

Legal Perspective

Bilt-Rite and the Evolving Scope of Negligence Liability for Design Professionals

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On three different occasions over the past year, the Pennsylvania appellate courts have recently elaborated on the potentially broad reach of negligent misrepresentation claims a contractor may have against a design professional for a faulty design, despite the absence of a contract between them.

Although Pennsylvania law generally adheres to the “economic loss” doctrine and prohibits the filing of a negligence claim that resulted solely in economic loss, a narrow exception is found in Section 552 of the Restatement (Second) of Torts entitled, “Information Negligently Supplied for the Guidance of Others.” In *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, the Pennsylvania Supreme Court adopted Section 552 and held a general contractor was able to bring an action against an architect for alleged negligent misrepresentations in plans and specifications upon which the contractor relied in submitting its winning bid for the construction of a school. 866 A.2d 270 (Pa. 2005).

Since the Supreme Court’s decision in *Bilt-Rite*, architects and engineers performing services on Pennsylvania projects have been tasked with carefully considering the potential liabilities that may be asserted by third-parties with whom they may have no contract.

A Failure To Update Plans In Light Of New Data May Constitute A Misrepresentation

In December 2015, the Pennsylvania Commonwealth Court confirmed the weight a *Bilt-Rite* claim can carry amidst a construction dispute in *Trinity Contracting, Inc. v. Mun. Sewage Auth. of Twp. of Sewickley and Gibson-Thomas Eng. Co., Inc.*, No. 523 C.D. 2015, 2015 WL 8776568 (Pa. Commw. Ct. Dec. 15, 2015).

The *Trinity Contracting* case arose out of a contract for the construction of a complete sewage treatment plant in Sewickley Township, Pennsylvania. Gibson-Thomas Engineering Co., Inc. (“Gibson-Thomas”) served as the engineer of record and the Authority’s representative for the project. Gibson-Thomas completed its preliminary design in Au-



gust of 2007, following which it contracted with a geotechnical engineer for the Project. In March 2007, the geotechnical engineer wrote to Gibson-Thomas and identified certain significant geotechnical problems associated with the site recommended by Gibson-Thomas for the project. Nevertheless, Gibson-Thomas completed its design for the project on the site it had originally selected, and never revised its design in light of the findings expressed in the geotechnical report. The Project Manual specifically indicated that the geotechnical report also was not a Contract Document.

Finally, the project was solicited as a “plan-and-spec project,” and ultimately awarded to Trinity Contracting, Inc. (“Trinity”) as the lowest responsible bidder. After construction was commenced, it was discovered that the subsurface conditions at the site differed substantially from the anticipated subsurface conditions as planned for by Gibson-Thomas, resulting in the need to move the location of the plant.

In response to Gibson-Thomas’s attempt to assess liquidated damages against Trinity based on Trinity’s delay in reaching substantial completion, Trinity retained Babst Calland Clements & Zomnir, P.C. to assert claims for (1) breach of contract against the Authority and (2) a Bilt-Rite claim against Gibson-Thomas, to recover the losses it incurred for having to move the project site. Under these facts, Trinity was able to prove at trial that the Authority breached its contract with Trinity and that Gibson-Thomas negligently misrepresented the site conditions, and the judgment entered in favor of Trinity was affirmed by the Pennsylvania Commonwealth Court.

In its affirming opinion, the Commonwealth Court held that, Gibson-Thomas was liable to Trinity on the Bilt-Rite claim because: (1) Gibson-Thomas had actual notice of the geotechnical data 14 months before the bid solicitation; (2) Gibson-Thomas failed to revise the project design in light of that data; and (3) Gibson-Thomas’s design constituted a representation to all bidders (including Trinity) that the project could be constructed as originally designed. 2015 WL 8776568, at *3.

The Commonwealth Court also rejected Gibson-Thomas’s argument that Trinity had a duty to perform its own geotechnical investigation prior to bidding on the contract, and held Trinity had no burden to independently verify the representations made by Gibson-Thomas or the owner during the bidding process in order for Trinity to properly rely on such information. *Id.*

The Design Itself Can Be Construed As A Representation

Earlier the same year, the Pennsylvania Superior Court also held that Bilt-Rite plaintiffs need not explicitly allege an “express misrepresentation” in order to properly assert a claim for negligent misrepresentation. *Gongloff Contracting, L.L.C. v. L. Robert Kimball & Associates, Architects & Engineers, Inc.*, 119 A.3d 1070 (Pa. Super. Ct. 2015). Plaintiff *Gongloff* did not allege the defendant “expressly” repre-

sented it could complete construction as designed by the defendant. Nevertheless, the Superior Court held the absence of such a representation is not fatal to a Bilt-Rite claim; meaning it no longer matters whether an owner or design professional expressly states “the project can be constructed as designed,” because the design itself is a representation.

In *Gongloff*, the roofing subcontractor (*Gongloff Contracting, LLC* or “*Gongloff*”) sued the project architect (*L. Robert Kimball & Associates, Architects and Engineers, Inc.* or “*Kimball*”) for negligent misrepresentation, alleging *Kimball* negligently misrepresented, either explicitly or implicitly, that the design of the structure would allow it to bear all required loads. *Kimball* moved for judgment on the pleadings, and the trial court granted the motion, ruling that a negligent misrepresentation claim required an express misrepresentation, which *Gongloff* had not alleged in its complaint.

The Superior Court later reversed, holding Bilt-Rite subjects architects to liability for Section 522 negligent misrepresentation claims when it is alleged that those professionals negligently included faulty information in their design documents.

The court stated: “The design itself can be construed as a representation by the architect that the plans and specifications, if followed, will result in a successful project. If, however, construction in accordance with the design is either impossible or increases the contractor’s costs beyond those anticipated because of defects or false information included in the design, the specter of liability is raised against the design professional.” *Gongloff*, 2015 WL 4112446, at *6.

In reaching its conclusion, the Superior Court distinguished the “actual misrepresentation” requirement under Bilt-Rite from the trial court’s decision to require an “express misrepresentation.” Acknowledging that courts have required plaintiffs to assert “an actual misrepresentation as opposed to assumptions on the part of the recipient,” *id.* (citing *State College Area School District v. Royal Bank of Canada*, 825 F.Supp.2d 573, 584 (M.D. Pa. 2011)), the Superior Court rejected the notion that a plaintiff must also identify some particular communication that was expressly false. The plaintiff’s use of the tangible design documents containing the allegedly faulty design was sufficient to allege an “actual misrepresentation” under Bilt-Rite. *Id.*

The court also pointed out Bilt-Rite does not require that a plaintiff precisely identify the misrepresentation in the design documents. *Id.* at *7. Although the court in Bilt-Rite mentioned that the design professional therein “expressly represented” that its aluminum curtain wall “could be installed and constructed through the use of normal and reasonable means and methods, using standard construction design tables,” the court did make “express representation” an element of a Section 522 negligent misrepresentation claim. *Id.* (citing *Bilt-Rite*, 866 A.2d at 272). Instead, Bilt-Rite only requires “that information, a rather general term, be negligently supplied by the design professional.” *Id.*

Although a defendant-architect may still defend against a Bilt-Rite claim by demonstrating through the presentation of evidence that the plaintiff-contractor's misrepresentation allegations are not substantiated, the Gongloff case will make it more difficult for a defendant to have a Bilt-Rite case dismissed on this basis early in the litigation, before engaging in discovery.

Bilt-Rite in the Days Ahead

Notably, these two decisions came on the heels of *Bruno v. Erie Ins. Co.*, 106 A.3d 48 (Pa. 2014), wherein the Pennsylvania Supreme Court held that contractors need not obtain a certificate of merit in support of a Bilt-Rite claim against a design professional because the contractor is not the design professional's client. In light of these decisions, contractors face fewer procedural hurdles in asserting a Bilt-Rite claim.

Overall, the recent developments in Bilt-Rite and its progeny indicate a contractor's assertions that certain unforeseen losses or a project delay could have been prevented by a more accurate design may carry more weight in the negotiation and resolution of construction disputes moving forward. The Gongloff decision serves as a reminder to design professionals that the plans in and of themselves operate as a "representation" to the third-parties who will ultimately utilize them. And in light of the Trinity Contracting decision, owners and design professionals would be prudent to ensure that the design fully considers the most accurate and up-to-date design information possible prior to letting a project out for bid. As a result of these decisions, it is also a possibility the industry experiences an increase in attempts by owners to allocate a certain amount of design responsibility to their contractors.

It is certainly without doubt we have yet to experience the full impact Bilt-Rite will have on construction disputes in Pennsylvania. In light of these cases, contractors, owners and design professionals alike should carefully consider the allocation of design responsibilities in their contracts, keeping in mind the importance these responsibilities will carry through the course of a project.

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