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Personal Tort Liability for Design Professionals

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Design professionals – architects, engineers and surveyors – typically practice through a corporation, partnership, limited liability company (LLC), or other corporate entity. The decision to practice through one of these corporate forms is usually based upon the design professional's desire to minimize the risk of personal liability. However, the formation of a corporate entity through which a design professional furnishes services does not shield the professional from personal liability for tort claims, such as professional malpractice or negligence.

Brief History of Florida Law Regarding Design Professional Liability

In Florida, the liability of the design professional has undergone significant change. In 1973, the Florida Supreme Court partially abolished the privity requirement as a condition precedent to bringing suit, thereby subjecting the design professional to potential lawsuits by contractors, the contractor's surety, subcontractors, purchasers, and other foreseeable third parties. *A. R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973).

However, in 1993, the Florida Supreme Court limited the *A.R. Moyer* decision to its facts and limited claims against design

professionals to those situations when the design professional exercises supervisory power. *Casa Clara Condominium Association v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244 (Fla. 1993). The Supreme Court approved the application of the "economic loss rule" to situations in which the plaintiffs failed to make a necessary showing of personal injury or property damage, thus prohibiting a claim for negligence seeking to recover purely economic losses.

Until 1999, design professionals generally were not exposed to economic damages claims based on negligence, unless they served as "supervising" design professionals, because of the limitations of the economic loss rule.

The Florida Supreme Court's Decision in *Moransais v. Heathman*

In 1999, the Florida Supreme Court issued its opinion in *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999). The *Moransais* decision marked a change in the law of design professional liability.

In *Moransais*, the Florida Supreme Court held that the economic loss rule does not bar a cause of action against a professional for his or her negligence even though the damages are purely economic and

the aggrieved party entered into a contract with the professional's employer. The Court further held that Florida recognizes a cause of action against professionals in negligence despite the lack of a direct contract between the professional and the aggrieved party.

The facts of *Moransais* are relatively simple. In June 1993, *Moransais* entered a contract to buy a home in Lakeland from *Heathman*. The contract provided for a building inspection before the closing, and *Moransais* contracted with a company known as *Bromwell & Carrier, Inc. (BCI)* to do the inspection. The inspection and report were performed by two engineers (*Jordan & Sauls*) working for *BCI*. *Moransais* subsequently discovered undisclosed defects that allegedly rendered the home uninhabitable. He filed an action against *BCI* for breach of contract and against *Jordan and Sauls* for professional negligence. The complaint alleged no bodily injury or property damage other than the undisclosed and undetected defects in the home. The trial court dismissed these malpractice claims, and the appellate court affirmed. The appellate court reasoned that a professional malpractice claim was primarily designed to address injuries to a person or property, and that contractual remedies (in this case, against *BCI*) were the more

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appropriate manner to recover a purely economic loss.

The Florida Supreme Court addressed the following two questions:

(1) Where a purchaser of a home contracts with an engineering corporation, does the purchaser have a cause of action for professional malpractice against an employee of the engineering corporation who performed the engineering services?

(2) Does the economic loss rule bar a claim for professional malpractice against the individual engineer who performed the inspection of the residence where no personal injury or property damage resulted?

The Court answered the first question in the affirmative, noting that engineering is a “profession” as defined by Florida law. The Court concluded that the homeowner could assert this cause of action despite the lack of a direct contract between the parties, and even though the homeowner had direct contractual remedies against the seller and the engineering company that employed the individual engineers.

The Court further found that the Florida Statutes also indicated an intent to hold professionals liable for their negligent acts by expressly stating that the formation of a corporation or partnership does not relieve the individual members of their professional liability.¹

The Court answered the second question in the negative, and held that the economic loss rule does not preclude actions for professional malpractice.

Expansion of The Design Professional's Liability?

Since *Moransais*, one appellate court appears to have extended a design professional's liability to anyone who has a “special relationship” to the design professional's work.

In *Hewett-Kier Const., Inc. v. Lemuel Ramos and Associates, Inc.*, 775 So.2d 373 (Fla. 4th DCA 2000), rev. den. 791 So.2d 1098, a general contractor sued an architectural firm and an architect for professional malpractice. The trial court granted the defendants' motion to dismiss and the general contractor appealed. The appellate court held that: (1) the allegations that the defendants prepared erroneous design documents with knowledge that the owner would supply them to the successful bidder, who would be injured if they were inadequate, were sufficient to establish a special relationship between the architect and the general contractor, and (2) the design contract between the owner and the architect could not be used as a basis to grant the architect's motion to dismiss. The *Hewett-Kier* Court's reasoning could expose the design professional to liability in tort to unforeseen parties not in privity with the design professional or even those outside the construction context.

Conclusion

Regardless of the form of corporate entity through which a design professional practices, negligent design professionals are personally liable for any economic and non-economic losses they cause to owners, contractors and other construction parties. A design professional owes a legal duty to use such skill, prudence and diligence as other members of his or her profession and to conform to a standard of conduct for the protection of others against unreasonable risks of harm.

Design professionals are facing more frequent claims for professional malpractice and negligence. These claims include actions based upon negligent review or approval of pay requisitions, defective design documents, incomplete or accurate engineering reports, and untimely or negligent review of shop drawings. Design professionals should understand the scope of their potential exposure and consider ways to limit their liability by contract, other liability-shifting devices, such as indemnification and contribution, and evaluate the availability and scope of general and professional liability insurance coverage.

¹ See Fla. Stat. § 471.023(3) (imposing personal liability against engineers practicing through corporations); Fla. Stat. § 621.07 (affirming individual liability of professionals practicing through professional service corporations). See also Fla. Stat. § 481.219(11) (imposing personal liability against architects signing and sealing construction documents).

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