be held liable to third persons who suffer damage proximately caused by the negligence of the professional person as an independent contractor in the performance of his professional duties even though there is no privity of contract between the third person and the professional person and even though the client does not complain about the quality of the professional service. (*Lucas* v. *Hamm* (1961) 56 Cal.2d 583 [15 Cal.Rptr. 821, 364 P.2d 685] (lawyers); *Biakanja v. Irving* (1958) 49 Cal.2d 647 [320 P.2d 16, 65 A.L.R.2d 1358] (notary public); *Gagne v. Bertran* (1954) 43 Cal.2d 481, 487-488 [275 P.2d 15] (soil engineer); *Kent* v. *Bartlett* (1975) 49 Cal.App.3d 724 [122 Cal.Rptr. 615] (surveyors); 15 Hastings L. J. 579 (1964) (architects); 47 Cal.L.Rev. 645, 674 (1959) (architects).) However, see *Goodman v. Kennedy* (1976) 18 Cal.3d 335 [134 Cal.Rptr. 375, 556 P.2d 737] (lawyers). [19] The reason for the rule is that the action is ex delicto, not ex contractu. Originally professional persons were exempt from liability to third persons because it was believed that they owed their duty to their clients not to third persons. In *Biakanja, v. Irving, supra*, 49 Cal.2d 647, the court, rejecting the privity of contract requirement declared that whether or not liability to third persons existed "... involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (49 Cal.2d at p. 650.) Foreseeability and proximate cause now supplant the former requirement of privity of contract.

Here the parties contemplated by their contract from the outset that the Architects' plans and specifications (prepared in the capacity of an independent contractor) might well contain errors and omissions. They undertook to protect from consequent damage by requiring the bidders to carefully inspect the plans and specifications and site *before* bidding, ***302** call attention to any needed corrections and warrant that they had done so in submitting their bids. A further safety factor was a contractual arrangement for change orders as the work progressed in order to take care of any latent errors, omissions or changes required, but which were discovered only as the work progressed. ([4b]) We do not say that under these circumstances Architects cannot be held liable for damages proximately caused by negligence in preparing plans and specifications. What we do say is that Contractor in attempting to prove its case was required to distinguish between those alleged acts of negligence by Architects in their capacity as independent contractors and their negligent acts as agents of the Owner

in supervising the work and their acts as quasi-judicial arbiters in resolving disputes between the Owner and Contractor. Here, Contractor made no such effort.

Contractor complains that the trial court did not allow in evidence certain documents which it claims proved that Architects were negligent in delaying for an unreasonable time the processing of C.O.s or shop drawings required by C.O.s. Although there was conflicting expert evidence on this point, Contractor claims here that the normal time should have been 5-10 days whereas Architects actually took several times the usual period. There are two answers. First, the delays complained of were in the course of Architects' supervisorial functions as agent of the Owner and were therefore not actionable under principles enunciated in *Lundgren, supra*, which we have already discussed. ([6a]) Second, and more importantly, where a C.O. based upon Contractor's C.E. was unduly or unreasonably delayed, the Contractor's remedy was to refuse to accept the C.O., unless there was an additional cost allowance for the additional time delay. We think that Contractor had a duty to then advise the Owner and Architects that the additional delay would result in additional cost. The Contractor had no right to accept the C.O., sign the accord and satisfaction clause, and then claim additional cost, which is what it is now doing. When Contractor accepted the delayed C.O. and signed the accord and satisfaction clause (see fn. 3, *ante*) the Contractor in contemplation of law waived any claim of damage for the delay in processing the C.O. The law is clear that Contractor could legally waive its claim for damage resulting from delay. (*Hansen v. Covell* (1933) 218 Cal. 622 [24 P.2d 772, 89 A.L.R. 670]; *Frank T. Hickey, Inc. v. L.A.J.C. Council* (1954) 128 Cal.App.2d 676 [276 P.2d 52].) We conclude that it has done so.

Contractor argues that the trial court misconstrued the law regarding the difference between a cause of action for simple negligence and a ***303** cause of action for negligent misrepresentation and that as a consequence it applied the wrong rule of the measure of damages and that if it had applied the correct rule, it would have received plaintiff's exhibit 3 in evidence. In reliance on *Gagne v. Bertran, supra*, 43 Cal.2d 481, Contractor contends that in a case of negligent misrepresentation (as distinguished from a case of simple negligence) it was entitled to the difference between the value of the "property" (the construction contract) as it was and as it would have been if it had been as represented, i.e., that Contractor is entitled to the entire difference between the bid price and the total cost of the completed project. *Gagne* does not support Contractor's position. In *Gagne*, the court said: "As indicated above, however, defendant's undertaking was limited to exercising due care to determine and report the extent of the fill, and the damages, *whether for deceit or negligence*, must be measured by the actual losses suffered because of the misrepresentation." (Italics ours.) (43 Cal.2d at p. 490.) As authority, the court cited, inter alia, Civil Code section 3333 which reads: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

It is clear that when the court used the word "because" in the foregoing quotation from *Gagne* it was using it as the equivalent of "proximately caused" as used in Civil Code section 3333. It is manifest therefore, that whether Contractor's cause of action was an action for "negligence" or "negligent misrepresentation" or both, Contractor was required to prove "the detriment proximately caused" by Architects' alleged breach of architectural duty in failing to prepare plans and specifications which did not contain errors or omissions.

To paraphrase *Gagne* and apply it to the case at bar: Architects' undertaking was limited to exercising due care in the preparation of the plans and specifications and the damages *whether for deceit or negligence* must be measured by the actual losses which were proximately caused by the alleged misrepresentation. None of the excluded evidence provided that causal connection between breach of duty and resulting damages.

Although we have no desire to become enmeshed in an esoteric discussion, we note parenthetically that there would appear to be an additional reason why *Gagne* does not assist Contractor's position. In ***304** *Gagne* the soil engineer made a *positive* assertion. In the case at bar, Contractor relies on an *implied* representation. No case has been cited and we find none in which any court held that the doctrine of negligent misrepresentation applies to *implied* representations. In all cases a "positive assertion" was involved. (See *Gagne v. Bertran, supra*, 43 Cal.2d 481; *Hale v. George A. Hormel & Co.* (1975) 48 Cal.App.3d 73, 82-87 [121 Cal.Rptr. 144]; *United States v. Rogers & Rogers* (S.D. Cal. 1958) 161 F.Supp. 132;

Civ. Code, § 1572, subd. 2; 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, §§ 480-482, pp. 2739-2744.) An implied representation would not appear to be a "positive assertion" which Civil Code section 1572, subdivision 2, requires as the basis for a negligent misrepresentation. However, we regard the alleged difference between negligence and negligent misrepresentation as academic in the case at bar since there was a failure of proof of causal connection under both theories.

Contractor's entire attitude in the court below and in this court is that it is entitled to be compensated for all losses sustained over its original estimate. (See discussion under measure of damages.) Stated in its simplest form, Contractor's position is that since the plans and specifications contained errors and omissions and the Architects were negligent in supervising the work and there were delays in completing the project and Contractor sustained a loss, Contractor should be made whole by Architects. Contractor apparently does not even make an effort to segregate and give the Architects credit for moneys and time credits (90 days) recouped by Contractor in its settlement with Owner.

([7a]) Contractor asserted in the court below and here that it was not required to segregate total cost overruns from moneys received from Owner under C.O.s (or by the settlement with Owner) because of the "collateral source" rule. The fallacy of course, is that Owner was not a *collateral* source - it was the primary debtor insofar as Contractor was concerned. After all, it was Owner's building. Owner was not in the position of an insurance company with secondary liability. Contractor apparently seeks a double recovery.

When we try to ascertain precisely what Architects did or failed to do which proximately caused damage to Contractor, Contractor's opening brief on appeal merely refers us to its counsel's closing argument to the jury in the court below which is appended as an exhibit to its opening brief on appeal. Although such argument does not cite any portions of ***305** either the clerk's or reporter's record and therefore does not comply with the rules on appeal (Cal. Rules of Court, rule 15(a)); 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal § 421, p. 4389), we have nevertheless read the 63-page argument in an effort to ascertain precisely what Contractor claims. Apparently it complains of seven specific items of work:

1. The main truss design for the roof of the theatre was defectively designed and had to be firred out two inches, which allegedly delayed the project 75 days;

2. The foundation footings, which were to be "one foot six inches below finished grade or actual grade whichever is lower or as otherwise noted," were inadequately described because there was no specification of precise elevation (presumably above sea level), which allegedly resulted in three weeks delay;

3. The cooling tower footings (for the air conditioning system) were defectively designed and the requisite corrections allegedly delayed the fireproofing of the structural steel;

4. Material originally specified for the ice rink insulation was not available, which required use of a substitute material which was more difficult to use and resulted in alleged delay of two weeks; (in this connection Architects point out that Contractor finished the work in the ice rink one month ahead of Contractor's schedule);

5. The plans did not adequately describe the location of the speaker grills (for the public address system) and the location of the diffuser lights, which required someone to make a decision on their location with reference to each other;

6. During the course of construction the Architects required the Contractor to produce an "absolutely smooth surface" on the concrete work whereas such requirement appeared only in the "repair" section of the original specifications, which resulted in increased labor costs;

7. The specifications were defective in relation to the concrete work in the arena because they did not specify the permissible deviation or variance on the face of the concrete risers to which the seats were to be bolted but merely specified that the seats to be installed on the risers ***306** would be supplied by American Seating Co. American Seating Co. allegedly required a deviation or variance on the face of the concrete risers of not more than one-fourth inch. Contractor apparently assumed that a greater deviation or variance would be permitted. After the concrete was poured, Contractor allegedly discovered the American Seating Co. requirement and Contractor was required to begin "bush-hammering" the risers down to meet the required tolerance. The Contractor

apparently worked too slowly, was removed from that portion of the project, and was replaced by a substitute contractor (Merritt Strunk). Contractor complains that Architects imposed less stringent tolerance requirements on the substitute contractor, who was permitted to relax the tolerance requirements. Architects reply that any relaxation of tolerance was because of necessity not because of any desire to favor the substitute contractor. There was a conflict in the evidence as to whether the excessive deviation or variance on the face of the concrete risers was due to the alleged fact that Contractor's forms slipped during the pouring of the concrete, rather than any uncertainty over the specification requirements.

We have searched this record (contrary to our obligation as an appellate court) and we have been unable to find any excluded evidence which would have shed any light or provided the jury with any additional information regarding any one of these seven specifications of Architects' neglect, particularly with reference to whether or not they resulted in any damage to Contractor and, if so, how much. We have found no excluded evidence which should have been admitted. Each of the seven specifications was fully litigated. The jury decided against the Contractor on each of the seven specifications. ([4c]) Many of the seven specifications involved actions by the Architects as agents of the Owner in the supervision of the work or as quasi-judicial officers acting as arbiters between Owner and Contractor and would not have been actionable in any event under principles enunciated in *Lundgren, supra,* in the absence of pleading and proof of wilful misconduct or malice. Contractor's basic problem here and in the court below was not over any esoteric difference, if any, between a cause of action for Architects' simple negligence and a cause of action for Architects' negligent misrepresentations. Contractor's basic problem stems from a failure of evidence to establish causation - the proximate cause of its loss, if any.

We are not persuaded that any excluded evidence would have supplied the missing element of proof or that it would have produced a different result. ***307**

([8]) As noted Contractor concedes on this appeal that plaintiff's exhibit 3 for identification was the *single* piece of evidence which established Contractor's damage. Since, as already noted, we conclude that exhibit 3 was properly excluded from evidence, it would appear from Contractor's own admission that there was no competent admissible evidence which established that Contractor sustained any damage proximately caused by Architects' negligence in preparing the plans and specifications. In our opinion, no miscarriage of justice occurred. Under these circumstances we may not reverse because of the exclusion of evidence. (Evid. Code, § 354.)[20]

Rulings Regarding the Measure of Damages

([7b]) We next consider Contractor's contention that the trial court committed error in its rulings regarding the correct measure of damages to be applied in the case. Contractor contends that because Architects would not allow it all of the time extensions it requested on C.O.s and because of Architects' delays in supervision, it was required to accelerate its work under the contract, thereby suffered damage, and consequently lost profits on the project. Contractor claims that it was error for the trial court to refuse to allow it to proceed under the "total cost" principle in proving its damage. This contention is dependent upon the admissibility of plaintiff's exhibit 3 which we have already discussed.

Contractor relies on *H. John Homan Co. v. United States* (1969) 418 F.2d 522 [189 Ct.Cl. 500] and *J.D. Hedin Construction Company v. United States* (5th Cir. 1965) 347 F.2d 235 [171 Ct.Cl. 70]. Architects and the trial court relied on the subsequent case of *Boyajian v. United States* (1970) 423 F.2d 1231 [191 Ct.Cl. 233] which explains and distinguishes *Hedin.*

Under the "total cost" method of proof Contractor claims that it was entitled to collect the $732,521 difference between its initial bid estimate and the total cost of the project as shown by Appendix A attached ***308** hereto.[21] The trial court correctly applied principles enunciated in

Contractor's position here and in the court below seems to be simply that although admittedly its computer operated accounting system did not distinguish in any manner between ordinary costs and alleged increased costs proximately caused by Architects' alleged negligence, nevertheless since such computer accounting system was kept in accordance with standard business practices, Contractor was entitled to collect its entire loss as shown by such computer accounting system (plaintiff's exhibit 3) without being required to prove the normal elements of damage proximately caused by negligence. In

other words, Contractor's business accounting methods should be allowed to control principles of law rather than principles of law controlling Contractor's business accounting methods. We are not prepared to embrace that concept, particularly when it is obvious that Contractor could have maintained a proper accounting system to establish its alleged damage proximately caused by Architects' alleged negligence, if it had desired to do so. Apparently it simply did not desire to do so.

It seems manifest that the computer printout was based upon records of original entry such as invoices for materials, cancelled checks for labor and material, time sheets and other normal and customary business records universally used in the business world. We cannot believe that Contractor fed into the computer raw data picked out of thin air. In fact, Bennett admitted that records of original entry existed during construction, but they were not produced at trial and no calculations therefrom were prepared. The failure is not explained. If the computer printout was not organized in a manner to indicate the specific cause of particular cost overruns, a qualified accountant should have been able to make the calculations from the original records which were the source for the data fed into the computer. But nobody took the time and effort to make any such calculations. No explanation is given for the failure. ***310**

If we were to accept Contractor's contention as the law of this state, the result would, for all practical purposes, nullify all laws regarding competitive bidding on public contracts. Under such a concept, contractors could submit any bid necessary to obtain the job knowing that the public agency (or its architects) would be required to pay whatever costs contractor incurred on the project if contractor could discover some error or omission *however irrelevant* in the plans and specifications. ([6b]) In the final analysis what Contractor actually complains of is that the amount of money which Owner paid Contractor under the 25 C.O.s and the time allowed for the changes or additional work was not sufficient to reimburse Contractor for its total cost and total delay. Contractor argues that somehow the total result exceeded the sum of the 25 parts. Assuming without deciding that such a result is within the realm of logical possibility, we think that the responsibility for the result lies with Contractor, not with Architects. It was within Contractor's legal power to compute estimated change order costs in a manner which would compensate Contractor for its total loss. It failed to do so. Architects were not legally responsible for that failure. So far as we can tell from this record, Contractor was paid in almost every instance what Contractor requested on the 25 C.O.s issued. Contractor simply did not request enough on those C.O.s which were authorized. A factor of 10 percent or 15 percent for administration and overhead was obviously too low if Contractor's present claims are accurate.

We find no error in the trial court's refusal to allow Contractor to prove damage under the total cost concept.

Errors Regarding Jury Instructions

Lastly, we consider Contractor's contention that the court committed reversible error in refusing to give its requested unnumbered instruction regarding negligent misrepresentation.[23] ***311**

"(i) by the person or one of the class of persons for whose guidance the information was supplied, and

"(ii) because of the harmed person's justifiable reliance upon the information in a transaction in which it was intended to influence his conduct.

([9]) At the outset, we are confronted with the question of whether or not the instruction was "requested" and the question of whether or not the court "refused" to give the instruction. The clerk's transcript contains a document filed April 2, 1973, by Contractor entitled "Statement of Fact; Proposed Voir Dire; Form of Verdict and Partial Jury Instructions of Plaintiff" within which is bound the unnumbered "instruction" quoted ***312** in the footnote. The trial court's minute order of April 6, 1973 (quoted fn. 10, *ante*), indicates that the court would grant Contractor's request if supported by the evidence to instruct the jury on the subject of "negligent misrepresentation." However, the reporter's transcript on appeal does not indicate the jury instructions as actually given to the jury by the trial court on August 16, 1973. The reporter's transcript does contain a partial record of the court's discussion with counsel in chambers regarding what instructions it would and would not give. In the portion of the discussions which were on the record (portions were "off the record") the instructions were discussed by number not by subject matter except incidentally. It does not affirmatively appear from such reporter's transcript that the instruction here in question was ever discussed. The instruction in

question is not contained within that portion of the clerk's transcript which contains the instructions which were "given" or the portion of the clerk's transcript which contains the instructions which were "refused."

We are left to speculate as to what if anything actually happened to the instruction. We know not whether the instruction was withdrawn, abandoned, or lost in the shuffle.

Bearing in mind that the instruction was "requested" on April 2, 1973, in a document filed in the clerk's file and the court did not reach a point in the trial of discussing with counsel the instructions to be given and to be refused until August 13, 1973, it is most probable that the instruction was lost in the shuffle of all of the papers involved in such an extended trial, but that is sheer speculation on our part. Under the rules governing this appeal, we must presume that Contractor withdrew its request because it is incumbent upon Contractor, as appellant, to make certain that the trial court has ruled and that the record on appeal discloses that ruling before the alleged ruling may be assigned as error. (*Lynch* v. *Birdwell* (1955) 44 Cal.2d 839 [285 P.2d 919]; *Vaughn v. Jonas* (1948) 31 Cal.2d 586, 596 [191 P.2d 432]; *Morehouse v. Taubman Co.* (1970) 5 Cal.App.3d 548, 559 [85 Cal.Rptr. 308].) In *Faulk* v. *Soberanes* (1961) 56 Cal.2d 466, 471 [14 Cal.Rptr. 545, 363 P.2d 593], the court said: "*Plaintiff, as appellant, has the burden to present a record sufficiently complete to establish that the claimed errors were not invited by her, and in the absence of such a showing she may not properly complain.*" (Italics ours.)

([10]) However, notwithstanding the foregoing rules we have examined the instruction in question and have concluded that it is not a ***313** correct statement of the law in any event and if it was requested and if it was refused, it was properly refused. The entire instruction relates to "the Architects' negligent conduct in supplying information," making no distinction between the alleged negligent conduct of the Architects in supplying information in their capacity as independent contractors and their alleged negligent conduct in supplying information in their capacity as agents of the Owner in supervising the work as it progresses and their alleged negligent conduct in delaying rulings in their capacity as arbiters and quasi-judicial officers, all as enunciated by *Lundgren, supra.* Also, the instruction required the jury to award Contractor all damage sustained "due to" the Architects' negligence whether or not proximately caused by such alleged negligence.

([11]) Furthermore, the instruction directed the jury to disregard the testimony of experts regarding the standard of care to which Architects were required by law to adhere without proper guidelines regarding the circumstances under which the jury would be permitted to disregard such expert testimony. Ordinarily, where a professional person is accused of negligence in failing to adhere to accepted standards within his profession the accepted standards must be established only by qualified expert testimony (*Lawless v. Calaway* (1944) 24 Cal.2d 81 [147 P.2d 604]; *Trindle v. Wheeler* (1943) 23 Cal.2d 330 [143 P.2d 932]; *Stephenson v. Kaiser Foundation Hospitals* (1962) 203 Cal.App.2d 631 [21 Cal.Rptr. 646]) unless the standard is a matter of common knowledge (*Ales v. Ryan* (1936) 8 Cal.2d 82 [64 P.2d 409]; *McBride v. Saylin* (1936) 6 Cal.2d 134 [56 P.2d 941]). However, when the matter in issue is within the knowledge of experts only and not within common knowledge, expert evidence is conclusive and cannot be disregarded. (*Engelking* v. *Carlson* (1939) 13 Cal.2d 216 [88 P.2d 695]; *Paxton v. County of Alameda* (1953) 119 Cal.App.2d 393 [259 P.2d 934]; *Danielson* v. *Roche* (1952) 109 Cal.App.2d 832 [241 P.2d 1028].) In the proposed instruction in the case at bar, the jury would in effect have been told that the testimony of experts regarding the proper professional standards could be disregarded if the standards did not conform to the jury's concept and determination of what was "due care."

We conclude that if the instruction in question was requested and, if it was refused by the trial court, it was properly refused because it was an incorrect statement of the law at least in the several respects noted.

Architects admit in their brief on appeal that their cross-appeals on the judgment of nonsuit in favor of Electrical Engineers and the judgmenton ***314** jury verdict in favor of Structural Engineers are "protective appeals" only and they agreed at oral argument that if we affirm the judgment against Contractor and in favor of Architects on the principal appeal then such cross-appeals are moot. Since we conclude that the judgment against Contractor and in favor of Architects should be affirmed we agree that the cross-appeal is moot and the two judgments on the cross-complaint will be affirmed.

([12]) Finally, we consider Architects' contention that the trial court committed error in its various rulings allowing and disallowing certain costs as claimed by Architects.

Prior to trial, Architects made an offer under Code of Civil Procedure section 998[24] to settle with Contractor for $55,000, which was never accepted by Contractor. In their memorandum of costs after judgment in their favor Architects sought $11,654.49 for moneys which they actually paid for the services of four experts as follows: *315

The court on motion to tax costs allowed only $2,000 for Charles A. Bode and refused to allow any sum for Zimmerman, Nicholson or Ellis.

Architects allege that the trial court refused to allow the claimed costs because the trial court was trying to punish Architects for their offer of $55,000 being inadequate. Architects claim that the amount of the offer to settle was reasonable under the circumstances, particularly in view of the fact that it represented 23.2 percent of the amount ($236,632) which Contractor's counsel requested the jury to award in closing arguments.

The trial court has discretion under Code of Civil Procedure section 998 to allow a prevailing party (as defined in the section) a reasonable sum to cover the costs of the services of expert witnesses. (*Pomeroy* v. *Zion* (1971) 19 Cal.App.3d 473 [96 Cal.Rptr. 822].) The trial court was in a far better position, having heard the entire case and observed the demeanor of witnesses, to exercise this discretion and determine what was a reasonable amount and what was reasonably necessary. It appears that at least one of the witnesses may have been a percipient witness rather than an expert. Architects have not established here that the court abused its discretion.

The judgment against appellants Huber, Hunt & Nichols, Inc., and in favor of respondents Richard R. Moore et al. is affirmed; the two judgments against cross-appellants Richard R. Moore et al., and in favor of cross-respondents McDougald and Leino et al., are each affirmed. The order taxing costs and order modifying order taxing costs are affirmed.

Brown (G. A.), P. J., and Gargano, J., concurred. *316

1. Forming Criteria.

Code	Item		Claim	
311	Walls	OR	$17,517.00	$99,000.00
321	Joist Pan Slabs	OR	21,411.00	21,411.00
322	Beams	OR	12,494.00	12,494.00
340	Bleachers	OR	73,644.00	65,644.00
435	Final Finish	OR	37,906.00	37,906.00
	Fringes			20,644.00
Sub-Total:				$168,099.00

2. Delays.

1502	Organization	OR	$35,923.00	$35,923.00
1503	Engineering	OR	6,286.00	1,286.00
1505	Office and Staff	OR	2,383.00	2,383.00
1506	Barricades and Fences	OR	2,122.00	2,122.00

1514	Cleanup	OR	1,025.00	1,025.00
1532	Scaffold (labor)	OR	11,776.00	11,776.00
1502	Organization (M)	OR	159.00	159.00
1508	Temporary Light, Water and Power	OR	4,192.00	4,192.00
1522	Telephone	OR	318.00	318.00
1524	Office Supplies	OR	1,487.00	1,487.00
1525	Drinking Water (M)	OR	1,293.00	1,293.00
1527	Scaffold (M)	OR	12,624.00	12,624.00
1555	Equip. Rental	OR	33,226.00	33,226.00
	Labor of $7,592 applicable			
	to fringes:			2,463.00
	Sub-Total:			$109,327.00

3. Slabs.

214	Slab on Grade	OR	$1,930.00	$1,930.00
217	Supported Slab	OR	2,191.00	2,191.00
305	Slab on Grade	OR	7,418.00	7,418.00
317	Supported Slab	OR	12,384.00	12,384.00
403	Trowell Finish	OR	11,967.00	11,967.00
412	Broom Finish	OR	1,780.00	1,780.00
443	Joint Sealer	OR	2,062.00	2,062.00
Sub-Total:				$39,732.00

4. Acceleration.

710	(L) Millwork OR	$2,824.00	$2,824.00	
711	(L) Fit and Hang Doors	OR	17,080.00	17,080.00
701	(M) All Mat.	OR	5,667.00	5,667.00
	Sub-Total (All Fringes Included):	$28,337.00		

5. Profit.

The as Bid: $300,000.00

Note 2% of gross amount of contract 6.4 million equals $128,000 is attributable as Home Office overhead thus gross profit would be $172,000.

6. Footing Elevations.

103	Fine Grading	OR	$20,407.00	$11,055.00
104	Backfill	OR	16,503.00	16,503.00
111	Machine Exc.	OR	2,623.00	2,623.00
155	Equip. Rental (M)	OR	33,332.00	33,332.00
208	Cols. and Piers	OR	1,672.00	1,672.00
248	Clear Cost Joints	OR	3,454.00	3,454.00
202	Footings (M)	OR	4,779.00	4,779.00
308	Columns	OR	6,358.00	6,358.00
311	Walls	OR	17,517.00	8,517.00
360	Plywood (M)	OR	2,795.00	1,300.00 ***318**
362	Accessories	OR	865.00	400.00
1503	Engineering	OR	6,286.00	5,086.00
1506	Barracades and Fence	OR	2,122.00	1,000.00
1503	Engineering	OR	759.00	754.00
1555	Equipment Rental	OR	33,226.00	
	Sub-Total (and Fringes):		$87,026.00	
TOTAL:				$732,521.00

Footnotes

* Assigned by the Chairman of the Judicial Council.

* Assigned by the Chairman of the Judicial Council.

1 The bid reads in part as follows:

"The undersigned bidder, having carefully read and examined the complete specifications therefor, and having examined the site of the proposed construction, hereby proposes and agrees to furnish all labor and materials and perform all work required for the construction of the Fresno Community and Convention Center, all in strict accordance with the plans and specifications therefor on file in the office of the City Clerk of the City of Fresno, excluding items of work specified therein to be done pursuant to separate bids, at the following prices:

Base Bid: 6,398,000.00 Dollars"

2 "Instructions to Bidders

"10. Before submitting a bid, each bidder shall carefully examine the drawings, read the specifications, the agreement form, and other contract documents, shall visit the site of the work and shall fully inform himself as to all existing conditions and limitations, and shall include in the bid a sum to cover the cost of all items included in the contract. The bidder is required to bid on all items called for in the proposal form.
"

. . . . .

"16. The bidder acknowledges by the submission of his bid that he has satisfied himself as to the nature and location of the work, the general and local conditions, conditions of the site, availability of labor, electric power, water, and the kind of surface and subsurface materials on the site, the kind of equipment needed, and all other matters which may in any way affect the work or the cost. Any failure of the bidder to acquaint himself with all of the available information concerning conditions will not relieve him from responsibility for estimating properly the difficulties or cost of the work.
"17. Should a bidder find discrepancies in, or omissions from, the drawings or specifications, or should he be in doubt as to their meaning, he shall at once notify the Architect, and should it become necessary, a written Addendum or Bulletin of instructions will be sent to all bidders. Bidders should act promptly and allow sufficient time for a bulletin to reach them before the submission of their bid. Neither Owner nor Architect will be responsible for any oral instructions.
"18. Bulletins or addenda furnished by the Architect interpreting the plans and specifications or answering questions of intended bidders, including all modifications thereof, shall be incorporated in the contract documents before the execution of the agreements.
"

. . . . .

"General Conditions
"5. Supervision:
"

. . . . .

"33. Drawings and Specifications:

. . . .

"34. Additional Details:
"

. . . . .

"37

. . . . .
"

. . . . .

"40. Changes in the Work:
"

. . . . .

"Special Conditions:
"

. . . . .

"9. Modification of Specifications : The Contractor shall notify the Architect of any conditions he may find where, in his judgment, it would be desirable to modify basic specified or detailed construction requirements to produce best results. If the Contractor fails to so notify the Architect, or if his recommendations for said modification are accepted, the Contractor assumes sole responsibility for satisfactory results.
"10. Unit Prices: The Contractor shall submit such additional unit prices on materials, labor, finishes, etc., as may be requested by the Architect and said unit prices shall be used during the progress of the work in computing cost of deducted or added work as determined by the Owner." (Italics ours.)

4 The clause regarding arbitration by Architects of disputes between Contractor and Owner read as follows:
"6. Authority of Architect, Settlement of Disputes;

3 The clause stated:
"The undersigned Contractor approves the foregoing Change Order as to the changes, if any, in the contract price specified for each item and as to the extension of time allowed, if any, for completion of the entire work on account of said Change Order, and agrees to furnish all labor and materials and perform all work necessary to complete any additional

work specified therein, for the consideration stated therein. It is understood that said Change Order shall be effective when approved by the Lessee and ordered by the Owner."

5 C.O.s Nos. 1 through 7, and 17.

6 This statement is based on plaintiff's exhibit 3 for identification hereinafter discussed in detail.

7 *Ibid.*

8 Various amounts of damages were claimed at various times in various pleadings, arguments, briefs, etc. The figure of $732,521 is derived from appendix A to Contractor's opening brief on appeal discussed in detail *infra* which appears to be its most recent claim.

9 The original pretrial order reads in part:

"5. Negligence of Architect

$676,431.00

"This Complaint is for the same items that are alleged in paragraphs 3 and 4, supra. The difference is that instead of being actions for breach of contract against the Public Entity, the action is against the architect for his negligence in preparing the plans and specifications and for delaying the project.

"The following acts of negligence by the architects are claimed:

"The foregoing acts of the architects resulted in general damages, as alleged above, in the amount of $500,000.00."

10 The clerk's minutes of April 6, 1973, read in part:

"Mr. Conrad L. Rushing, counsel for the Plaintiff, states to the Court that he will submit a motion for a new cause of action on the issue of negligence of misrepresentation, and including it in the new Pre-Trial Conference Order, and the Court rules that the issue as proposed by the Plaintiff will not go into the Pre-Trial Conference Order, that it is not to mean however that the Plaintiff will not be pre-cluded [*sic*] under the Pre-Trial Conference Order from proposing Jury instructions and as the Court understands it, this was the Plaintiff's intial [*sic*] position, and the Court is of the opinion that this is a matter of proof."

An augmented reporter's transcript demonstrates that the court advised counsel that the giving of an instruction on negligent misrepresentation depended upon the production of evidence to substantiate such claim.

11 The record on appeal here does not include the initial complaint, but does include an order of the Superior Court of Santa Clara County dated October 24, 1968, granting defendant's motion for change of venue to Fresno County. However, we take judicial notice of the fact that the original complaint was filed in Santa Clara County on August 18, 1968.

12 Plaintiff's exhibit 3 is a computer read out consisting of pages approximating 11 inches X 15 inches in size which in the aggregate are 3 inches thick. Each page consists of various columns containing words or figures arranged under the following headings: "Cost Code" (under which appear the numbers for 200 different items); "Description" (under which appear one to three words describing the 200 different items such as "Tectun Decks," "Dasher Board inserts," "Dasher boards," "Insulation AC tile," "Allowances," "Metal Deck and siding," "Steel joists," "Struct. Steel," "Sheet Metal," "Roofing," "Roof Hatches and vents," "Lath and plaster," "Masonry," "Paving," "Filler Panels," "Millwork," "Misc. Matl," "Commitments," "Backcharge sales," and other words of a similar or dissimilar nature); "Construction Budget"; "Budget Changes" with subheadings "Initial," "Final," "Current Budget"; "Costs" with subheadings "To Date," "To Complete," "Overrun/Underrun"; "Variance" with subheadings "Fm.," "Prev.," "Mo."

13 The court explained to counsel its reasons as follows:

"The Court: Well, I'm going to treat this in this manner: assuming that the foundational requirements are testified substantially as outlined by Mr. Rushing, I'm going to admit the computer printout - I'm going to have it marked, rather, as an exhibit for identification. I'm then going to permit the witness to testify from the document. But the document itself, the printout itself, will not be - will not go to the jury. And I do that for this reason: that a lay juror is not qualified, and I so find, to interpret a computer printout; that by allowing that document to go to the jury, that the Court would take the risk that the jury would misinterpret the document, just as the same reasoning that has been applied by the Court with reference to x-ray films, for example.

"

. . . . .

"Mr. Rushing: Let me ask the Court one further question, if I may. May I be permitted, if it is not going to go to the jury, to prepare a chart showing the category of work - categories of work? That I deem relevant.

"The Court: Supported by the evidence. I'm not saying it would be admissible in evidence, but there is no reason you couldn't use it in argument.

"Mr. Rushing: Well, I want to use it in my argument. This is not a particularly easy area of the case, I think, for any of us. It's a matter that takes considerable care in going through it. *And if one mis-steps; and makes sort of a category case about codes and categories, and things like that, you will come out wrong in the conclusions about what it shows.*
"The Court: I don't think I can answer your question until I see what you are offering." (Italics ours.)
The court admonished the jury as follows:
"The Court: Very well. It is the order of the Court that the exhibit, which has previously been marked as Plaintiff's Exhibit 3 for identification, not be received into evidence. It is further ordered, however, that the Witness, this witness, or any other witness, may refer to the document, and testify concerning matters contained therein, and by reference to the matters contained in the document. I would like to explain, ladies and gentlemen, the reason for my ruling.
"The court finds that this exhibit, which consists of printouts from a computer, is a matter which requires interpretation, and that neither the Court nor the jury is qualified to interpret the documents. And it is necessary, therefore, to have a witness who is qualified to testify concerning the documents and the interpretation of matters contained therein. That is the reason I'm not admitting it into evidence, but am ordering that it may be referred to by this witness and any other qualified witness."

14 Evidence Code section 352 reads as follows: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

15 Bennett was testifying regarding the costs of additional footings made necessary because allegedly the plans and specifications did not include specific elevations. The court asked Bennett what figures he was going to give from plaintiff's exhibit 3. Bennett replied that they would include all of the costs on all footings during a particular month indicating that there "is no way absolutely no way" that he could break out cost data attributable to alleged errors in elevation. A colloquy then ensued during the course of which the following occurred:
"The Court: All right. As I understand the evidence so far, Mr. Bennett included in each one of these anything that would have exceeded the initial budget.
"Mr. Rushing: That's correct.
"The Court: Isn't that right?
"Mr. Rushing: Yes.
"The Court: All right. Now, don't you have to show that all of these exceptions were in some way related to the claimed errors and omissions and the requirements contained in IR 10? Doesn't that necessarily follow?
"Mr. Rushing: Your Honor, all exceptions?
"The Court: All extra costs.
"Mr. Rushing: Okay.
"The Court: Doesn't that necessarily follow?
"Mr. Rushing: Yes. I mean, that is what we are attempting to do.
"The Court: But you haven't done it.
"Mr. Rushing: I'm painfully aware of it.
"The Court: And I'm not sure you can. And this IR 10 is only one. It merely points it up, because if the extra costs of lowering the footings referred to in IR 10 are included in the total figures, which we know they are, then they most certainly must be broken out from the total figure."

16 "Q. Last item, flat slabs, did you observe any flat slabs at the Convention Center?
"A. Yes, I did.
"Q. All right. I want to ask you to assume that there are 6,167 square feet of these slabs, and that the contractor originally estimated that his costs of doing this work would be fifty cents per square foot, and actual costs of doing the flat slab work was $1.30 per square foot. Can you tell me, first, whether or not you can form any opinion as to the fifty cent estimate?
"A. Yes, I can.
"Q. Can you tell us what the opinion is?
"A. My opinion, the unit is - doesn't properly represent the cost of the work involved.
"Q. All right. In other words, it's too low?
"A. Too low.
"Q. Can you form an opinion with regard to the $1.30 cost of actually doing the work?
"A. I think that is a reasonable unit."

17 For example, one problem which caused delay was the deviation in excess of 1/4 inch in the face of the risers to which the American Seating Company seats were to be bolted (discussed *infra*) which may well have been caused by the slippage

of Contractor's forms for concrete. Another cause of delay was a "rock pocket" found after the forms were removed in concrete arch 56 and which required "repair." The "repair" consisted of demolition of the arch and construction of a new one. This delay was caused solely by Contractor. In various C.O.s, Contractor was granted several extensions due to delays caused by rain and inclement weather and several extensions due to delays caused by strikes. During all of these periods at least a portion of its overhead expenses must have continued. Contractor made no effort to explain or segregate.

18 In *Lundgren v. Freeman, supra*, 307 F.2d 104, the court said at pages 116-118:

"As agents, architects are not here liable for decisions made by them, acting within their powers as agents, because Lundgren has elected his remedy. It is generally held that a plaintiff who has had the existence or extent of a wrong litigated in an action against the principal may not thereafter have the same matters litigated as to the agent. (See 31 A.L.R. 194-97; 30A American Jurisprudence, Judgments, §§ 429-30). The better rule seems to be that a plaintiff who has recovered against a principal may sue the agent for the balance of an unsatisfied judgment against the principal. [Citations.] This, however, is not such an action. A widely held view is that by suing the principal, the plaintiff has elected to rely on the principal's financial resources, evidently on the reasoning that the agent should not be sued twice, - once by the principal for the amount of the judgment the principal has paid, and again by the plaintiff. [Citations.] The Oregon courts do not seem to have passed on the subject. We think that, in this particular case, Lundgren made an election on the contracts. They expressly provide that architects' decisions are subject to arbitration, and the arbitration is between Lundgren and school district. (Footnote 2, supra.) It is clearly contemplated that architects may make erroneous decisions, and a means of rectifying them is provided. We see no reason for adding another remedy against architects, at least where the judgment against school district is not uncollectible. This rule, we think applies whether architects' actions were intentional, negligent or merely erroneous.

"What we have said applies equally to acts done by architects as quasi-arbitrators. There is a further reason why they should be protected when so acting. If their decisions can thereafter be questioned in suits brought against them by either party, there is a real possibility that their decisions will be governed more by the fear of such suits than by their own unfettered judgment as to the merits of the matter they must decide. It is for this reason that architects, acting as quasi-arbitrators, have been held immune from suit. [Citations.] An architect acts as a 'quasi-arbiter' within this rule when, using the contract as a guideline, he resolves disputes between owner and contractor. [Citations.] Thus in some instances the architect, as quasi-arbiter, may have to re-examine positions taken by himself as the owner's agent. Oregon immunizes state officials acting in a judicial capacity from suit, if they are acting within their jurisdiction, in order to prevent fear of suit from influencing their decisions. [Citations.] We presume that this policy extends to private persons acting in a quasi-judicial capacity within jurisdiction established by private agreement."

19 In view of the recent decision of the Supreme Court in *Goodman v. Kennedy, supra*, we have some mental reservation that an architect can be held liable to contractor for simple negligence in view of the fact that Owner did not intend to confer a benefit on Contractor and dealt with Contractor at arm's length. However, in view of the ultimate overall conclusion which we reach, we proceed on the assumption that in a proper case an architect could be held liable to a contractor for simple negligence in preparing plans and specifications.

20 Evidence Code section 354 reads:

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:

"(a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer or proof, or by any other means;

"(b) The rulings of the court made compliance with subdivision (a) futile; or

"(c) The evidence was sought by questions asked during cross-examination or recross-examination."

21 Our calculations indicate that this claim makes no allowance for the change of work authorized by the C.O.s, the moneys paid and the credits allowed pursuant to such 25 C.O.s, or the moneys and time credits which Contractor recouped in its settlement with Owner. Such settlement allowed Contractor 90 days of credit in addition to amounts previously allowed on specific C.O.s. Architects point out in their reply brief herein that the contract date of completion was June 9, 1966, and the Owner did not occupy the convention center complex until October 12, 1966, approximately 123 days late. One year later the project had not yet been completed. As late as December 31, 1972, Contractor's own records (plaintiff's exhibit 3 for identification) indicated that an additional expenditure of $72,500 was required to complete the project. Architects claim that Contractor's losses, if any, were attributable to Contractor's incompetence. *Boyajian v. United States, supra.* [22] We think the following statement by the United States Court of Claims in

22 In *Boyajian*, the court said:

"Recovery of damages for a breach of contract is not allowed unless acceptable evidence demonstrates that the damages claimed resulted from and were caused by the breach. 'The costs must be tied in to fault on defendant's part.' [Citations.]
"

. . . . .

"However, contrary to these basic causal-connection damage principles, no attempt is here made to relate any specific amount of increased costs to any particular alleged breach. Nor is any satisfactory explanation given as to why such an attempt was not made or why it would not have produced reasonably accurate results. Instead, the damage proof consists only of an accountant's schedule (and the accountant's testimony in support thereof), setting forth computations, based on plaintiff's books and records, of plaintiff's total expenditures in performing the contract, and subtracting therefrom the total contract receipts, thus arriving at a total 'loss' figure, for which plaintiff demands recoupment. ...
"

. . . . .

"On this record, it is not possible to conclude that plaintiff's total contract loss, *i.e.*, the difference between plaintiff's contract expenditures and its contract receipts, is reasonably to be equated with the increased costs directly resulting from defendant's alleged breaches.
"

. . . . .

"In situations similar to the instant one, the court has consistently rejected damage claims based on the theory that all unreimbursed contract expenditures of every nature made throughout the life of the contract should be reimbursed. ... [Citing cases.]
"

. . . . .

"None of such cases [relied on by Contractor] were comparable to the instant one, in which several breaches are alleged but consolidated for damage purposes into a claimed unadjusted 'total cost' recovery. The above review indicates that the court has never allowed such a recovery in such a case. On the other hand, it has consistently insisted on a showing that 'the excess costs claimed must be tied in to defendant's breaches' (*J. D. Hedin Construction Co., supra*, 347 F.2d at 259, 171 Ct. Cl. at 108), especially where as here, there is an insufficient showing that such a direct damage calculation could not as a practical matter be made.

"Nor does the mere fact that plaintiff's books and records do not, in segregated form, show the amounts of the increased costs attributable to the breaches give it automatic license to use the 'total cost' method. Contractors rarely keep their books in such fashion. Such failure, however, normally does not prevent the submission of reasonably satisfactory proof of increased costs incurred during certain contract periods or flowing from certain events based, for instance, on acceptable cost allocation principles or on expert testimony. ..." (423 F.2d at pp. 1235-1236, 1238-1239, 1242.) *Boyajian, supra,* is particularly ***309** relevant to the basic problems involved in the case at bar: "Nor does the mere fact that plaintiff's books and records do not, in segregated form, show the amounts of the increased costs attributable to the breaches give it automatic license to use the 'total cost' method. Contractors rarely keep their books in such fashion. Such failure, however, normally does not prevent the submission of reasonably satisfactory proof of increased costs incurred during certain contract periods or flowing from certain events based, for instance, on acceptable cost allocation principles or on expert testimony. ..." (423 F.2d at p. 1242.)

23 The unnumbered "instruction" (disregarding the citation of authorities) reads as follows:

"One of the issues you must decide is whether defendant architects are liable to the plaintiff general contractor for harm suffered by the general contractor due to the architects' negligent conduct in supplying information.

"The rule followed in this state is that one who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if:"

(1) the supplier of information fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and

"(2) the harm is suffered

"In applying this rule to the case at bar, you must consider the following items:"

(1) whether defendant architects, in the course of their business or profession, supply information for the guidance of others in their business transactions"

(2) whether plaintiff general contractor relied upon such information in conducting its business transactions"

(3) whether plaintiff general contractor was the person or one of the class of persons for whose guidance the architects supplied information"

(4) whether plaintiff general contractor suffered harm in a transaction in which the architect-supplied information was intended to influence the general contractor's conduct.

"If you do not find affirmatively on these four questions, you must find for the defendant architects on this issue.

"If you do find affirmatively on these four items, you must consider two additional questions:

"(1) Did the architects fail to exercise that care and competence in supplying information which the general contractor was justified in expecting?

"To help you answer this question, I point out to you that the degree of care and competence which the general contractor was justified in expecting is sometimes stated to be the standard of care of competence prevailing in the architectural profession.

"You have heard evidence on the matter of professional architectural standards and on the care and competence exercised by the architects in this case.

"While evidence of standards in the same profession is provided for your consideration, it is not conclusive on what constitutes care and competence. Conformity to general standards will not excuse conduct which is inconsistent with due care. A person cannot justify his failure to use due care by showing that others in the same profession practice a similar want of care.

"(2) Was the general contractor justified in relying on the architect-supplied information in conducting its business transactions?

"On this question, much evidence has been presented. The court has only two points to add. First, the general contractor's reliance on the architect-supplied information would not be unjustified merely because a statement included in the information proclaimed that the issuer of said information would not be responsible for its accuracy or completeness. Second, a defendant who misrepresents the facts and induces the plaintiff to rely on his statements cannot assert that the plaintiff's reliance was unjustified unless plaintiff's conduct, in the light of his intelligence and information, is preposterous or irrational. You must consider all the circumstances of the transactions involved in this case to decide whether the general contractor's reliance on architect-supplied information was justified.

"If your answers to the last two questions are affirmative, you must find for plaintiff general contractor, and must award to him damages for the harm you find he sustained due to the architect's negligent conduct in supplying information.

"If both answers are not affirmative, you must find for defendant architects on this issue."

24 Code of Civil Procedure section 998 reads:

"(a) The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section.

"(b) Not less than 10 days prior to commencement of the trial as defined in subdivision 1 of Section 581, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken in accordance with the terms and conditions stated at that time. If such offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly. If such offer is not accepted prior to trial or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial.

"(c) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment, the plaintiff shall not recover his costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court, in its discretion, may require the plaintiff to pay the defendant's costs from the date of filing of the complaint and a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in the preparation of the case for trial by the defendant.

"(d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment, the court in its discretion may require the defendant to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in the preparation of the case for trial by the plaintiff, in addition to plaintiff's costs.

"(e) Police officers shall be deemed to be expert witnesses for the purposes of this section; plaintiff includes a cross-complainant and defendant includes a cross-defendant. Any judgment entered pursuant to this section shall be deemed to be a compromise settlement.

"(f) The provisions of this chapter shall not apply to an offer which is made by a plaintiff in an eminent domain action."

Ralph Zimmerman	$428.20
Charles A. Bode	7,672.50
Ralph Nicholson	3,441.79

Calvin G. Ellis	112.00

End of Document

139 Ariz. 184
Supreme Court of Arizona,
In Banc.

DONNELLY CONSTRUCTION COMPANY,
an Arizona corporation, Plaintiff-Appellant,
v.
OBERG/HUNT/GILLELAND,
Architects, Defendants-Appellees.

No. 17056–PR.
|
Feb. 8, 1984.

Construction contractor brought action against architects, alleging that substantial error in plans and specifications prepared by architects for property owner resulted in increased cost of construction. The Superior Court, Coconino County, Richard K. Mangum, J., dismissed complaint, and contractor appealed. The Court of Appeals, 139 Ariz. 190, 677 P.2d 1298, reversed and remanded, and architects petitioned for review. The Supreme Court, Gordon, V.C.J., held that: (1) architects were not immune from action on basis that preparation of plans and specifications was quasi-judicial in nature, and (2) contractor stated causes of action in negligence, negligent misrepresentation, and breach of common-law warranty of exercise of skills with care and diligence and in reasonable, nonnegligent manner, despite contractor's lack of privity.

Trial court reversed and remanded, Court of Appeals opinion vacated.

Attorneys and Law Firms

***185** ****1293** O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, P.C. by Larry L. Smith and Charles J. Muchmore, Phoenix, for plaintiff-appellant.

Jennings, Strouss & Salmon, by Jefferson L. Lankford, Phoenix, for defendants-appellees.

Opinion

GORDON, Vice Chief Justice:

In June of 1976, the Board of Supervisors of Coconino County solicited bids on behalf of Page School District Number Eight for improvements to the Page School complex. The site improvements included the construction of retaining walls and sidewalks, grading and filling, and the installation of a sprinkler system. Among the documents available to the bidders was a site plan, including engineering site specifications, prepared by Oberg/Hunt/Gilleland [hereinafter "O/H/G"], a firm of architects. Plaintiff, Donnelly Construction Company, relied on the plans, specifications, and information contained in the site plan to prepare its bid on the improvements. Donnelly's bid was accepted and a contract with the county board of supervisors was entered on July 6, 1976. Upon beginning work, Donnelly found the plans ***186** ****1294** and specifications prepared by O/H/G to be in substantial error. The errors resulted in increased costs of construction to Donnelly.

After substantially completing the work, Donnelly sued the Page School District [1] and O/H/G for its increased costs. Donnelly asserted three claims against O/H/G: negligence, negligent misrepresentation, and breach of the implied warranty that O/H/G's plans and specifications were accurate. O/H/G filed a motion to dismiss pursuant to Ariz.R.Civ.P. 12(b)(6) claiming that Donnelly's complaint failed to state a claim upon which relief could be granted. O/H/G supported its motion with arguments that the claims were barred (a) because all of O/H/G's actions were quasi-judicial in nature and deserving of immunity and (b) because there was no contractual privity between Donnelly and O/H/G. Without recitation of its reasoning, the trial court granted the motion to dismiss. Donnelly appealed to Division One of the Court of Appeals which reversed and remanded to the trial court. [2] *Donnelly Construction Co. v. Oberl/Hunt/Gilleland,* 139 Ariz. 190, 677 P.2d 1298 (App.1983). O/H/G petitioned this Court to review the decision. Having found the holding of Division One in this matter to be in direct conflict with case law from Division Two, we accepted jurisdiction, pursuant to Ariz. Const. art. 6, § 5(3) and Ariz.R.Civ.App.P. 23, to resolve the conflict. Although we agree with Division One of the Court of Appeals that the trial court's granting of O/H/G's motion to dismiss was error, we vacate its opinion in the instant case.

[1] In our review of the granting of the motion to dismiss for failure to state a claim, this Court must assume the truth of Donnelly's allegations. *Parks v. Macro-*

Dynamics, Inc., 121 Ariz. 517, 591 P.2d 1005 (App.1979). We can uphold the dismissal only if Donnelly could not be entitled to relief under any facts susceptible of proof under the claims stated. *Sun World Corp. v. Pennysaver, Inc.*, 130 Ariz. 585, 637 P.2d 1088 (App.1981). As noted above, O/H/G offered two arguments that Donnelly's complaint stated no claim. These arguments will be examined seriately.

IMMUNITY FOR QUASI–JUDICIAL FUNCTIONS

[2] O/H/G's first basis for their motion to dismiss was that their duties were quasi-judicial in nature and that they therefore had immunity against actions such as the one brought by Donnelly. In *Craviolini v. Scholer & Fuller Associated Architects,* 89 Ariz. 24, 357 P.2d 611 (1960), this Court held that an architect who is empowered to resolve disputes between an owner and a contractor acts, in resolving such disputes, in a quasi-judicial capacity and that, to allay the architect's fears of being mulcted in damages, he or she has immunity against actions arising from performance of those duties. However, we find *Craviolini* to be inapposite to the case before us. Donnelly's claims against O/H/G all stem from allegedly negligently prepared plans and specifications, not from O/H/G's resolution of any dispute between Donnelly and the Coconino Board of Supervisors or the Page School District. As we made clear in *Craviolini,* the immunity

> "attaches to every act done in the judicial capacity, but to no other. Thus the architect has no immunity *as an architect* * * *. If the tortious conduct with which he is charged * * * is remote from and in no way associated with the performance of his arbitrator's function, he is liable for it in accordance with the usual principles of tort law."

Id. at 28, 357 P.2d at 614 (emphasis in original). The grant of the motion to dismiss ***187** ****1295** cannot be upheld on the basis of immunity.

PRIVITY OF CONTRACT

O/H/G's second basis for the motion to dismiss was that, absent privity of contract, they owed no duty and could not be liable to a contractor such as Donnelly. This argument was premised on *Blecick v. School District No. 18 of Cochise County,* 2 Ariz.App. 115, 406 P.2d 750 (1965). In *Blecick,* Division Two of the Court of Appeals was confronted with a fact situation similar to the one currently before us. There, the plaintiff was a contractor who had entered into a building contract with the defendant school district's Board of Trustees to construct school rooms at an elementary school. During construction, changes in the architects' plans and specifications had to be made. The changes resulted in added cost to the contractor who sued the school district and the architects. The trial court dismissed the complaint against the architects for failure to state a claim. The Court of Appeals affirmed. Although stating the issue in tort terminology ("Is an architect liable to a contractor for the preparation of defective plans and specifications?" *Id.* at 119, 406 P.2d at 754), the Court of Appeals discussed it in contract language ("There is no privity between [the contractor] and the architects by virtue of the [contract between the owner and the architects] nor are [the contractors] third-party beneficiaries thereof." *Id.* at 120, 406 P.2d at 755) and held that the contractor could not hold the architect liable for having negligently drawn the plans and specifications. Insofar as *Blecick* stands for the proposition that an architect cannot be sued *in tort* by a contractor for negligent preparation of plans and specifications, it must be overruled.

[3] **[4]** There is no requirement of privity in this state to maintain an action in tort. *See, e.g., O.S. Stapley Co. v. Miller,* 103 Ariz. 556, 559, 447 P.2d 248, 251 (1968) (Quoting Restatement (Second) of Torts § 402A(2)(b) (1965), this Court stated that the seller of a product is liable to a user or consumer although "the user or consumer has not bought the product from or entered into any contractual relation with the seller."); *Wetzel v. Commercial Chair Co.,* 18 Ariz.App. 54, 500 P.2d 314 (1972). Rather, an action in negligence may be maintained upon the plaintiff's showing that the defendant owed a duty to him, that the duty was breached, and that the breach proximately caused an injury which resulted in actual damages. *Ontiveros v. Borak,* 136 Ariz. 500, 667 P.2d 200 (1983). Duty and liability are only imposed where both the plaintiff and the risk are foreseeable to a reasonable person. This Court has held that a broad view will be taken of the class of risks and the class of victims

that are foreseeable. *McFarlin v. Hall,* 127 Ariz. 220, 619 P.2d 729 (1980).

[5] Design professionals have a duty to use ordinary skill, care, and diligence in rendering their professional services. *National Housing Industries, Inc. v. E.L. Jones Development Co.,* 118 Ariz. 374, 576 P.2d 1374 (App.1978). When they are called upon to provide plans and specifications for a particular job, they must use their skill and care to provide plans and specifications which are sufficient and adequate. *See L.H. Bell & Associates, Inc. v. Granger,* 112 Ariz. 440, 543 P.2d 428 (1975); *Rosell v. Silver Crest Enterprises,* 7 Ariz.App. 137, 436 P.2d 915 (1968). This duty extends to those with whom the design professional is in privity, as in *Rosell,* and to those with whom he or she is not, as in *L.H. Bell.*

In *L.H. Bell,* an engineer was hired to design a bridge and its approaches. The bridge was constructed according to the engineer's plans. After a heavy rainfall, water flooded nearby property causing property damage and loss of business income. This Court found that it was foreseeable, in designing a bridge without culverts, that there would be flooding on the plaintiff's property. Given both a foreseeable risk and a foreseeable victim, the trial court's finding of negligence was upheld.

[6] We find it equally foreseeable in the instant case that Donnelly, hired to follow ***188 **1296** the plans and specifications prepared by O/H/G, would incur increased costs if those plans and specifications were in error. As noted above, we here assume the truth of Donnelly's allegations, including that it was hired to follow the plans and specifications prepared by O/H/G. Such an allegation is subject to proof. O/H/G may be able to demonstrate that Donnelly was not a foreseeable victim in this case because Donnelly was not hired to follow the plans and specifications prepared by O/H/G, but rather was given those plans and specifications as only general guidelines and was expected to create its own plans and specifications prior to construction. However, such proof goes beyond the face of the complaint. The complaint did state a cause of action in negligence and its dismissal was error. [3]

[7] Our decision herein necessitates a review of Arizona cases other than *Blecick* which have denied negligence actions against certain professionals because of a lack of privity. For example, in *Phoenix Title & Trust Co. v. Continental Oil Co.,* 43 Ariz. 219, 228, 29 P.2d 1065, 1068 (1934), this Court noted that, subject to certain enumerated exceptions, an "abstractor * * * is not liable to persons who may be misled to their damage by reason of his negligence, unless there is some privity of contract between them." Also, in *Chalpin v. Brennan,* 114 Ariz. 124, 126, 559 P.2d 680, 682 (App.1976), our Court of Appeals refused "to grant a cause of action for malpractice to an individual who is not a client or in privity with [an] attorney." We do not intend to use this opportunity to set forth foreseeability standards for each and every professional. However, we do expressly disapprove such blanket denials of causes of action as the two just set forth. Standards for professional conduct and legal culpability for failure to maintain those standards are not universal among the professions. [4] This Court will confront each case as it comes before us. We only hold here that design professionals are liable for foreseeable injuries to foreseeable victims which proximately result from their negligent performance of their professional services.

[8] Donnelly's second cause of action against O/H/G was for negligent misrepresentation. Such an action was recognized by this Court in *Van Buren v. Pima Community College District Board,* 113 Ariz. 85, 546 P.2d 821 (1976) and is governed by § 552 of the Restatement (Second) of Torts. Section 552 provides:

"Information Negligently Supplied for the Guidance of Others

"(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable ***189 **1297** care or competence in obtaining or communicating the information.

"(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

"(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

"(b) through reliance upon it in a transaction that he intends the information to influence or knows that

the recipient so intends or in a substantially similar transaction.

"(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them."

By its terms, this section does not require privity to maintain a cause of action. Subsection (2)(a) acknowledges that persons, for whose benefit or guidance the representation is made, may bring a claim against the maker of the representation. Illustration 9 of the comments to § 552 is particularly enlightening and is pertinent to the case before us:

> "The City of A is about to ask for bids for work on a sewer tunnel. It hires B Company, a firm of engineers, to make boring tests and provide a report showing the rock and soil conditions to be encountered. It notifies B Company that the report will be made available to bidders as a basis for their bids and that it is expected to be used by the successful bidder in doing the work. Without knowing the identity of any of the contractors bidding on the work, B Company negligently prepares and delivers to the City an inaccurate report, containing false and misleading information. On the basis of the report C makes a successful bid, and also on the basis of the report D, a subcontractor, contracts with C to do a part of the work. By reason of the inaccuracy of the report, C and D suffer pecuniary loss in performing their contracts. B company is subject to liability to B [sic] and to D."

Donnelly's complaint stated a cause of action in negligent misrepresentation and its dismissal was error.

[9] [10] [11] Donnelly's third cause of action was for breach of the implied warranty that O/H/G's plans and specifications were accurate. Design professionals, in the absence of an express guarantee, do not "warrant" that their work will be "accurate," *L.H. Bell, supra.* Rather, as noted above, they "warrant" merely that they have exercised their skills with care and diligence and in a reasonable, non-negligent manner. A claim for breach of a common law warranty does not require privity, *Rocky Mountain Fire and Casualty Co. v. Biddulph Oldsmobile,* 131 Ariz. 289, 640 P.2d 851 (1982), and, thus, the dismissal of it was error.

Because neither of O/H/G's bases for their motion to dismiss can be substantiated, the trial court's grant of dismissal was error and is hereby reversed. The matter is remanded to the trial court for further proceedings not inconsistent with this opinion.

HOLOHAN, C.J., and HAYS, CAMERON and FELDMAN, JJ., concur.

All Citations

139 Ariz. 184, 677 P.2d 1292

Footnotes

1 Claims against the Page School District are not on appeal to this Court and will not be considered herein.

2 In its opinion, the Court of Appeals also addressed O/H/G's claim that the trial court actually granted a summary judgment, not a motion to dismiss. The Court of Appeals held, and we agree, that the trial court clearly dismissed Donnelly's complaint pursuant to Ariz.R.Civ.P. 12(b)(6).

3 We note that many other jurisdictions, presented with similar issues, have reached the same conclusion. *See, e.g., E.C. Ernst, Inc. v. Manhattan Construction Co. of Texas,* 551 F.2d 1026 (5th Cir.1977), *cert. denied sub nom. Providence Hospital v. Manhattan Construction Co. of Texas,* 434 U.S. 1067, 98 S.Ct. 1246, 55 L.Ed.2d 769 (1978) (applying Alabama law); *United States ex rel. Los Angeles Testing Laboratory v. Rogers & Rogers,* 161 F.Supp. 132 (S.D.Cal.1958); *A.R. Moyer, Inc. v. Graham,* 285 So.2d 397 (Fla.1973); *Normoyle-Berg & Associates, Inc. v. Village of Deer Creek,* 39 Ill.App.3d 744, 350 N.E.2d 559 (1976); *Gurtler, Hebert & Co., Inc. v. Weyland Machine Shop, Inc.,* 405 So.2d 660 (La.App.1981); *Conforti & Eisele, Inc. v. John C. Morris Associates,* 175 N.J.Super. 341, 418 A.2d 1290 (Law Div.1980); *Schoffner*

Industries, Inc. v. W.B. Lloyd Construction Co., 42 N.C.App. 259, 257 S.E.2d 50 (1979); *A.E. Investment Corp. v. Link Builders, Inc.*, 62 Wis.2d 479, 214 N.W.2d 764 (1974); *see also Owen v. Dodd*, 431 F.Supp. 1239 (N.D.Miss.1977); *Detweiler Bros., Inc. v. John Graham & Co.*, 412 F.Supp. 416 (E.D.Wash.1976). *But see Bernard Johnson, Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365 (Tex.Civ.App.1982). *See generally* Annot., 65 A.L.R.3d 249 (1975).

4 Several annotations explore third-party causes of action against professionals. *See, e.g.*, Annot., 46 A.L.R.3d 979 (1972) (third-party liability of accountants); Annot., 45 A.L.R.3d 1181 (1972) (third-party liability of attorneys); Annot., 34 A.L.R.3d 1122 (1970) (third party liability of title abstractors).

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583 A.2d 1378
Superior Court of Delaware,
New Castle County.

GUARDIAN CONSTRUCTION CO., a Delaware Corporation and Stephen Batzel, t/a Batzel Construction Co., Plaintiffs,
v.
TETRA TECH RICHARDSON, INC., a Delaware Corporation, Defendant.

Submitted: July 11, 1990.
Decided: Aug. 15, 1990.

General contractor and subcontractor brought action against design engineer, alleging that design engineer's miscalculations as to tidal heights and project benchmark resulted in additional labor and equipment costs to subcontractor and lost profits to general contractor. Design engineer filed motion for summary judgment. The Superior Court, New Castle County, Barron, J., held that: (1) plaintiffs' negligence and negligent misrepresentation claims against design engineer were cognizable, despite lack of contractual privity and fact that plaintiffs sought purely economic damages, and (2) plaintiffs were not third-party beneficiaries of contract between design engineer and State Department of Natural Resources and Environmental Control, and thus could not maintain breach of contract action against design engineer based thereon.

Motion granted in part and denied in part.

*1380 Upon Defendant's Motion for Summary Judgment. Denied in Part, Granted in Part.

Attorneys and Law Firms

David S. Lank, of Theisen, Lank, Mulford & Goldberg, P.A., Wilmington, for plaintiffs.

Frederick W. Iobst, of Young, Conaway, Stargatt & Taylor, Wilmington, for defendant.

OPINION

BARRON, Judge.

Before the Court is an action filed by Plaintiffs Guardian Construction Company (Guardian) and Stephen Batzel, t/a Batzel Construction Company (Batzel) against Tetra Tech Richardson, Inc. (TTR). Guardian and Batzel seek damages from TTR which together total $203,500 plus interest and costs arising out of a construction project involving the parties herein, the State of Delaware, Department of Natural Resources and Environmental Control (DNREC) and Landmark Engineering, Inc. (Landmark). [1]

The construction project giving rise to this action, known as the Augustine Breakwater Project (project), was initiated by DNREC in order to make certain improvements to the Augustine Beach breakwater structure. TTR was the design engineer hired by DNREC to prepare contract documents and specifications for the project. In reliance upon these plans and specifications prepared by TTR pursuant to its contract with DNREC, as well as certain technical information conveyed by TTR to Plaintiffs and others at a pre-bid meeting, Plaintiffs prepared and submitted a bid to DNREC on the construction work to be performed on the project.

Plaintiffs' bid was successful and Guardian was hired by DNREC as general contractor on the project. Guardian then hired Batzel as subcontractor to provide labor and materials on the project in accordance with the plans and specifications prepared by TTR. At all times relevant hereto, neither Guardian nor Batzel had a direct contractual relationship with TTR.

After commencing work on the project, Plaintiffs discovered that the tidal heights and project benchmark had been miscalculated by TTR. These initial miscalculations were used by TTR to develop the project plans and specifications. As indicated, the project plans and specifications were in *1381 turn used by Plaintiffs to formulate their bids on the project. As a result of TTR's miscalculations, Batzel claims that it was unable to perform its work on the project as planned. According to Plaintiffs, TTR's miscalculations resulted in additional labor and equipment costs to Batzel of $185,000 and lost profits to Guardian totalling $18,500. On May 9, 1989, Guardian and Batzel filed this action against TTR alleging negligent misrepresentation, negligence and breach of contract. On July 2, 1990, TTR filed the instant motion

for summary judgment pursuant to Superior Court Civil Rule 56.

TTR's motion presents two interesting and difficult questions of law. The first is whether or not Plaintiffs may recover purely economic losses under their negligence claims against TTR absent privity of contract. The second question is whether or not Plaintiffs were intended third-party beneficiaries of the contract between DNREC and TTR and therefore entitled to maintain a breach of contract claim against TTR thereon.

STANDARD OF REVIEW

[1] [2] In weighing a motion for summary judgment under Rule 56, the Court must examine the present record, including pleadings, depositions, admissions, affidavits and answers to interrogatories. The facts must be viewed in a light favorable to the non-moving party (in this case Plaintiffs), although uncontroverted evidence offered in support of the motion must be accepted as true. The moving party must show that, on unquestioned facts he is entitled to judgment as a matter of law. *See Oliver B. Cannon & Sons, Inc. v. Dorr–Oliver, Inc.*, Del.Super., 312 A.2d 322 (1973); *Matas v. Green*, Del.Super., 171 A.2d 916 (1961). Indeed, the parties herein do not dispute the material facts giving rise to this litigation. It is therefore, the function of the Court at this stage of the case simply to test the legal sufficiency of the claims asserted by Plaintiffs against the body of law applicable thereto.

PLAINTIFFS' NEGLIGENCE CLAIM

As indicated, Plaintiffs seek to impose liability upon TTR for negligent preparation of the project plans and specifications and for negligent misrepresentation of material information relied upon by Plaintiffs in calculating their project bids. TTR maintains, however, that as a matter of law, the lack of contractual privity between it and Plaintiffs and the fact that Plaintiffs seek purely economic damages as opposed to damages arising out of personal injury or property damage, effectively bars recovery on both negligence theories.

Traditionally, attempts by injured third-parties to recover for damages arising out of the negligent performance of a contractual duty generally failed because of lack of privity. *See generally Rozny v. Marnul*, 43 Ill.2d 54, 250 N.E.2d 656 (1969). *See also* 57A Am.Jur.2d *Negligence*, § 123 (1989). The privity requirement was eventually abandoned in such cases as *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) and tort liability was extended, particularly in the products liability context, to plaintiffs suffering tangible physical injury or property damage. However, where recovery was sought for purely economic damages, like those claimed by Plaintiffs in the instant case, the "citadel of privity" was held intact.

The rationale behind the traditional rule as it applied to liability for economic losses was expressed by Justice Cardozo in *Ultramares Corp v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931). In deciding that an accounting firm that had negligently prepared financial statements for general use by a business was not liable to a lender who made a series of loans on the basis of the financial statements, the Court reasoned:

> "If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt ***1382** whether a flaw may not exist in the implication of a duty that exposes to these consequences."

Id. 174 N.E. at 444.

The basis of the *Ultramares* holding was that the accountant's work was intended to be used by the party with whom there was privity as the needs of his business might require. In short, where the lender's reliance on the information was merely one unintended possibility among many, the Court was unwilling to recognize a legal duty running from the accountant to the lender which would support a negligence cause of action.

Where however, the relationship or nexus between the supplier and the user of certain types of information is, in one way or another sufficiently close, some Courts have been willing to extend liability for economic loss in the absence of direct contractual privity. These cases suggest

that the controlling question is whether it was *foreseeable* to the negligent supplier of information that the injured party would rely on the information. Under this line of cases, if reliance was foreseeable, a legal duty was found to exist which would support liability for economic losses even in the absence of contractual privity. *See Council of Co-owners v. Whiting–Turner,* 308 Md. 18, 517 A.2d 336 (1986) (developer and builder liable to homeowner's association for faulty construction of building); *Donnelly Const. Co. 'v. Oberg/Hunt/Gilleland,* 139 Ariz. 184, 677 P.2d 1292 (1984) (architect liable on negligence theory to contractor for increased cost of construction due to error in plans and specifications); *Howell v. Fisher,* 49 N.C.App. 488, 272 S.E.2d 19 (1980) (geological engineer liable to corporate shareholders for negligent misrepresentation in preparation of soil testing report); *A.R. Moyer, Inc. v. Graham,* Fla.Supr., 285 So.2d 397 (1973) (architect/ engineer liable on negligence theory to general contractor absent privity); *Tartera v. Palumbo,* 224 Tenn. 262, 453 S.W.2d 780 (1970) (surveyor hired by purchaser of property may be liable to third person for economic losses arising out of negligent survey); *Audlane Lbr. & Bldrs. Sup. v. D.E. Britt Associates, Inc.,* D.Ct.App.Fla., 168 So.2d 333 (1964) (architect liable on negligence theory to a third-party as a result of faulty plans and specifications).

Other cases take the foreseeability requirement a step farther and require that the faulty information be intended by its negligent supplier to be specifically relied upon by a particular party or a settled class of parties before economic damages are recoverable on a negligence theory. *See E.C. Goldman, Inc. v. A/R/C/ Associates,* Fla.Dist.Ct.App., 543 So.2d 1268 (1989) (roofing inspector not liable to roofing subcontractor because no intention on part of inspector that subcontractor rely on information negligently supplied); *Baublit v. Barr & Riddle Engineering Co., Inc.,* Mo.Ct.App., 768 S.W.2d 233 (1989) (land surveyor not liable to property owner for negligent survey performed for third-party where no showing of justifiable reliance on survey); *Credit Alliance v. Arthur Anderson & Co.,* 65 N.Y.2d 536, 493 N.Y.S.2d 435, 483 N.E.2d 110 (1985) (accounting firm not liable to lender for negligently prepared financial statements not intended to be presented to or relied upon by lender); *First American Title Insurance Company, Inc. v. First Title Service Company of the Florida Keys Inc.,* Fla.Supr., 457 So.2d 467 (1984) (title abstractor liable to title insurance company for negligently prepared abstracts); *Rozny v. Marnul,* 43 Ill.2d 54, 250 N.E.2d 656 (1969) (surveyor liable to purchaser of land for faulty survey); *Glanzer v. Shepard,* 233 N.Y. 236, 135 N.E. 275 (1922) (weigher of beans liable to buyer for negligent weighing where buyers reliance was intended). *See also* Prosser, *Misrepresentation and Third Persons,* 19 Vand.L.Rev. 231 (1966).

A good illustration of the rationale behind this line of cases is found in *Glanzer.* There, the New York Court of Appeals addressed a situation in which a seller of beans contracted with a public weigher to weigh a quantity of beans to be sold to a buyer. The weigher certified the weight of the beans to the seller who paid for the service. A copy of the weight certificate was sent by the weighers to both the seller ***1383** and the buyer. The buyer ultimately paid for the quantity of beans on the faith of the weight certification made by the weighers. When the buyer attempted to resell the beans, it discovered that the actual weight of the beans was significantly less than certified by the weighers.

In holding that the defendant weighers were liable to the buyer for their economic losses notwithstanding the absence of contractual privity, Justice Cardozo stated:

> "We think the law imposes a duty toward buyer as well as seller in the situation here disclosed. The plaintiffs' use of the certificate was not an indirect or collateral consequence of the action of the weighers. It was a consequence which to the weighers knowledge, was the end and aim of the transaction.... The defendants held themselves out to the public as skilled and careful in their calling. They knew that the beans had been sold, and that on the faith of their certificate payment would be made. They sent a copy to the plaintiffs for the very purpose of inducing action. All this they admit. In such circumstances, assumption of the task of weighing was the assumption of a duty to weigh carefully for the benefit of all whose conduct was to be governed." [2]

Id. 135 N.E. at 275, 276.

The Court's analysis in *Glanzer* is particularly instructive given the facts of this case. Further, Justice Cardozo's analysis reflects the provisions of § 552 of the Restatement (Second) of Torts (1977) which provide, in pertinent part, as follows:

> § 552. Information Negligently Supplied for the Guidance of Others

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.[3]

A third line of cases have strictly required privity of contract where the damages sought to be recovered are purely economic. *See East River SS Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986) (contractor not liable to charterer of vessel for economic losses in products liability case); *Trans World Airlines v. Curtiss–Wright Corp.*, 1 Misc.2d 477, 148 N.Y.S.2d 284 (1955) *aff'd* 2 A.D.2d 666, 153 N.Y.S.2d 546 (1956) (negligent manufacturers of airplane *1384 engines not liable to purchaser of airplanes for economic losses).

The rationale behind these cases was set out in *East River*, where the Court stated:

> Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product.[4]

Id. at 874, 106 S.Ct. at 2304.

The Delaware case law is divided on the issue of whether privity of contract is a prerequisite for the imposition of liability on a negligence theory where the damages sought to be recovered are purely economic. In *Crowell Corporation v. Topkis Construction Co.*, Del.Super., 280 A.2d 730 (1971), Judge (now Chief Justice) Christie relying on *Trans World Airlines v. Curtiss–Wright Corp., supra,* held that an owner of a building could not bring a negligence action for faulty workmanship against a subcontractor absent privity where no dramatic accident or collapse had taken place and no person suffered physical injury due to the subcontractor's alleged negligence. After recognizing that, from a social point of view, there was much to be said for Plaintiff's position that it should be permitted to recover losses sustained in order to avoid catastrophic physical injury or property damage, the Court decided to follow what it considered the then prevailing view that economic damages are not recoverable absent privity of contract.

After *Crowell* came *Oliver B. Cannon & Sons, Inc. v. Dorr–Oliver, Inc.*, Del.Super., 312 A.2d 322 (1973). In *Oliver B. Cannon,* a property owner sued a painting subcontractor to recover sums paid for painting work and for damages arising out of alleged negligent workmanship when paint applied to the interior of chemical storage tanks quickly deteriorated and peeled off. In deciding that the owner could maintain a negligence cause of action against the painting subcontractor even in the absence of direct contractual privity, the Court approved of the approach taken in *Crowell, supra* but distinguished *Crowell* on its facts, concluding that rapid deterioration of the paint constituted an accident giving rise to physical injury to property. *Id.* at 329. The Court cited with approval the opinion of *Stewart v. Cox,* 55 Cal.2d 857, 13 Cal.Rptr. 521, 362 P.2d 345 (1961). There, the Supreme Court of California stated:

> Liability for negligence can exist without privity although the risk involved is only damage to property, and ... the determination whether in a specific case the defendant will be liable to a third person is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of the harm to him, the degree of

> certainty that he suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered and the policy of preventing future harm.... The liability of a contractor or subcontractor must be determined by applying this general test rather than by arbitrarily placing them in a separate category subject to a special rule.

Id. 13 Cal.Rptr. at 524, 362 P.2d at 348.

Three years after the *Oliver B. Cannon* opinion, our Supreme Court, in *Seiler v. Levitz Furniture Co., Etc.,* Del.Supr., 367 A.2d 999 (1976), addressed a situation in which a commercial tenant sued, among others, an architect/engineer who designed the building occupied by the tenant after two floods caused extensive damage to its property. The tenant sought recovery for property damage and the cost of correcting the defective condition of the property. Without addressing *Crowell,* the Court held that in light of the holding in *Martin v. Ryder Truck Rental, Inc.,* Del.Supr., 353 A.2d 581 (1976) privity of contract was not required for plaintiff to recover these losses ***1385** on a negligence theory under the facts of that case. [5]

Similarly in *Pack & Process, Inc. v. Celotex Corp.,* Del.Super., 503 A.2d 646 (1985) this Court, without addressing *Crowell,* held that a purchaser of a building need not show privity of contract as a prerequisite for recovery for economic losses against a roofer where the roof proved to be inherently defective. The Court stated:

> Just as the privity requirement has been abandoned in personal injury actions where the item is inherently dangerous, so should the privity requirement be abandoned in actions for economic injury where the good is inherently defective. (Citations omitted.)

Id. at 660.

In *Gilbane Bldg. Co. v. Nemours Foundation,* D.Del., 606 F.Supp. 995 (1985) rev'd *sub nom Pierce Associates, Inc. v. Nemours Foundation,* 3rd Cir., 865 F.2d 530 (1988), Chief Judge Stapleton, writing for the District Court, squarely addressed the continuing viability of *Crowell* in a case factually similar to the one *sub judice.* In concluding that contractual privity is not always required in a negligence action where recovery is sought for economic losses, the District Court stated:

> Since *Martin v. Ryder Truck Rental, Inc.,* Del.Supr., 353 A.2d 581 (1976) clearly indicated that Delaware had abandoned common law privity requirements in the area of products liability cases, I am convinced that the Delaware Supreme Court in *Seiler v. Levitz Furniture, Inc.,* Del.Supr., 367 A.2d 999 (1976) was likewise indicating an intent to abandon privity as a prerequisite to bringing suit on a negligence theory to recover financial losses suffered in the construction context.

Id. at 1005.

On appeal, however, the Third Circuit Court of Appeals reversed the opinion of the District Court. The Court of Appeals found that "[r]ecent developments in the law suggest a trend to preclude the maintenance of a negligence action to recover purely economic loss" absent privity of contract. *Id.* at 540, 541. [6] On that basis, the Court predicted that the Delaware Supreme Court would, if the issue were raised, reaffirm the *Crowell* ruling as Delaware law.

Just over a year after the District Court's decision in *Gilbane,* this Court in *Hodges v. Smith,* Del.Super., 517 A.2d 299 (1986), was again faced with issue of whether or not economic losses are recoverable under a negligence theory absent privity of contract. In *Hodges,* plaintiff land owners brought a negligence action for economic losses against land surveyors who negligently surveyed land purchased by them years after the survey was performed. In deciding that privity was not required to maintain this negligence action, this Court held:

> Modern authority may be said to be to the effect that tort liability should be measured by the scope of the duty owed rather than by artificial concepts of privity.

> 74 Am.Jur.2d *Torts,* § 52 (1974). Although it appears no Delaware court has yet adopted the reasoning of Restatement (Second) of Torts, § 552 (1977), which would abolish the privity requirement in certain cases of negligent misrepresentation, the Court approves the extension of liability to foreseeable plaintiffs ***1386** under these allegations of a survey error.

Id. at 301.

[3] In my view, the reasoning set out in *Glanzer, supra,* and Judge Ridgely's opinion in *Hodges* are particularly compelling in this case and should be applied. While it is not this Court's intention to state a general rule which applies to all professions in all situations, the Court concludes that privity of contract is not an indispensable prerequisite to the recovery of economic damages in negligence cases such as this which fall within the parameters of § 552 of Restatement (Second) of Torts.

[4] Modern legal authority supports the proposition that if, in the course of its business, TTR negligently obtained and communicated incorrect information specifically known and intended to be for the guidance of Plaintiffs, and if it is specifically known and intended that Plaintiffs would rely in calculating their project bids on that information, and if Plaintiffs rely thereon to their detriment, then TTR should be liable for foreseeable economic losses sustained by Plaintiffs regardless of whether privity of contract exists.

[5] At the time it prepared the project plans and specifications and conveyed the information at the pre-bid meeting, TTR knew and intended that this information would be specifically supplied to and relied upon by project bidders for the specific purpose of calculating their project bids. On this basis, TTR owed a legal duty to Plaintiffs, as known and intended members of this limited class, to supply correct information.

[6] [7] A reading of the facts in a light most favorable to Plaintiffs reveals a claim that TTR negligently calculated the applicable tidal heights and project benchmark to the detriment of Plaintiffs. As the Court in *Glanzer, supra,* stated, the use of the information negligently supplied was not an indirect or collateral consequence ... it was the end and aim of the transaction. Therefore, the Court concludes, as a matter of law, that the lack of contractual privity between TTR and Plaintiffs is not fatal to their negligence claims notwithstanding the fact that Plaintiffs seek purely economic damages in this case. Stated otherwise, the Court holds that a claim of negligence lies with regard to those cases falling within the purview of § 552 of the Restatement (Second) of Torts (1977), the provisions of which this Court now specifically adopts with regard to Delaware civil practice. [7]

PLAINTIFFS' THIRD–PARTY BENEFICIARY CLAIM

[8] Ordinarily, a stranger to a contract acquires no rights thereunder unless it is the intention of the parties to confer a benefit upon such a third-party. *Delmar News, Inc. v. Jacobs Oil Company,* Del.Super., 584 A.2d 531 (Barron, J.) 1990; 2 *Williston on Contracts,* § 356 (1954). It is universally recognized, however, that where it is the intention of the promisee to secure performance of the promised act for the benefit of another, either as a gift or in satisfaction of an obligation to that person, and the promisee makes a valid contract to do so, then such third person has an enforceable right under that contract to require the promisor to perform or respond in damages. *Blair v. Anderson,* Del.Supr., 325 A.2d 94 (1974); *Astle v. Wenke,* Del.Supr., 297 A.2d 45 (1972).

[9] In order for third-party beneficiary rights to be created, not only is it necessary that performance of the contract confer a benefit upon a third person that was intended, but the conferring of the beneficial effect on such third-party, whether it be creditor or donee, should be a material part of the contract's purpose. ***1387** *Insituform of North America v. Chandler,* Del.Ch., 534 A.2d 257 (1987).

[10] The only third parties who have legal rights are donees and creditors of the promisee. See Restatement of Contracts (Second), § 311(3) (1979). It is abundantly clear to the Court that Plaintiffs were not creditors of DNREC at the time the TTR/DNREC contract was made nor were they the subject of DNREC's generosity.

[11] Moreover, while it is true that the agreement between TTR and DNREC, requiring TTR to provide plans and specifications for the project, was made in anticipation

that bids would be made thereon, this does not confer upon either Plaintiff the status of third-party beneficiary. The plans prepared by TTR pursuant to the contract were intended to be used by Plaintiffs and others who planned to submit bids on the project. This, however, is not, in my view, tantamount to saying that the contract giving rise to those plans and specifications was intended in any legal sense to benefit Plaintiffs.

Although the effect of the agreement was intended, and in fact did, provide information for the use of Plaintiffs, the contract itself was merely a means through which the benefit that motivated the contract, namely, the acquisition of plans and specifications for the project, was sought to be achieved by the parties thereto. Where this is the case, the third parties even though not merely incidental to the contract in the sense of being collateral or peripheral to the achievement of the contract's purpose, take no rights thereunder. *Insituform of North America,* 534 A.2d at 270.

CONCLUSION

For the foregoing reasons, the Court concludes that as to the Plaintiffs' claims that the negligently prepared project plans and specifications and the information conveyed at the pre-bid meeting were prepared and presented by TTR for the use of a specific and limited class of potential users of which Plaintiffs were known members, and because Plaintiffs were intended to and did rely to their detriment on that information in preparing their project bids, Plaintiffs' negligence and negligent misrepresentation claims are cognizable despite the lack of contractual privity with TTR and the fact that Plaintiffs seek purely economic damages.

As to Plaintiffs' second cause of action the Court concludes that Plaintiffs were not third-party beneficiaries of the contract between TTR and DNREC and are, therefore, not entitled to maintain a breach of contract action against TTR based thereon.

TTR's summary judgment is, therefore, denied with respect to Counts I and III of the complaint and granted with respect to Count II.

It Is So ORDERED.

All Citations

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Footnotes

1 DNREC and Landmark were originally joined as third-party defendants in this action by TTR. On December 5, 1989, counsel for TTR and DNREC filed a stipulation dismissing DNREC from this action. On July 12, 1990, this Court granted Landmark's unopposed motion for summary judgment. Therefore, the only parties involved in the instant motion are Plaintiffs Guardian and Batzel and Defendant TTR.

2 Justice Cardozo's opinion in *Glanzer* is not at odds with his opinion in *Ultramares.* The facts in *Glanzer* supported both foreseeability and intended reliance. On the other hand, the facts in *Ultramares,* while arguably foreseeable, clearly showed no intended reliance. The different conclusions thus reached by Justice Cardozo are readily explainable.

3 Comment (a) to Section 552 provides, in pertinent part, as follows:

> "It does not follow that every user of commercial information may hold every maker to a duty of care. Unlike the duty of honesty, the duty of care to be observed in supplying information for use in commercial transactions implies an undertaking to observe a relative standard, which may be defined only in terms of the use to which the information will be put, weighed against the magnitude and probability of loss that might attend that use if the information proves to be incorrect. A user of commercial information cannot reasonably expect its maker to have undertaken to satisfy this obligation unless the terms of the obligation were known to him. Rather, one who relies upon information in connection with a commercial transaction may reasonably expect to hold the maker to a duty of care only in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended to supply it for that purpose."

4 Nearly all cases addressing the issue, however, do permit recovery for personal injury and property damage on a negligence theory even in the absence of privity.

5 *Martin* held that privity of contract was not required for a defendant lessor of trucks to be held strictly liable in tort for personal injury and property damage sustained when a defective truck owned by defendant struck a bystander.

6 The Court of Appeals noted that both *Oliver B. Cannon & Sons, Inc. v. Dorr–Oliver, Inc., supra,* and *Seiler v. Levitz Furniture Co., supra,* involved (i) property damage, not merely economic loss and (ii) privity of contract between the injured party and the wrongdoer. Thus, the Court inferred that these two Delaware Supreme Court decisions could not be construed as abandoning the holding in *Crowell.* It is noteworthy, however, that neither the Court of Appeals in *Pierce Associates, Inc.* nor this Court in *Crowell* cited § 552 of Restatement (Second) of Torts (1977).

7 The decision reached herein is not at variance with the holding in *Crowell Corporation v. Topkis Construction Co., supra. Crowell* was decided under traditional product liability concepts. Here we do not have a defective product caused by faulty manufacture or construction. Rather, the case *sub judice* is predicated on the limited parameters of § 552 of Restatement (Second) of Torts (1977), that is, false information generated for a profit supplied for business guidance with an intended reliance upon such information by the recipient thereof.

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