SANDBERG PHOENIX

PROFESSIONAL LIABILITY BLOG

Privity and Duty: The Design Professional's Liability to Third Parties Seeking Economic Losses

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There is no question that an architect and other design professionals owe a duty of care to those with which it has privity. But to what extent can an architect be held liable for negligence that causes economic losses for contractors and construction managers?

The general rule is that a contracting party does not owe a duty to a person or entity that was not party to the contract, nor can that plaintiff sue for the negligent performance of the contract. Fleischer v. Hellmuth, Obata & Kassabaum, Inc., 870 S.W.2d 832, 834 (Mo. Ct. App. 1993). The justification for this general rule is twofold: (1) to prevent excessive and unlimited liability on the part of a party; and (2) to protect the parties' right to contract and not burden contracting parties with liabilities they didn't voluntarily assume. Id. at 834.

In holding an architect who does not owe a duty of care to construction managers when purely economic losses are sought, the *Hellmuth* court upheld the traditional justifications requiring privity before imposing a duty of care. The court reasoned that allowing construction participants who lack privity to assert negligence claims against an architect would subject an architect to excessive and unlimited liability. Id. at 836. For instance, an architect could potentially be subject to liability from prime contractors, subcontractors, suppliers, and laborers. Id. at 837. The court further determined that an architect's freedom to contract would be impaired if it was subject to liability from construction managers and general contractors. Id. In essence, the contractor would be prohibited from negotiating and allocating risk in its contracts.

The *Hellmuth* court and its progeny established that an architect does not owe a duty of care to a construction manager or contractor in the absence of privity. However, Missouri courts utilize a different approach in personal injury or premises liability cases. Further, other states are split on the issue of if and when a design professional owes a duty to third parties which magnify the need for design professionals to be familiar with the laws of the locale in which they practice. If you have questions about whether a design professional owes a duty of care to third parties in other states, the Professional Liability team at Sandberg Phoenix is here to help.