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Further Thoughts On Professional Malpractice Liability

The Florida Supreme Court's Recent Decision In *Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc.*

by Robert Alfert, Jr., Esq., Assoc. AIA

Malpractice liability, on account of the exponential increase in negligence suits and corresponding escalation of professional liability insurance premiums, is unequivocally the paramount issue confronting professionals today. Architects are no exception to the rule. In the Winter 1993 edition of *Florida Architect*, my colleague David Tegeler, AIA, Esquire, brought refreshing news to architects in his article discussing the recent Florida Supreme Court decision in *Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993). The *Casa Clara* decision has been heavily touted by various commentators as narrowly defining the scope of negligence liability for architects. Unfortunately, various recent appellate decisions construing the *Casa Clara* decision have illustrated that some negligence claims may still exist against an architect or other design professionals for negligence in the performance of their duties.

The controversial debate underlying professional malpractice liability surrounds a technical legal doctrine referred to as the "economic loss rule." Simply stated, the economic loss rule bars negligence claims seeking recovery for purely economic losses rather than redress for personal injury or damage to other property outside the scope of the parties' relationship. The policy is grounded in a fine, but often blurred, distinction between contract law and tort (or civil wrong) law: Disappointed economic expectations (for example, lost profits or delay damages) are properly addressed pursuant to the law of contract; whereas tort law is

designed to protect society's interest in being free from harm.

The Florida Supreme Court reinforced the economic loss rule in the *Casa Clara* decision. The Court held that negligence claims seeking redress for purely economic losses must be brought under a contract theory. This ruling arguably shielded architects from liability for their negligence to those with whom they were not in a contractual relationship. In the standard architect-owner relationship, this ruling effectively precludes claims against the architect brought by, among others, general contractors, subcontractors and material suppliers. The only narrowly-defined exception to this ruling was the Supreme Court's refusal to overrule its earlier landmark decision in *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973).

The decision in *A.R. Moyer* permitted a general contractor to sue a supervising architect under negligence (or tort) theory despite the fact that the claim sought recovery for purely economic losses. The Court clearly, though not necessarily convincingly as applied by today's standards, articulated its rationale:

Considerations of reason and policy impel the conclusion that the position and authority of a supervising architect are such that he ought to labor under a duty to the prime contractor to supervise the project with due care under the circumstances, even though his sole contractual relationship is with the owner.

Although too much control over the contractor necessarily rests in the hands of the supervising architect for him not

to be placed under a duty imposed by law to perform without negligence his functions as they affect the contractor, the power of the architect to stop the work is tantamount to a power of economic life or death over the contractor. It is only just that such authority, exercised in such a relationship, carry commensurate legal responsibility.

The Court's subsequent decision in *Casa Clara* maintained *A.R. Moyer's* an exception to the economic loss rule, but the exception was narrowly defined.

The first post-*Casa Clara* appellate decision involving an architect's liability in negligence, *Spancrete, Inc. v. Ronald E. Frazier & Associates, P.A.*, 630 So. 2d 1197 (Fla. 3d DCA 1994), construed the limitation literally. The appellate court recognized that *A.R. Moyer* was decided in the context of a "supervising" architect with the power to stop work and exercise some control over the contractor. The role of the architect in *Spancrete* was governed by the American Institute of Architects Document A201. Under that contract, the architect does not have the right to stop work; that power is reserved to the owner. Moreover, AIA Document A201 does not confer upon the architect supervisory responsibility over the contractor or subcontractors. Thus, the court opined that, since *A.R. Moyer* is to be strictly confined to its facts, the architect did not qualify as a supervisory architect within the meaning of *A.R. Moyer*.

It is not known whether the *Spancrete* Court's argument

regarding the supervisory status of an architect will gain unanimous acceptance with the courts. Taken to its logical extreme, the argument suggests that an architect can never be held liable to a general contractor for economic losses unless the owner and the architect were governed by a contract which expressly vested in the architect the power to stop work and supervise the contractor. Arguably, the Supreme Court in *Casa Clara* did not intend such a result. Some commentators suggest that, as a practical matter, *Spancrete* means *A.R. Moyer* is dead. This view is premised on the fact that the standard AIA contract does not confer upon the architect supervisory responsibility. This view, however, glosses over the fact that many architects and other design professionals perform work without a written contract or use their own variant of the AIA contract which may or may not address the supervisory issue.

Contractual responsibilities aside, an architect may assume a supervisory role during the course of construction. It is not uncommon for architects, or other design professionals for that matter, to assume roles or duties extending beyond the four corners of their contract. Under such a factual scenario, it is not unlikely that a court would find the architect liable in a negligence action seeking recovery for purely economic losses.

The *Spancrete* decision, nevertheless, is a positive ruling for architects and other design professionals. The decision, however, also implicitly heralds a warning to architects against expanding either ex-

pressly or implicitly, the scope of their contractual responsibilities and thereby increasing their potential liability.

Perhaps the most troubling development following *Casa Clara* is the very recent opinion by the Fifth District Court of Appeal in *Southland Construction, Inc. v. The Richeson Corp.*, 19 Fla. L. Wkly. D1564 (Fla. 5th DCA 1994), decided in July of 1994. In that case, Southland Construction hired The Richeson Corporation, an engineering firm headed by a professional licensed engineer, to design a retaining wall for an apartment complex. The engineer allegedly did not design the wall in accordance with professional engineering standards, and the wall "cracked and bulged." Southland Construction sustained significant economic losses related to the costs of reinforcing and repairing the wall.

Although the appellate court acknowledged the *Casa Clara* decision, it distinguished that the economic loss rule did not bar a negligence action against a professional where a client seeks recovery for economic losses caused by such professional's *malpractice*. The court specifically held:

The tort liability of professionals appears to vary according to the type of professional involved, and the court's public policy decisions as to who should be "foreseeable plaintiffs." As regards the tort liability of engineers, one who negligently performs a professional service, knowing that another will be injured if it is negligently performed, is liable in tort, even though there is no contract

between the parties.

Notwithstanding the serious question as to the validity of this policy-driven decision, the decision may have haunting consequences on architects as well. It is not a stretch to suggest that the *Southland Construction* decision can easily and most likely will be applied to alleged malpractice by architects. The decision will also not be appealed to the Supreme Court. Unfortunately the case settled during the pendency of the appeal. Thus, the *Southland Construction* decision will carry persuasive value until challenged by another appellate court.

Architects need also be wary that negligent violations of applicable building codes may still form the basis for liability in tort for purely economic losses. Section 553.84 (1994) of the Florida Building Codes Act creates a right to sue for damages caused by violations of the state minimum building codes section or other local building codes.

The Second District Court of Appeal in *Edward J. Seibert, AIA, Architect & Planner, P.A. v. Bayport Beach Beach & Tennis Club Ass'n*, 573 So. 2d 889 (Fla. 2d DCA 1991), recently stated that violation of a building code could form the basis for tort liability against an architect. In *Seibert, AIA*, a condominium association sued, among others, an architect for various acts of alleged negligence and violation of the applicable building code with respect to design of the fire exit system. The association sought recovery for the costs of coming into compliance with the code. The court expressly held that the architect had a duty to design the fire

exits in a manner that complied with the applicable building code, and failure to use due care in that regard would create liability. However, the architect here was not negligent. The architect used his professional judgment in interpreting the code, the building inspector approved of the design, and the architect relied upon such approval.

The *Seibert, AIA* case was decided under pre-*Casa Clara* law where a tort that was independent of or distinguishable from a contract could provide the basis for recovering purely economic losses. *Casa Clara* appears to suggest that any tort claim seeking recovery for purely economic damages is foreclosed. It is highly unlikely, however, that the Supreme Court meant to sweep so broadly; otherwise, well-established tort claims such as defamation, tortious interference, civil theft, and fraud in the inducement, to name a few, would be eliminated. The more logical view, thus, would also appear to be that negligence *per se* claims also survive *Casa Clara*. As stated in *Sierra v. Allied Stores Corp.*, 538 So. 2d 943, 944 (Fla. 3d DCA 1989), section 553.84 of the Florida Building Codes Act creates an independent cause of action. The legislature enacted the standard minimum building code for the primary purpose of protecting the public safety, health and general welfare. Allowing a party to avoid the consequences of violating a safety regulation arguably contravenes the legislative purpose of section 553.84.

In summary, the law in the area of architect's liability in negligence for economic losses is by no means definitive. Considered as a whole, even though *Casa Clara* fails to shield them completely from liability in tort, architects are in a far better position than they were in prior to the decision. Architects, however, must be cognizant of the fact that the law is dynamic and constantly changing. Reliance on the current status of the law should never supplant the high standards of professionalism engendered by the American Institute of Architects.

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