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STANDARD OF CARE

for design professionals

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INTRODUCTION

This manual outlines the standard of care for design professionals in all 50 states and the District of Columbia. It also provides information about additional state-specific statutes, doctrines, and rules that may be helpful in defending professional malpractice claims.

Where available, this manual also focuses on states and case law that have recognized that "perfection" is not the legal standard for design professionals. Although architects, engineers, and design professionals strive for perfection, the seminal American case of Coombs v. Beede explains:

> The undertaking of [a design professional] implies that he possesses the skill and ability . . . sufficient to enable him to perform the required services at least ordinarily and reasonably well. . . . But the undertaking does not imply or warrant a satisfactory result . . . . An error of judgment is not necessarily evidence of a want of skill or care, for mistakes and miscalculations are incident to all the business of life.

89 Me. 187, 36 A. 104 (1896). The Restatement (Second) of Torts § 299A incorporates Coombs in its standard for design professionals:

> Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

Restatement (Second) of Torts § 299A.

> Although 'perfection' is not required, plaintiffs still demand it. Plaintiffs routinely seek to use even the smallest mistake to prosecute an action against design professionals.

As one Wisconsin federal court recently explained, the standard of care "does not mean that an engineer's drawings must be perfect and free from mistakes or defects." Novum Structures, LLC v. C. Larson Engineering, Inc., 2019 U.S. Dist. LEXIS 72187, at *5 (E.D. Wis. Apr. 30, 2019). "An architect does not guarantee a perfect plan or a satisfactory result, he does by his contract imply that he enjoys ordinary skill and ability in his profession and that he will exercise these attributes without neglect and with a certain exactness of performance to effectuate work properly done." Seiler v. Levitz Furniture Co. of E. Region, 367 A.2d 999, 1007–08 (Del. 1976). This viewpoint is shared by courts across the country.[1]

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[1] See, e.g., Sch. Bd. of Broward Cty. v. Pierce Goodwin Alexander & Linville, 137 So. 3d 1059, 1065 (Fla. Dist. Ct. App. 2014); Mayberry Cafe, Inc. v. Glenmark Const. Co., 879 N.E.2d 1162, 1173 (Ind. Ct. App. 2008); Lukowski v. Vecta Educ. Corp., 401 N.E.2d 781, 786 (Ind. Ct. App. 1980); Colbert v. B.F. Carvin Constr. Co., 600 So.2d 719, 729 (La. Ct. App. 1992); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514, 525 (1982); Waggoner v. W & W Steel Co., 657 P.2d 147, 149 (Okla. 1982); Howard v. Usiak, 775 A.2d 909, 915–16 (Vt. 2001); Martin v. Sizemore, 78 S.W.3d 249, 281 (Tenn. Ct. App. 2001); Mississippi Meadows, Inc. v. Hodson, 299 N.E.2d

These decisions comport with reality. The Construction Industry Institute conducted a study in the late 1980s showing that there was, on average, a 2%–3% cost overrun in the construction budget due to designer errors and omissions. Construction Contingency; Standard of Care vs. Cost of Design Errors and Omissions, L.G. Lewis Jr., P.E., Engineering Times, Feb. 1999.

A National Research Council report also suggested that construction changes resulting from error and omission are acceptable so long as they do not increase the construction costs by more than 5%. Dale L. Munhall, AIA and Leo A. Daly, Standard of Care: Confronting the Errors-and Omissions Taboo Upfront (AIA Best Practices, February 2011); see also The American Bar Association, Seven Steps to Resolving Construction Contract Claims, p. 3.7 (1983) ("The architect's undertaking, in the absence of a special agreement does not imply or guarantee a perfect plan or satisfactory result.").

These practical realities have led some commentators to propose a legal standard of care that incorporates an error threshold level to establish a plausible breach of the standard of care. One commentator proposed that "a court could easily rule that a reasonable owner should expect an overrun of 3% on a construction project due to errors and omissions." Paul Cottrell and Patrick McGrory, *Architects and Engineers Professional Liability – Redesigning the Standard of Care*, (Jan. 5, 2021) https://www.theclm.org/clmpublishing.

In a series of articles published by the American College of Construction Lawyers, commentators have debated the merits of a threshold approach. See David W. Mockbee, The Measure of Malpractice – There is a Place for the Threshold Approach in Evaluation Design Errors and Omissions, 7 ACCL JOURNAL 153 (2013); John R. Heisse, The Measure of Malpractice – A Further Rebuttal to the "Threshold Approach," 8 ACCL JOURNAL 87, n.2 (2014). These debates acknowledge that architects and engineers are not expected to be perfect, but they disagree on the efficacy of a threshold approach.

The reasoning behind the threshold approach is simple: Because "perfection" is neither practical nor required, design professionals' standard of care should include a threshold of imperfection. The threshold of imperfection would be based on studies that show the average cost increases to projects based on historical data regarding architect/engineer errors or omissions. By using this historical data, the threshold level of any given project can be estimated with a competent degree of certainty, and ensure that architects and engineers are not held to a standard of perfection.

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359 (Ill. App. Ct. 1973); Kemper Architects, P.C. v. McFall, Konkel & Kimball Consulting Condo. Ass'n v. Park Point at Wheeling, LLC., 2015 IL App (1st) 123452, ¶18 (Ill. App. Ct. 2015); Garaman, Inc. v. Williams, 912 P.2d 1121, 1124 (Wyo. 1996); Smith v. Walsh Construction Company II, LLC, 95 N.E.3d 78 (Ind. Ct. App. 2018); Mayberry Cafe, Inc. v. Glenmark Const. Co., Inc., 879 N.E.2d 1162 (Ind. Ct. App. 2008).

Although we are not aware of any court that has — to date — formally adopted a threshold approach for errors and omission by design professionals, the attorneys defending professional malpractice cases should be cognizant of the prevalence of errors in design projects and develop an evidentiary record for the fact-finder through expert testimony or otherwise.

ALABAMA

STANDARD OF CARE

In Alabama, the standard of care for professionals, including architects and engineers, "is based upon the learning, skill, and care ordinarily possessed and practiced by those ordinarily skilled in that profession." Collins Co. Inc., v. City of Decatur, 533 So. 2d 1127, 1134 (Ala. 1988). "When the engineer's actions meet the standard of those skilled and experienced in that profession, the engineer has met his responsibility." Id. at 1134 (relying on testimony from two expert witnesses to establish that it was not the custom or practice of engineers in Alabama to advise contractors on wages in a construction project).

The Alabama Supreme Court has established that "[a] competent architect, pursuing an independent profession, is not an insurer of the accuracy or perfection of his work. In preparing plans and specifications he must be faithful and possess and apply the ordinary care and skill of the ordinarily skilled in that profession." Looker v. Gulf Coast Fair, 81 So. 832, 835 (Ala. 1919); see also R.L. Reid, Inc. v. Plant, 350 So. 2d. 1022 (Ala. 1977).

Although Alabama courts agree that design professionals are not held to a standard of perfection, the Alabama Supreme Court has held that reasonable accuracy could be expected, depending on the nature of the work and the factors involved. Broyles v. Brown Eng'g Co., 151 So. 2d 767 (Ala. 1963). In Broyles, the plaintiffs brought a breach of warranty claim against a civil engineering firm relating to inadequate drainage in the firm's plans and specifications for developing a tract of land. 151 So. 2d at 769. The firm argued that, unless there were an express contract stating otherwise, it could only be liable for inadequate plans that resulted from negligence or a failure to use reasonable skill and diligence in their preparation. Id. The court acknowledged that Alabama courts do not hold architects to "a strict accountability of guaranty" and have not imposed "any implied agreement of insurability," citing the varied factors involved in an architect's work (*e.g.*, the materials they recommend are produced by others beyond their control; their work is "to a certain degree experimental;" and their work is dependent on the law of physics, gravity, the rotation of the Earth, the texture of the soil for a foundation, and other factors they cannot control). Id. at 771-772. Nevertheless, the court reasoned that the plaintiff had "a right to expect the survey to be done with reasonable accuracy chargeable to the profession" and that there were no "unknown or uncontrollable topographical or landscape conditions as would prevent a drainage survey, if properly made with reasonable skill and diligence by a qualified civil engineer, from being reasonably accurate by the proper use of instruments and known formulas accepted and used by the civil engineering profession." Id. at 772. Finding that the engineer should "expect to be charged with a guaranty of reasonable results," the court remanded the case for further proceedings. Id. at 772-773.

RESTATEMENT

Alabama does not follow the Restatement Law (Second) of Torts § 299A.

Elements of a Claim

In Alabama, a negligence action against a person in their professional capacity is "essentially no different from those of any other negligence suit." Kuhlman v. Keith, 409 So. 2d 804, 808 (Ala. 1982). To recover, the plaintiff must prove the following elements:

1) Duty
2) Breach of the duty
3) The breach was the proximate cause of the injury
4) Damages

See Id.

Expert Testimony

"Alabama law requires that expert testimony establish the appropriate standard of care that professionals, such as architects and engineers, must exercise." Collins Co., 533 So. 2d at 1134.

Relevant Statutes and Regulations

- Ala. Code § 34-2-30:

> Control over all phases of the practice of architecture, including, but not limited to, control over and detailed knowledge of the content of technical submissions during their preparation as is ordinarily exercised by registered architects applying the required professional standard of care.

- Ala. Admin. Code r. 100-X-7.01:

> In practicing architecture, an architect's primary duty is to protect the public's health, safety, and welfare. In discharging this duty, an architect shall act with reasonable care and competence, and shall apply the knowledge and skill which is ordinarily applied by architects of good standing, practicing in the same locality.
>
> In designing a project, an architect shall take into account all applicable state and municipal building laws and regulations. While an architect may rely on the advice of other professionals (e.g. attorneys, engineers, and other qualified persons) as to the intent and meaning of such laws and regulations, once having obtained such advice, an architect shall not knowingly design a project in violation of such laws and regulations.

- ALA. CODE § 6-5-711:

> [N]either a professional firm nor any of its employees that provide construction monitoring services on behalf of an awarding authority relating to the construction, repair, resurfacing, refurbishment, replacement, removal, modification, alteration, or other improvement of any public or private infrastructure shall be civilly liable in tort or otherwise for property damage, personal injury, or death resulting from construction monitoring services that substantially comply with the professional firm's construction monitoring services requirements for the awarding authority related to the plans and specifications in determining compliance of the contractor's work with the plans and specifications.
>
> This is not applicable to the extent that (a) "a professional firm or its employees are engaged by an awarding authority solely to design and/or prepare the engineering plans and specifications for a public or private infrastructure" or (b) "a professional firm or its employees performing construction monitoring services are also engaged by an awarding authority to prepare the engineering plans for that project, or are otherwise providing additional services on that project, and to the extent that a deficiency in such plans or additional services proximately causes property damage, personal injury, or death to a third party with whom the professional firm is not in privity of contract." ALA. CODE § 6-5-712.

ECONOMIC LOSS DOCTRINE

In Alabama, the "economic-loss rule prevents tort recovery when a product damages itself, causing economic loss, but does not cause personal injury or damage to any property other than itself." Pub. Bldg. Auth. of Huntsville v. St. Paul Fire & Marine Ins. Co., 80 So. 3d. 171, 184 (Ala. 2010). However, Alabama courts have not applied the economic-loss rule to bar tort claims in a commercial-construction context. Id. Instead, Alabama courts focus on "whether there exists a duty from which a tort might arise in a construction context." Id. (quoting RaCON, Inc. v. Tuscaloosa Cnty., 953 So. 2d 321 (Ala. 2006); Berkel & Co. Contractors, Inc. v. Providence Hosp., 454 So. 2d 496 (Ala. 1984)). Thus, where a party owes a duty in tort to another in a commercial-construction context, the tort claim may stand. Id.

STATUTE OF LIMITATIONS AND STATUTE OF REPOSE

- Statute of Limitations:
  - Two years, for actions involving injury to person or property . ALA. CODE § 6-2-38.
- Statute of Repose:
  - Two years after the cause of action accrues — but not more than seven years after the construction's or improvement's completion, unless the architect or engineer had actual knowledge of the defect and failed to disclose it — for civil actions in tort, contract, or

otherwise against any architect or engineer performing or furnishing the design, planning, specifications, testing, supervision, administration, or observation of any construction of any improvement on or to real property. ALA. CODE § 6-5-221.

ADDITIONAL ISSUES

- An architectural firm that replaces the initial architect on a project may still be liable for construction and design issues encountered in earlier phases of construction if the new architect has sufficient involvement in those earlier phases of construction. Walker Key Condominium Homeowners Ass'n Inc. v. Washer-Hill & Lipscomb, 899 So. 2d 994, 998 (Ala. 2004).

PATTERN JURY INSTRUCTIONS

Alabama does not have a specific pattern instruction for design professionals' standard of care or professional negligence.

ALASKA

STANDARD OF CARE

In Alaska, "an engineer has the duty to have that degree of learning and skill ordinarily possessed by reputable engineers, practicing in the same or a similar locality and under similar circumstances." Clark v. City of Seward, 659 P.2d 1227, 1230 (Alaska 1983). "It is his further duty to use the care and skill ordinarily used in like cases by reputable members of his profession practicing in the same or a similar locality under similar circumstances, and to use reasonable diligence and his best judgment in the exercise of his professional skill and in the application of his learning, in an effort to accomplish the purpose for which he was employed." Id.

Additionally, the Alaska Supreme Court has held that a "design professional has a duty in tort to exercise reasonable care, or the ordinary skill of the profession, for the protection of anyone lawfully upon the premises whose injury is reasonably foreseeable as the result of negligent design, plans, orders, or directions." State Dep't of Natural Res. v. Transamerica Premier Ins. Co., 856 P.2d 766, 772 (Alaska 1993) (internal quotations omitted).

In Alaska, design professionals do not guarantee perfection or perfect results. See Moloso v. State, 644 P.2d 205 (Alaska 1982). In Moloso, plaintiffs brought a wrongful death action against the state when a rock slide killed heavy equipment operators while they worked on a state highway project. Id. at 208. The court held that, although the state, as engineer, "need not guarantee a perfect plan or results[,]" it is "liable for a failure to exercise reasonable care and skill." Id. at 217. After considering several professionals' testimony regarding the standard of care, the court determined that a reasonable person could have concluded that the rock slide was due to a shortcoming in the state's performance of its duties as engineer and that the question should have been left for the jury to determine. Id.

RESTATEMENT

Alaska does not follow the Restatement (Second) of Torts § 299A.

ELEMENTS OF A CLAIM

In Alaska, the elements of a professional negligence cause of action are:

1) Duty of the professional to use the skill, prudence, and diligence that other members of the profession commonly possess and exercise.

2) Breach of that duty.

3) Proximate causal connection between the negligent conduct and the resulting injury.

4) Actual loss or damage resulting from the professional's negligence.

See Linck v. Barokas & Martin, 667 P.2d 171, 173 n.4 (Alaska 1983).

Expert Testimony

In Alaska, "expert testimony is not required to establish the standard of care in all cases of professional negligence." John's Heating Serv. v. Lamb, 46 P.3d 1024, 1038 (Alaska 2002). However, Alaska courts give substantial consideration to testimony from other design professionals regarding the standard of care. Moloso, 644 P.2d at 217 (relying on the testimony of "several professionals in the field" to "illuminate" the engineer's standard of care).

Relevant Statutes and Regulations

- Alaska Admin. Code tit. 12 § 36.200:

  > (a) In order to establish and maintain a high standard of integrity, skill, and practice in the professions of architecture, engineering, land surveying, and landscape architecture, and to safeguard the life, health, property, and welfare of the public, 12 AAC 36.200 – 12 AAC 36.245 are binding upon every individual holding a certificate of registration as an architect, engineer, . . . or other legal entities authorized to offer or perform architectural [or] engineering . . . services in this state.
  >
  > (b) A registrant shall act with complete integrity in professional matters.
  >
  > (c) A registrant may not practice architecture [or] engineering . . . if the registrant's professional competence is substantially impaired.

- Alaska Admin. Code tit. 12 § 36.210:

  > A registrant with the State Board of Registration for Architects, Engineers, and Land Surveyors "must at all times recognize that a registrant's primary obligation is to protect the safety, healthy, property, and welfare of the public in the performance of his or her professional duties[.]

Economic Loss Doctrine

In Alaska, "a project owner may sue a design professional in tort for economic losses arising from the professional's malpractice, despite the existence of a contractual relationship between the parties." State Dep't of Natural Res. v. Transamerica Premier Ins. Co 856 P.2d 766, 772 (Alaska 1993).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Two years, for personal injury or injury to personal property. Alaska Stat. Ann. § 09.10.070.

- Statute of Repose:

- 10 years, for personal injury, death, or property damage from the earlier of: (1) the date of substantial completion of the construction alleged to have caused the personal injury, death, or property damage; or (2) the last act alleged to have caused the personal injury, death, or property damage. ALASKA STAT. ANN. § 09.10.055.

ADDITIONAL ISSUES

- A design professional owes a duty of care not to injure an independent contractor's employees through the negligent provision of services. State Dep't of Natural Res. v. Transamerica Premier Ins. Co., 856 P.2d 766, 772 (Alaska 1993).

- "An engineer, or any other so-called professional does not 'warrant' his service or the tangible evidence of his skill to be 'merchantable' or 'fit for an intended use.' These are terms uniquely applicable to goods. Rather, in the preparation of design and specifications as the basis of construction, the engineer or architect 'warrants' that he will or has exercised his skill according to a certain standard of care, that he acted reasonably and without neglect. Breach of this 'warranty' occurs if he was negligent. Accordingly, the elements of an action for negligence and for breach of the 'implied warranty' are the same. The use of the term 'implied warranty' in these circumstances merely introduces further confusion into an area of law where confusion abounds." Pepsi Cola Bottling Co. of Anchorage v. Superior Burner Serv. Co., Inc., 427 P.2d 833, 841 n. 27 (Alaska 1967) (internal quotations omitted).

PATTERN JURY INSTRUCTIONS

Although Alaska does not have a specific pattern instruction for design professionals' standard of care, Alaska Pattern Jury Instruction 8.15 instructs juries on the duty of care for professional negligence and reads as follows:

> An [architect, engineer, or design professional] is negligent if [he, she, or it] fails to exercise that degree of skill that a reasonably prudent, skilled, and qualified [architect, engineer, or design professional] would exercise under the circumstances.

See AK Pattern Jury Ins. – Civ. 8.15 (Other Professional Malpractice – Duty of Professional Other Than Health Care Provider or Attorney).

ARIZONA

STANDARD OF CARE

In Arizona, the "duty of an engineer, whether based in tort or arising from a breach of contract, is to exercise the degree of skill, care, and diligence as engineers ordinarily exercise under like circumstances." Nat'l Hous. Indus., Inc. v. E.L. Jones Dev. Co., 576 P.2d 1374, 1377 (Ariz. 1978). "An architect's work can be inaccurate or imperfect without being an actionable deviation from the standards of care observed by design professionals." Chaney Bldg. Co. v. City of Tucson, 716 P.2d 28, 31 (Ariz. 1986) (quoting The American Bar Association, *Seven Steps to Resolving Construction Contract Claims*, p. 3.7 (1983) for the proposition that "[t]he architect's undertaking, in the absence of a special agreement does not imply or guarantee a perfect plan or satisfactory result."). In Chaney, a contractor sued an architecture company, alleging that it negligently prepared plans and specifications for the fire station the contractor was building, resulting in additional costs beyond the contract bid. 716 P.2d at 29. The court reasoned that, even if the plans did cause the contractor to incur delay and additional costs, that did not necessarily mean the architect was negligent. Id. at 31.

RESTATEMENT

Arizona follows the Restatement (Second) of Torts § 299A for professionals, though it appears it has not yet been specifically applied in cases involving design professionals.

ELEMENTS OF A CLAIM

In Arizona, the elements of a professional negligence cause of action are:

1) Duty of the professional to meet the applicable standard of care

2) Breach of that duty

3) Causation

4) Plaintiff's damage resulting from the defendant's conduct below the applicable standard of care.

See Resolution Trust Corp. v. W. Tech., Inc., 877 P.2d 294, 298 (Ariz. 1994).

EXPERT TESTIMONY

Arizona requires expert testimony when the jury must consider issues it could not resolve with knowledge from its common experiences. See 34 Degrees North, LLC v. Mountain View Constr., LLC, No. 1 CA-CV 15-0646, 2016 WL 7209664 at *6 (Ariz. Ct. App. Dec. 13, 2016) (finding that issues of the standard of care relating to a building's architectural plans and design are the type a jury could not have resolved from its common experience and, thus, would require expert testimony). As noted below, a written statement certifying whether expert testimony is necessary

to prove standard of care must accompany a claim against a licensed professional. ARIZ. REV. STAT. ANN. § 12-2602.

RELEVANT STATUTES AND REGULATIONS

- Ariz. Rev. Stat. Ann. § 12-2602:

> If a claim against a licensed professional is asserted in a civil action, the claimant or the claimant's attorney shall certify in a written statement that is filed and served with the claim whether or not expert opinion testimony is necessary to prove the licensed professional's standard of care or liability for the claim.
>
> If the claimant or the claimant's attorney certifies pursuant to subsection A that expert opinion testimony is necessary, the claimant shall serve a preliminary expert opinion affidavit with the initial disclosures that are required by rule 26.1, Arizona rules of civil procedure . . .

ECONOMIC LOSS DOCTRINE

In Arizona, the economic loss doctrine bars plaintiffs from tort recovery when an architect's negligent design causes economic loss but no physical injury to persons or other property. Flagstaff Affordable Hous. Ltd. P'ship v. Design Alliance, Inc., 223 P.3d 664, 673 (Ariz. 2010).

- Statute of Limitations:
  - Two years, for personal injury or injury to property. ARIZ. REV. STAT. ANN. § 12-542.
- Statute of Repose:
  - Eight years after substantial completion of the improvement to real property, for an action or arbitration based in contract against a person who develops or develops and sells real property, or performs or furnishes the design, specifications, surveying, planning, supervision, testing, construction or observation of construction of an improvement to real property. Ariz. Rev. Stat. Ann. § 12-552A.
  - One year after the date on which an injury to real property or an improvement to real property occurred or a latent defect was discovered — but not more than nine years after the substantial completion of the improvement — for an action involving an injury that occurred during the eighth year after the substantial completion, or, in the case of a latent defect, was not discovered until the eighth year after substantial completion. ARIZ. REV. STAT. ANN. § 12-552E.

Additional Issues

- "An engineer, or any other so-called professional does not 'warrant' his service or the tangible evidence of his skill to be 'merchantable' or 'fit for an intended use.' These are terms uniquely applicable to goods. Rather, in the preparation of design and specifications as the basis of construction, the engineer or architect 'warrants' that he will or has exercised his skill according to a certain standard of care, that he acted reasonably and without neglect." L. H. Bell & Assoc., Inc. v. Granger, 543 P.2d 428, 433 (Ariz. 1975) (internal quotations omitted).

- Arizona does not require privity to maintain an action in tort. Thus, design professionals owe the duty to use ordinary skill, care, and diligence in rendering their professional services, even to those with whom the design professional is not in privity. Donnelly Const. Co. v. Oberg/Hunt/Gilleland, 677 P.2d 1292, 1295 (Ariz. 1984) (overruled on other grounds by Gipson v. Kasey, 150 P.3d 228 (Ariz. 2007). However, "[d]uty and liability are only imposed where both the plaintiff and the risk are foreseeable to a reasonable person." Donnelly Const. Co., 677 P.2d at 1295.

Pattern Jury Instructions

Arizona does not have a specific pattern instruction for design professionals' standard of care or professional negligence.

ARKANSAS

Standard of Care

In Arkansas, "an architect implies that he or she possesses and will exercise and apply skill, ability, judgment, and taste reasonably and without neglect. Clark v. Transcontinental Ins. Co., 197 S.W.3d 449, 456 (Ark. 2004) (internal quotations omitted). Thus, an architect's standard of care is the skill and diligence "ordinarily required of architects, and the efficiency of an architect in the preparation of plans and specifications is tested by the rule of ordinary and reasonable skill usually exercised by one in that profession." Id.

The architect, "in the absence of a special agreement, does not imply or guarantee a perfect plan or satisfactory result, and the architect is liable only for failure to exercise reasonable care and skill." Id. at 456-457. In Clark, an injured construction worker alleged that an architecture firm's negligent design created an unreasonable power line safety hazard and that the firm failed to inform the contractor of the risks in the design. Id. at 456. During discovery, a licensed architect stated in an affidavit that the firm failed to apply the knowledge and skill ordinarily used by a reasonably well-qualified architect. Id. at 457. The court noted that the firm "failed to provide evidence or authority to show that architects are not responsible for accurately depicting the location of power lines on plans . . . or for providing warnings on the plans of the need to avoid the hazard produced by the power line." Id. Thus, the court found that a material issue of fact existed as to whether the firm was liable for the worker's injuries. Id.

Restatement

Arkansas does not follow the Restatement (Second) of Torts § 299A.

Elements of a Claim

In Arkansas, the elements of a professional negligence cause of action are:

1) The professional's duty to meet the applicable standard of care

2) Breach of that duty

3) Causation

4) Damage

See Bryan v. City of Cotter, 344 S.W.3d 654, 656 (Ark. 2009); Earnest v. Joe Works Chevrolet, Inc., 746 S.W.2d 554, 555 (Ark. 1988).

Expert Testimony

It does not appear that Arkansas state courts have expressly addressed whether expert testimony is required to establish the standard of care for architects, engineers, and other design professionals. However, the Clark court, discussed above, gave substantial consideration to the

affidavit of a licensed architect who provided an opinion regarding whether the knowledge and skill ordinarily used by a reasonably well-qualified architect was applied. 197 S.W.3d at 457. Additionally, the Eighth Circuit Court of Appeals established that the "general rule on expert testimony to establish the standard of professional care required" applies to architect, engineers, and other professionals. Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc., 392 F.2d 472, 478 (8th Cir. 1968).

Relevant Statutes and Regulations

- Ark. Admin. Code 021.00.1-XIV A.:

> When engaging in the practice of architecture or landscape architecture, or utilizing the title "registered interior designer," a registered architect, landscape architect, or registered interior designer shall act with reasonable care and competence and shall apply the knowledge and skills that are ordinarily applied by registered architects, landscape architects, and registered interior designers of good standing, practicing in the same locality.

Economic Loss Doctrine

Arkansas has not adopted the economic loss doctrine, so it does not apply to bar negligence claims arising from purely economic damages. See 1 Arkansas Law Of Damages § 4:7. Erdman Co. v. Phoenix Land & Acquisition, LLC, No. 2:10-CV-2045, 2013 WL 685209, at *2 (W.D. Ark. Feb. 25, 2013).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Three years, for actions founded upon any contract and actions for taking or injuring any goods. Ark. Code Ann. § 16-56-105.
- Statute of Repose:
  - Five years, for actions in contract to recover damages caused by any deficiency in the design, planning, supervision, or observation of construction or the construction and repair of any improvement to real property or for injury to real or personal property caused by such deficiency. Ark. Code Ann. § 16-56-112(a).
  - Four years, for actions in tort or contract to recover damages for personal injury or wrongful death caused by any deficiency in the design, planning, supervision, or observation of construction or the construction and repairing of any improvement to real property. Ark. Code Ann. § 16-56-112(b)(1).
  - One year after the date on which an injury or wrongful death occurred — but not more than five years after the project's substantial completion — when the injury occurred during the third year after the substantial completion of the improvement. Ark. Code Ann. § 16-56-112(b)(2).

Additional Issues

- The "locality" rule that applies to malpractice claims against medical care providers (stating that the standard of care is that of other professionals in the same locality) does not apply to malpractice claims against architects and engineers. Carroll-Boone Water Dist. V. M. & P. Equip. Co., 661 S.W.2d 345, 353 (Ark. 1983).

- "There is an implied warranty that goes with the sale of new housing by such a vendor-builder that it is constructed in a good workmanlike manner and is fit for human habitation." Coney v. Stewart, 562 S.W.2d 619, 620 (Ark. 1978) (citing Wawak v. Stewart, 449 S.W.2d 922 (Ark. 1970)).

Pattern Jury Instructions

The Arkansas Model Jury Instructions provide the following instruction on the standard of care for architects and engineers:

> An [architect][engineer] must possess and apply with reasonable care the degree of skill and learning ordinarily possessed and used by members of [his][her] profession in good standing, doing work similar to that shown by the evidence in this case. A failure to meet this standard is negligence.
>
> In determining the degree of skill and learning the law required of (defendant) (and) (in deciding whether (defendant) used the degree of skill and learning the law required of [him][her]), you may consider only the evidence presented by the (architects) (engineers) called as expert witnesses (and) (evidence of professional standards presented in the trial). In considering the evidence on any other issue in this case, you are not required to set aside your common knowledge, but you have a right to consider all the evidence in light of your own observations and experiences in the affairs of life.

See AMI 1204 (Architect, Engineer—Standard of Care).

CALIFORNIA

STANDARD OF CARE

In California, it is implied into a contract for architectural services "that the architect possesses architectural skill and ability and promises to exercise them reasonably and without neglect." 6 Cal. Jur. 3d § 33 (citing Benenato v. McDougall, 137 P. 8, 9 (Cal. 1913)). The standard of care for an architect is the "level of skill and competence among the members of the profession in the community, and there is no negligence liability if the architect complies with the standard." 6 Cal. Jur. 3d § 33 (citing Paxton v. Alameda County, 259 P.2d 934 (Cal. Dist. Ct. App. 1953)).

"[A]bsent a special agreement, an engineer is not an insurer of the accuracy of the work performed." 6 Cal. Jur. 3d § 64 (citing Stuart, 34 Cal. App. 3d at 812 (Ca. Ct. App. 1973)). In Stuart, the plaintiff sought to impose strict liability on engineers for a failed water system. 34 Cal. App. 3d at 809. The court found that, because engineers sell their professional services rather than a product, engineers cannot be held strictly liable. Id. at 811 (citing the "well settled" rule in California that, "where the primary objective of a transaction is to obtain services, the doctrines of implied warranty and strict liability do not apply."). The court deemed "those who sell their services for the guidance of others in their economic, financial, and personal affairs as not liable in the absence of negligence of intentional misconduct." Id. Such professionals "have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence. Those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance." Id. at 812.

In California, lack of privity of contract generally does not preclude the imposition of a duty of care. 6 Cal. Jur. 3d § 64 (citing Stuart v. Crestview Mut. Water Co.,); 34 Cal. App. 3d 802, 812 (Ca. Ct. App. 1973); Weseloh Family Ltd. Partnership v. K.L. Wessel Construction Co., Inc., 125 Cal. App. 4th 152 (Ca. Ct. App. 2004)). "[T]he courts have a checklist of factors to consider in assessing the legal duty in the absence of privity of contract between a plaintiff and a defendant," which involves the balancing of factors such as "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to the plaintiff, 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." 6 Cal. Jur. 3d § 64 (citing Weseloh Family Ltd. Partnership, 125 Cal. App. 4th 152).

RESTATEMENT

California follows the Restatement (Second) of Torts § 299A.

ELEMENTS OF A CLAIM

In California, the elements of a professional negligence cause of action are:

1) The professional's duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise

2) Breach of that duty

3) Proximate causal connection between the negligent conduct and the resulting injury

4) Actual loss or damage resulting from the professional's negligence

See Paul v. Patton, 235 Cal. App. 4th 1088, 1095 (Ca. Ct. App. 2015).

Expert Testimony

"[A]s a general proposition proof of professional negligence requires testimony of experts as to the standard of care in the relevant community." Huang v. Garner, 157 Cal. App. 3d 404, 413 (Ca. Ct. App. 1984). However, because California courts have allowed negligence per se to apply in the professional negligence context, the Huang court held that expert testimony was not required where the standard of care was established by statute. Id. at 414-416. In Huang, the plaintiff brought an action for defective design and construction against the original owner/developer of the property at issue, his wholly owned construction company, building designer, and the project's civil engineer. Id. at 410. The court held that expert testimony was not required regarding the requisite standard of care because the standard was established under the Uniform Building Code. Id. at 416.

Relevant Statutes and Regulations

- Cal. Bus. & Prof. Code § 5535.1:

  > The phrase "responsible control" means that amount of control over the content of all architectural instruments of service during their preparation that is ordinarily exercised by architects applying the required professional standard of care.

- Cal. Code Regs. tit. 16, § 160:

  > [A]n architect shall act with reasonable care and competence, and shall apply the technical knowledge and skill which is ordinarily applied by architects of good standing, practicing in this state under similar circumstances and conditions.

- Cal. Code Regs. tit. 16, § 475:

  > The Code of Professional Conduct for Professional Engineering is set forth with the purpose of protecting and safeguarding the health, safety, welfare, and property of the public.

Economic Loss Doctrine

In California, "the economic loss rule precludes recovery for damages such as the difference between price paid and value received, and deviations from standards of quality that have not resulted in property damage or personal injury." State Ready Mix, Inc. v. Moffatt Nichol, 232 Cal.

App. 4th 1227, 1232 (Cal. Ct. App. 2015) (economic loss doctrine barred subcontractors' indemnity claim against engineer who approved concrete mix).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Two years, for injury caused by the wrongful act or neglect of another. Cal. Civ. Proc. Code § 335.1.
  - Three years, for injury to property. Cal. Civ. Proc. Code § 338.
- Statute of Repose:
  - Four years, for actions for damages from persons performing or furnishing design, specifications, surveying, planning, supervision, or observation of construction or construction of improvement to realty. Cal. Civ. Proc. Code § 337.1.
  - 10 years, for actions against a real property developer, contractor, architect, etc., for latent deficiency or injury to property. Cal. Civ. Proc. Code § 337.15.

Additional Issues

- Architects and other design professionals may be held liable for damages sustained during construction because architects "supervise construction as a common practice." Peak v. Richmond Elementary School Dist., 326 P.2d 869, 861 (Cal. Dist. Ct. Ap. 1958).
- An architect or other design professional "owes a duty of care to future homeowners where the architect is a *principal architect* on the project—that is, the architect, in providing professional design services, is not subordinate to any other design professional—even if the architect does not actually build the project or exercise ultimate control over construction decisions." Beacon Residential Cmty. Ass'n v. Skidmore, Owings & Merrill LLP, 327 P.3d 850, 859 (Cal. 2014) (emphasis in original).
- The doctrines of strict liability and implied warranty do not apply to actions against architects and engineers. See 6 Cal. Jur. 3d § 33;6 Cal. Jur. 3d § 64.
- Architects and other design professionals owe a fiduciary duty of loyalty and good faith to their clients. 6 Cal. Jur. 3d § 33 (citing Palmer v. Brown, 127 Cal. App. 2d 44 (Cal. Ct. App. 1954)).
- "An architect, in the capacity of independent contractor, can be held liable to clients for negligence in the preparation of plans and specifications." 6 Cal. Jur. 3d § 35 (citing Huber, Hunt & Nichols, Inc. v. Moore, 67 Cal. App. 3d 278, 300 (Cal. Ct. App. 1977)).

- "Under the completed and accepted doctrine, when a contractor completes work that is accepted by the owner, the contractor is not liable to third parties injured as a result of the condition of the work, even if the contractor was negligent in performing the contract, unless the defect in the work was latent or concealed." 6 Cal. Jur. 3d § 39 (citing Neiman v. Leo A. Daly Co., 210 Cal. App. 4th 962, 969 (Cal. Ct. App. 2012)). In other words, "when the owner has accepted a structure from the contractor, the owner's failure to attempt to remedy an obviously dangerous defect is an intervening cause for which the contractor is not liable." Neiman, 210 Cal. App. 4th at 969.

PATTERN JURY INSTRUCTIONS

The California Civil Jury Instructions provide the following instructions on professional negligence and duty:

The essential elements of this claim are:

1) The defendant was negligent;

2) The Plaintiff was harmed; and

3) The defendant's negligence was a substantial factor in causing plaintiff's harm.

See CACI 400 (Negligence – Essential Factual Elements)

[A/An] [architect, engineer, or design professional] performing professional services for a client, owes the client the following duties of care:

1) The duty to have that degree of learning and skill ordinarily possessed by reputable [architects, engineers, or design professionals], practicing under similar circumstances;

2) The duty to use the care and skill ordinarily exercised in like cases by reputable members of the profession practicing under similar circumstances; and

3) The duty to use reasonable diligence and [his or her] best judgment in the exercise of skill and the application of learning.

A failure to perform any of these duties is negligence.

See BAJI 6.37 (Duty of a Professional)

> [A/An] [architect, engineer, or design professional] is not necessarily negligent because [he/she] errs in judgment or because [his/her] efforts prove unsuccessful. However, [a/an] [architect, engineer, or design professional] is negligent if the error in judgment or lack of success is due to a failure to perform any of the duties as defined in these instructions.

See BAJI 6.37.2 (Professional Perfection Not Required)

COLORADO

STANDARD OF CARE

Colorado does not have a particularized standard of care for architects, engineers, and design professionals.

Rather, "those practicing a profession requiring specialized knowledge or skill, reasonable care requires the actor to possess a standard minimum of special knowledge and ability and to exercise reasonable care in a manner consistent with the knowledge and ability possessed by members of the profession in good standing." Corcoran v. Sanner, 854 P.2d 1376, 1379 (Colo. App. 1993) (internal quotations omitted); see also Hildebrand v. New Vista Homes II, LLC, 252 P.3d 1159, 1163 (Colo. App. 2010) ("A builder has a duty to use reasonable care and skill in constructing a home, and the failure to do so constitutes negligence"); see, e.g., City of Westminster v. Centric-Jones Constructors, 100 P.3d 472, 485-486 (Colo. App. 2003) (finding no professional negligence because whether the alleged misconduct "may have" caused the damage is not sufficient evidence of causation). "[T]here can be no liability on the part of [engineering firm] to Plaintiff on account of error in the area of opinion or judgment." Balcom Indus., Inc. v. Nelson, 454 P.2d 599, 601 (1969) (finding that an engineer who prepared plans is not negligent when the plans were not followed in material respects).

Courts must apply statewide standards, not local ones, in determining a professional's duty to a client and whether the duty had been breached. See Corcoran, 854 P.2d at 1379.

Furthermore, when the parties to a negligence action "are part of an industry that conforms to certain well-established safety customs," those customs may be considered by the jury as nonconclusive evidence of the standard of reasonable care that the defendant should have followed. Scott v. Matlack, Inc., 39 P.3d 1160, 1166 (Colo. 2002) (admission of Occupational Safety and Health Act regulations as nonconclusive evidence of the standard of care).

A plaintiff who files a lawsuit against a licensed professional for professional negligence *must* file with the court a certificate of review for each professional who is a named party. COLO. REV. STAT. § 13-20-602. The certificate of review is completed by an attorney who has consulted with "a person who has expertise in the area of the alleged negligent conduct" and has reviewed the known facts "and, based on the review of such facts, has concluded that the filing of the claim . . . does not lack substantial justification." COLO. REV. STAT. § 13-20-602(3).

RESTATEMENT

Colorado appears to follow the Restatement (Second) of Torts § 299A generally, but the few cases citing this standard do not concern design professionals. See Colo. Jury Instr., Civil 15:26 Negligence—Other Professionals—Defined (the "Source and Authority" section references the restatement for a general discussion of the standard of care).

Elements of a Claim

Colorado generally articulates the elements of a claim for professional negligence as follows:

1) The defendant owed a duty of care to the plaintiff.

2) The defendant breached that duty of care.

3) Such breach proximately caused an injury to the plaintiff.

4) Damaged resulted.

See, e.g., Gibbons v. Ludlow, 304 P.3d 239, 244 (Colo. 2013); Scott v. Matlack, Inc., 39 P.3d 1160 (Colo. 2002).

Expert Testimony

When filing a lawsuit against a licensed professional, the plaintiff must file a certification that the claim does not lack substantial merit based upon a consultation with an expert in the professional's same field. Colo. Rev. Stat. §§ 13-20-601, 13-20-602. Further, expert testimony must establish the professional standard of care when "the applicable standard is not within the common knowledge and experience of ordinary persons." Corcoran v. Sanner, 854 P.2d 1376, 1379 (Colo. App. 1993). However, when the expert testimony indicates "that the standard of care established or accepted" is deficient, then the professional's compliance with the standard "is some evidence that the professional was not negligent, but is not conclusive proof of his or her exercise of due care." Colo. Jury Instr., Civil 15:26 Negligence—Other Professionals—Defined.

Relevant Statutes and Regulations

- Colo. Rev. Stat. § 12-120-201:

  > It shall be deemed that the right to engage in the practice of engineering is a privilege granted by the state through the state board of licensure for architects, professional engineers, and professional land surveyors, created in section 12-120-103; that the profession involves personal skill and presupposes a period of intensive preparation, internship, due examination, and admission; and that a professional engineer's license is solely the professional engineer's own and is nontransferable.

- Colo. Rev. Stat. § 12-120-410:

  > (1) The shareholders, members, or partners of an entity that practices architecture are liable for the acts, errors, and omissions of the employees, members, and partners of the entity except when the entity maintains a qualifying policy of professional liability insurance as set forth in subsection (2) of this section.

(2)(a) A qualifying policy of professional liability insurance shall meet the following minimum standards: (I) The policy insures the entity against liability imposed upon it by law for damages arising out of the negligent acts, errors, and omissions of all professional and nonprofessional employees, members, and partners; and (II) The insurance is in a policy amount of at least seventy-five thousand dollars multiplied by the total number of architects and engineers in or employed by the entity, up to a maximum of five hundred thousand dollars.

- Colo. Rev. Stat. § 13-20-601:

  The general assembly hereby declares that, in enacting this part 6, the general assembly has determined that the certificate of review requirement should be utilized in civil actions for negligence brought against those professionals who are licensed by this state to practice a particular profession and regarding whom expert testimony would be necessary to establish a prima facie case.

- Colo. Rev. Stat. § 13-20-602:

  (1)(a) In every action for damages or indemnity based upon the alleged professional negligence of . . . a licensed professional, the plaintiff's or complainant's attorney shall file with the court a certificate of review for each . . . licensed professional named as a party, as specified in subsection (3) of this section, within sixty days after the service of the complaint, counterclaim, or cross claim against such person unless the court determines that a longer period is necessary for good cause shown.

  (b) A certificate of review shall be filed with respect to every action described in paragraph (a) of this subsection (1) against a company or firm that employed a person specified in such paragraph (a) at the time of the alleged negligence, even if such person is not named as a party in such action.

  (2) In the event of failure to file a certificate of review in accordance with this section and if the . . . licensed professional defending the claim believes that an expert is necessary to prove the claim of professional negligence, the defense may move the court for an order requiring filing of such a certificate. The court shall give priority to deciding such a motion, and in no event shall the court allow the case to be set for trial without a decision on such motion.

  (3)(a) A certificate of review shall be executed by the attorney for the plaintiff or complainant declaring:

  (I) That the attorney has consulted a person who has expertise in the area of the alleged negligent conduct; and

  (II) That the professional who has been consulted pursuant to subparagraph (I) of this paragraph (a) has reviewed the known facts, including such records, documents, and other materials which the professional has found to be relevant

> to the allegations of negligent conduct and, based on the review of such facts, has concluded that the filing of the claim, counterclaim, or cross claim does not lack substantial justification within the meaning of section 13-17-102(4).
>
> (b) The court, in its discretion, may require the identity of the . . . licensed professional who was consulted pursuant to subparagraph (I) of paragraph (a) of this subsection (3) to be disclosed to the court and may verify the content of such certificate of review. The identity of the professional need not be identified to the opposing party or parties in the civil action.
>
> . . .
>
> (4) The failure to file a certificate of review in accordance with this section shall result in the dismissal of the complaint, counterclaim, or cross claim.

Economic Loss Doctrine

In Colorado, the economic loss doctrine has been found to preclude the recovery of purely economic loss under tort theories, including negligence against a contractor. See, e.g., Town of Alma v. AZCO Constr., Inc., 10 P.3d 1256, 1264 (Colo. 2000); City of Westminster v. Centric-Jones Constructors, 100 P.3d 472, 482-483 (Colo. App. 2003).

However, "[i]f a contract for professional services does not explicitly adopt the professional standard of care, and Colorado law identifies the service provider as a professional, fulfillment of the professional standard of care is a duty that is independent of the services agreement, and the economic loss rule will not bar a claim for breach of the professional duty." Stan Clauson Assocs., Inc. v. Coleman Bros. Const., LLC, 297 P.3d 1042, 1045 (Colo. App. 2013). These professionals include engineers, architects, and others who are regulated by the state through licensing and certification. Id.

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Two years, which start when the plaintiff discovers the harm or reasonably should have discovered it. C.R.S. §§ 13-80-102, 13-80-104(1).
  - Three years after a breach of warranty is discovered or should have been discovered. C.R.S. §§ 13-80-101(1)(a); 13-80-108(6); see Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co., 413 P.3d 219, 226 (Colo. App. 2017).
- Statute of Repose:
  - Six years, beginning upon substantial completion of the improvement to real property. C.R.S. § 13-80-104(1)(a). However, if the harm is discovered or should have been discovered "during the fifth or sixth year after substantial completion," the statute of repose is extended by two years. C.R.S. § 13-80-104(2).

- The statute of limitations and statute of repose can be tolled. If a notice of claim is sent before the filing of a lawsuit, the statute of limitations or statute of repose does not run until 60 days after completion of the notice-of-claim process required by the Colorado Construction Defect Action Reform Act. C.R.S. §§ 13-20-803.5, 13-20-805.

Additional Issues

- "[A] practicing professional is generally entitled to be judged according to the tenets of the 'school of practice' which the practitioner professes to follow. And, because in most cases of professional negligence the applicable standard is not within the common knowledge and experience of ordinary persons, such standard must be established by expert testimony." Corcoran v. Sanner, 854 P.2d 1376, 1379 (Colo. App. 1993).

- "A plaintiff in an action for damages or indemnity based upon the alleged professional negligence of a licensed professional must file with the court a 'certificate of review' within 60 days after commencing the action. . . . The certificate of review must recite that (a) the attorney for the plaintiff has consulted with a person who has expertise in the area of the alleged negligence, (b) the person consulted with has reviewed the known facts and records deemed relevant by the consultant, (c) the claim asserted by the plaintiff does not lack substantial justification, and (d) . . . the consultant is competent to express an opinion as to the negligent conduct alleged. The failure to file the required certificate of review shall result in dismissal of the claim of negligence." 1B Colo. Prac., Methods Of Practice § 31:23 (7th ed.) (internal quotations omitted).

- A construction professional "can be liable for negligence if it fails to follow the recommendations of its independent contractors." Hildebrand, 252 P.3d at 1165.

- Contractual privity does not limit negligence claims arising from construction defects. Rather, foreseeability of harm defines the scope of tort liability. Forest City Stapleton Inc. v. Rogers, 393 P.3d 487, 491 (Colo. 2017).

- The implied warranty of fitness is not applicable to service contracts, thus not applicable to engineers who prepare drawings and specifications for construction projects. Johnson–Voiland–Archuleta, Inc. v. Roark Assocs., 572 P.2d 1220, 1221 (Colo. App. 1977).

Patter Jury Instructions

Although Colorado does not have a specific pattern jury instruction for the standard of care for architects, engineers, or design professionals, Colorado Jury Instruction 15:26 instructs juries on the professional duty of care and reads as follows:

> (A/An) (architect, engineer, design professional) is negligent when (he/she) (does an act that reasonably careful [architects, engineers, design professionals] would not do) (or) (fails to do an act that reasonably careful [architects, engineers, design professionals] would do).

> To determine whether (a/an) (architect, engineer, design professional)'s conduct is negligent, you must compare that conduct with what (a/an) (architect, engineer, design professional) having and using that knowledge and skill of (architects, engineers, design professionals) practicing (architecture, engineering, designing), at the same time, would or would not have done under the same or similar circumstances.

Colo. Jury Instr., Civil 15:26 Negligence—Other Professionals—Defined.

CONNECTICUT

STANDARD OF CARE

In Connecticut, "professional malpractice claims are applicable to traditional professions, such as . . . architects and engineers, as well as those who undertake any work calling for a special skill that requires a standard minimum of special knowledge and ability." Canale v. KBE Bldg. Corp., No. UWYCV156026262S, 2017 WL 4621399, at *3 (Conn. Super. Ct. Sept. 5, 2017); See also Matyas v. Minck, 655 A.2d 1155, 1158 (Conn. App. Ct. 1995) (professional malpractice standard applies to engineers). "[P]rofessional negligence or malpractice is defined as the failure of one rendering professional services to exercise that a degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services." Falzarano v. C.E. Floyd Co., Inc., No. CV176031537, 2019 WL 1938067, at *3 (Conn. Super. Ct. Apr. 4, 2019); see also Johnson v. Flammia, 363 A.2d 1048, 1052 (Conn. 1975). Architects "are not guarantors of their work," and "[i]n the absence of special agreement the architect does not imply or guarantee a perfect plan or a satisfactory result, but rather is only liable if he fails to exercise reasonable care and skill." Ctr. Court Assocs. Ltd. P'ship v. Maitland/Strauss & Behr, No. CV-86-252381, 1994 WL 185595, at *32 (Conn. Super. Ct. May 4, 1994). Architects and design professionals do not impliedly warrant perfect plans or satisfactory results, but instead warrant that they will use the skill customarily demanded. Cruet v. Carroll, No. X06CV000166704S, 2001 WL 1570228, at *2-3 (Conn. Super. Ct. Nov. 27, 2001).

In professional negligence or malpractice cases, "it is incumbent upon the plaintiff to produce evidence as to what a skilled engineer of ordinary prudence engaged in the same line of business would have exercised in the same or similar circumstances." Matyas v. Minck, 655 A.2d 1155, 1158-9 (Conn. App. Ct. 1995) (internal quotations omitted).

RESTATEMENT

Connecticut does not follow the Restatement (Second) of Torts §299A.

ELEMENTS OF A CLAIM

Connecticut generally articulates the elements of a professional negligence claim as follows:

1) The defendant was obligated to conform to the applicable standard of care.

2) The defendant departed from that standard.

3) The plaintiff suffered some injury.

4) The defendant's departure from the standard of care caused the plaintiff harm.

Connecticut Judicial Branch Civil Jury Instruction 3-8-1; see, e.g., Gordon v. Glass, 785 A.2d 1220, 1223 (Conn. App. Ct. 2001); Falzarano v. C.E. Floyd Co., Inc., No. CV176031537, 2019

WL 1938067, at *3 (Conn. Super. Ct. Apr. 4, 2019); Canale v. KBE Bldg. Corp., No. UWYCV156026262S, 2017 WL 4621399, at *3 (Conn. Super. Ct. Sept. 5, 2017).

Expert Testimony

Expert testimony is required to establish the applicable standard of care and causation. Falzarano v. C.E. Floyd Co., Inc., No. CV176031537, 2019 WL 1938067, at *3, 4 (Conn. Super. Ct. Apr. 4, 2019); Canale v. KBE Bldg. Corp., No. UWYCV156026262S, 2017 WL 4621399, at *3 (Conn. Super. Ct. Sept. 5, 2017). Expert testimony is not required where there is such an obvious and gross lack of care and skill that it is clear even to a layperson. Davis v. Margolis, 576 A.2d 489, 493 n.6 (Conn. 1990).

Relevant Statutes and Regulations

- N/A

Economic Loss Doctrine

In Connecticut, the trial courts are split over whether the economic loss doctrine precludes the recovery of purely economic loss under tort theories in construction cases. Greater New Haven Transit Dist. v. Nafis & Young Eng'rs, Inc., No. CV020469107S, 2003 WL 21675945, at *5 (Conn. Super. Ct. July 1, 2003) (applying the economic loss doctrine to dismiss the negligence claim in a construction case); Darien Asphalt Paving, Inc. v. Town of Newtown, No. CV 9804878, 1998 WL 886507, at *5 (Conn. Super. Ct. Dec. 7, 1998) (declining to find that the economic loss doctrine bars a tort claim against an architectural firm); Diversified Tech. Consultants, Inc. v. Sentinel Equities Corp., No. CV054012681, 2006 WL 2556381, at *4 (Conn. Super. Ct. Aug. 11, 2006) (finding that the economic loss doctrine does not apply when the dispute arises from defective performance under a contract for professional engineering and landscape architectural services).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Two years from when an injury is first sustained, discovered, or reasonably discovered — but not "more than three years from the date of the act or omission complained of" — for an action to recover damages for injury to persons or property (caused by negligence or by reckless or wanton misconduct). Conn. Gen. Stat. § 52-584. However, a counterclaim may be asserted any time before the pleadings are closed. Conn. Gen. Stat. § 52-584.
  - Six years after the injury is inflicted, for actions based on a written contract, as well as for claims for breach of implied warranty of habitability or for breach of express warranty. Conn. Gen. Stat. § 52-576; Kennedy v. Johns-Manville Sales Corp., 135 Conn. 176 (1948) (finding injury inflicted at the time the alleged faulty work was done).

- A cause of action does not accrue until the plaintiff discovers or should have discovered the tortfeasor's identity. See Tarnowsky v. Socci, 271 Conn. 284 (2004).

- One year after the delivery of a deed to a purchaser or one year after a purchaser takes possession of the house — whichever occurs first — for express and implied warranties related to the construction of a new single family dwelling or the conversion of a condominium unit. "[I]n the case of an improvement not completed at the time of delivery of the deed to the purchaser, [the statute of limitations is] one year after the date of the completion or one year after taking of possession by the purchaser, whichever occurs first." Conn. Gen. Stat. §§ 47-117 and 47-118.

☐ Statute of Repose:

- Seven years after substantial completion, for any action "to recover damages (A) for any deficiency in the design, planning, contract administration, supervision, observation of construction or construction of, or land surveying in connection with, an improvement to real property; (B) for injury to property, real or personal, arising out of any such deficiency; (C) for injury to the person or for wrongful death arising out of any such deficiency" that is "brought against any architect, professional engineer or land surveyor performing or furnishing the design, planning, supervision, observation of construction or construction of, or land surveying in connection with, such improvement." Conn. Gen. Stat. § 52-584a(a). However, if the injury occurs within the seventh year after substantial completion, a plaintiff may bring a tort claim within one year of the injury, but no more than eight years after substantial completion of the improvement. Conn. Gen. Stat. § 52-584a(b). Substantial completion occurs when the improvement is first used by the owner or tenant or "it is first available for use after having been completed in accordance with the contract or agreement," whichever is first. Conn. Gen. Stat. § 52-584a(c).

ADDITIONAL ISSUES

☐ "[O]ne who constructs a building impliedly warrants that the building shall be erected in a workmanlike manner. The implied warranty imposes on a builder the duty to exercise that degree of care which a skilled builder of ordinary prudence would have exercised under the same or similar conditions." Thompson v. Putnam Kitchens, No. CV020188635, 2004 WL 3220276, at *1 (Conn. Super. Ct. Dec. 7, 2004) (internal quotations omitted).

☐ "In the acceptance by the purchaser-owner of defective performance under a contract for construction of a house, there arises no legal presumption that such acceptance discharges any right of damages for those defects unless a length of time unreasonable under all of the circumstances elapses without complaint. . . . It is generally held that the mere fact that a purchaser-owner of a building has taken possession thereof after its erection does not in itself constitute an acceptance of the workmanship of the contractor-builder in each respect." Vernali v. Centrella, 266 A.2d 200, 202 (Conn. Super. Ct. 1970).

☐ Professional negligence claims against architects may also fall under Connecticut Uniform Trade Practices Act (CUTPA). Darien Asphalt Paving, Inc. v. Town of Newtown, No. CV

9804878, 1998 WL 886507, at *6 (Conn. Super. Ct. Dec. 7, 1998) (finding that CUTPA claims can be brought against architects); Hopper v. Hemphill, No. CV 990171709S, 2000 WL 726829, at *2 (Conn. Super. Ct. May 10, 2000) (same); but see Amity Reg'l Sch. Dist. #5 v. Atlas Const. Co., No. X06CV 990153388S, 2000 WL 1161095, at *2 (Conn. Super. Ct. July 26, 2000) ("CUTPA is inapplicable to professional services such as those provided by" a company providing architectural, engineering, and design services); Hendriks Assocs., LLC v. Old Lyme Marina, Inc., No. 546496, 2001 WL 496883, at *6 (Conn. Super. Ct. Apr. 26, 2001) (declining to allow a professional negligence claim against an engineering firm to be converted into a CUTPA claim); Shoreline Care Ltd. P'ship v. Jansen & Rogan Consulting Eng'rs, P.C., No. X06CV940155982SCLD, 2002 WL 173155, at *4 (Conn. Super. Ct. Jan. 9, 2002) (dismissing a CUTPA claim against engineering firm).

Pattern Jury Instructions

Although Connecticut does not have a specific pattern jury instruction for the standard of care for architects, engineers, or design professionals, Connecticut Judicial Branch Civil Jury Instruction 3-8-1 instructs juries on the duty of care and reads, in part, as follows:

> The plaintiff's claims in this case are claims of professional malpractice, since the allegations of the complaint revolve around the conduct of defendant in the practice of (his/her) profession. Malpractice is commonly defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by a reasonably prudent member of the profession with the result of injury, loss or damage to the recipient of those services.
>
> In a malpractice case against a professional [engineer, architect, or design professional], it is incumbent upon the plaintiff to produce evidence as to what a skilled [engineer, architect, or design professional] of ordinary prudence engaged in the same line of business would have exercised in the same or similar circumstances. This must be established through expert testimony. When the question involved goes beyond the field of the ordinary knowledge and experience of judges or jurors, expert testimony is required.
>
> Based on the evidence that has been presented, you must determine whether the defendant failed to exercise that degree of skill and learning commonly applied by a reasonably prudent [engineer, architect, or design professional] under the circumstances here as you find them to be. If you find that the defendant failed to exercise such skill, you must then determine whether that lack of skill was a legal cause of the plaintiff's claimed injuries, and such legal cause must also be shown by expert testimony.
>
> In every professional malpractice action, the plaintiff is required to prove that 1) the defendant was obligated to conform to the applicable standard of care, 2) the defendant departed from that standard, 3) the plaintiff suffered some injury, and 4) the defendant's departure from the standard of care caused the plaintiff harm.

See Conn. Judicial Branch Civil Jury Instruction 3-8-1.

DELAWARE

STANDARD OF CARE

In Delaware, the same standard of care applicable to a physician or an attorney applies to an architect or engineer in a malpractice action. See, e.g., Seiler v. Levitz Furniture Co. of E. Region, Inc., 367 A.2d 999, 1007 (Del. 1976). The Delaware Supreme Court adopted the following standard:

> An architect is bound to perform with reasonable care the duties for which he contracts. His client has the right to regard him as skilled in the science of the construction of buildings, and to expect that he will use reasonable and ordinary care and diligence in the application of his professional knowledge to accomplish the purpose for which he is retained. *While he does not guarantee a perfect plan or a satisfactory result*, he does by his contract imply that he enjoys ordinary skill and ability in his profession and that he will exercise these attributes without neglect and with a certain exactness of performance to effectuate work properly done.

Id. at 1007-08 (quoting Bloomsburg Mills, Inc. v. Sordoni Constr. Co., 164 A.2d 201, 203 (Pa. 1960) (emphasis added)). "This legal duty is not necessarily limited to the specific duties for which one was hired." Gordon v. Nat'l R.R. Passenger Corp., No. CIV. A. 10753, 1997 WL 298320, at *13 (Del. Ch. Ct. Mar. 19, 1997). However, "if the owner chooses to ignore or reject the advice of the architect, then the owner cannot hold the architect liable for the consequences. Id. at *11.

In Council of Unit Owners of Sea Colony E., Phase IV, Phase VI, Phase VII Condo., On Behalf of Ass'n of Owners v. Carl M. Freeman Assocs., Inc., No. C.A. 86C-AU-49, 1990 WL 260761, at *1 (Del. Super. Ct. Dec. 20, 1990), individual unit owners of a condominium filed suit against the developer entities for damages resulting from defects in the windows and sliding glass doors located in the individual units. The developer entities filed third-party claims against the architect seeking contribution and indemnification. Id.

The architect did the design work for the condominium project. Id. "The design process consist[ed] of the chronological development from schematic and preliminary design to the ultimate production of what is commonly referred to as construction documents." Id. at *4. The specifications concerned the windows and sliding glass doors at issue. Id. However, the owner/general contractor—not the architect—retained authority for final approval of shop drawings, and the architect was not required to be on site to maintain quality control. Id. Given this arrangement, the court concluded that the developer entities did not meet their burden of proving by a preponderance of the evidence that the architect violated the standard of care applicable to design professionals by specifying A2-HP windows and sliding glass doors or that the architect breached any other duty to the developer entities. Id. There was ample evidence that the failures at the condominium were causally related to poor manufacture of the windows and sliding glass doors and to poor installation, and that the issues were "an installation oversight not a design defect." Id. at 11.

RESTATEMENT

Delaware follows the Restatement (Second) of Torts § 299A. See Tydings v. Loewenstein, 505 A.2d 443, 445 (Del. 1986).

ELEMENTS OF A CLAIM

To prevail on a negligence claim, a plaintiff must prove that:

1) A defendant owed the plaintiff a duty of care.

2) The defendant breached that duty.

3) The breach proximately caused an injury.

Doe 30's Mother v. Bradley, 58 A.3d 429, 447 (Del. Super. Ct. 2012). If an architect, engineer, or design professional holds themselves out as having a higher level of skill, then a court will apply a heightened duty. See Tydings, 505 A.2d at 445.

EXPERT TESTIMONY

Generally, the standard of care applicable to a professional can only be established by way of expert testimony. Seiler, 367 A.2d at 1007-08; see also Oliver v. Bancroft Constr. Co., No. 09C-05-174 MMJ, 2011 WL 5042389, at *3 (Del. Super. Ct. Oct. 21, 2011) (granting summary judgment in favor of defendant engineer because neither the plaintiff's nor the defendant's experts opined that either defendant breached an applicable standard of care or caused the plaintiff's injuries). However, "if a layman is as competent as an expert to judge whether or not a particular design created an unusual risk, evidence by experts is inadmissible because their proof that the defendant followed standard practice would not necessarily show he was not negligent." Seiler, 367 A.2d at 1008.

RELEVANT STATUTES AND REGULATIONS

- DEL. CODE ANN. tit. 24, § 213:

  Practitioners regulated under this chapter shall be subject to [] disciplinary actions . . . if, after a hearing, the Board finds:

  1) That the practitioner has employed or knowingly cooperated in fraud or material deception in order to be licensed, or be otherwise authorized to practice landscape architecture;

  2) Illegal, incompetent or negligent conduct in the practice of landscape architecture;

  3) Excessive use or abuse of drugs (including alcohol, narcotics or chemicals);

  4) That the practitioner has been convicted of a crime that is substantially related to the practice of landscape architecture;

5) That the practitioner, as a landscape architect or otherwise in the practice of the profession, knowingly engaged in an act of consumer fraud or deception, engaged in the restraint of competition or participated in price-fixing activities;

6) That the practitioner has violated a lawful provision of this chapter, or any lawful regulation established thereunder."

- DEL. CODE ANN. tit. 24, § 2823:

Applicants, adjunct and affiliate members, and any person licensed under this chapter shall be subject to disciplinary penalties set forth in § 2824(c) of this title, if, after a hearing, the person is found to violate any of the following:

(1) The practice of any fraud or deceit in the attempt to obtain any authorization to practice engineering in this State;

(2) Any gross negligence, incompetence, or misconduct in the practice of engineering;

(3) Violation of the code of ethics promulgated by the Council;

(4) A crime that is substantially related to the practice of engineering."

(emphasis added).

ECONOMIC LOSS DOCTRINE

The economic loss doctrine is "alive and well" in Delaware. See Palma, Inc. v. Claymont Fire Co., No. 09L-06-121-JRS, 2009 WL 3865395, at *1 (Del. Super. Ct. Nov. 18, 2009) (dismissing negligent misrepresentation claims brought against architect). "The economic loss doctrine essentially prevents a plaintiff from recovering in tort 'for losses that are solely economic in nature.'" Commonwealth Constr. Co. v. Endecon, Inc., No. 08C-01-266 RRC, 2009 WL 609426, at *4 (Del. Super. Ct. Mar. 9, 2009). Delaware courts have also recognized exceptions to the doctrine. For example, the economic loss doctrine does not bar a plaintiff's claim for tortious interference with contract. See Id. at *5. The doctrine also does not bar claims for the tort of negligent misrepresentation if "(1) the defendant supplied the information to the plaintiff for use in business transactions, and (2) the defendant is in the business of supplying information." Id. at *4. This is often referred to as the "negligent misrepresentation exception." Id.

However, Delaware courts have declined to apply the negligent misrepresentation exception to the economic loss doctrine in situations specific to an engineer or architect. Accordingly, design professionals have been able to successfully invoke the economic loss doctrine. See Millsboro Fire Co. v. Constr. Mgmt. Servs., Inc., No. 05C-06-137 MMJ, 2006 WL 1867705, at *3 (Del. Super. Ct. June 7, 2006) (granting a joint motion for summary judgment on the third-party complaint and holding that the third-party defendants who provided architectural and engineering services did not engage in the business of supplying information but, rather, incidentally supplied information in connection with the construction and renovation of a fire hall, and thus could claim protection under the economic loss doctrine); Delaware Art Museum v. Ann Beha Architects, Inc., No.

06-481 GMS, 2007 WL 2601472, at *3 (D. Del. Sept. 11, 2007) (dismissing negligent misrepresentation claim against engineering firm because it acted as more than a "pure information provider," and thus finding that the second requirement for the plaintiff's negligent misrepresentation claim was not met).

STATUTE OF LIMITATIONS AND STATUTE OF REPOSE

- Statute of Limitations:
  - *See* DEL. CODE ANN. tit. 10, § 8119 ("No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years *from the date upon which it is claimed that such alleged injuries were sustained*; subject, however, to the provisions of § 8127 of this title." (emphasis added)); *see also* DEL. CODE ANN. tit. 10, § 8107 ("No action to recover damages for wrongful death or for injury to personal property shall be brought after the expiration of 2 years *from the accruing of the cause of such action*." (emphasis added)).
- Statute of Repose:
  - *See* DEL. CODE ANN. tit. 10, § 8127: Provides for a six-year limitation period for improvements for claims against "any person performing or furnishing, or causing the performance or furnishing of, any such construction of such an improvement or against any person performing or furnishing, or causing the performing or furnishing of, any such designing, planning, supervision, and/or observation of any such construction or manner of construction of such an improvement." The limitation period runs from whichever of the following dates occurs first:
    i. The contractually stipulated date of purported completion of all the work, if the parties agreed to such date in the contract itself
    ii. The date when the statute of limitations commences to run in relation to the particular phase or segment of work performed, pursuant to the contract in which the alleged deficiency occurred, when the contact specifically provides that date
    iii. The date when the statute of limitations commences to run in relation to the contract itself, when the contract specifically provides that date
    iv. The date when payment in full has been received by the person against whom the action is brought for the particular phase of such construction or for the particular phase of such designing, planning, supervision, and/or observation of such construction or manner of such construction, as the case may be, in which the alleged deficiency occurred
    v. The date the person against whom the action is brought has received final payment in full, under the contract for the construction or for the designing,

planning, supervision, and/or observation of construction, as the case may be, called for by contract

vi. The date when the construction of such an improvement as called for by the contract has been substantially completed

vii. The date when an improvement has been accepted, as provided in the contract, by the owner or occupant following such construction's commencement

viii. For alleged personal injuries, the date upon which it is claimed that such alleged injuries were sustained, or after the period of limitations provided in the contract, if the contract provides such a period and if such period expires before two years from whichever of the foregoing dates is earliest.

ADDITIONAL ISSUES

- LTL Acres Ltd. P'ship v. Butler Mfg. Co., 136 A.3d 682 (Del. 2016) (holding that the six-year statute of limitations applied to a building owner's action for breach of warranty, breach of contract, *and negligence* against the manufacturer of pre-engineered components used to build roof and exterior walls, although the owner asserted that manufacturer merely supplied building materials and that another company actually constructed building on-site because the manufacturer specially engineered and fabricated the components for building based on design criteria that the owner's contractor provided).

PATTERN JURY INSTRUCTIONS

- Duty of Professional § 8.1, DEL. P.J.I. CIV. § 8.1 (2000)

  [*Plaintiff's name*] has alleged that [*defendant's name*] was negligent in [__identify the alleged negligent conduct__]. One who undertakes to render services in the practice of a profession or trade is always required to exercise the skill and knowledge normally held by members of that profession or trade in good standing in communities similar to this one.

  If you find that [*defendant's name*] held [*himself/herself/itself*] out as having a particular degree of skill in [*his/her*] trade or profession, then the degree of skill required of [*defendant's name*] is that which [*he/she/it*] held [*his/her/itself*] out as having.

- Architect Negligence – Proof of Damages § 8.3A, DEL. P.J.I. CIV. § 8.3A (2000)

  An architect is bound to perform with reasonable care the duties for which [*he/she*] contracts. [*His/Her*] client has the right to regard [*him/her*] as skilled in the science of the construction of buildings, and to expect that [*he/she*] will use reasonable and ordinary care and diligence in the application of [*his/her*]

professional knowledge to accomplish the purpose for which [*he/she*] is retained.

While [*he/she*] does not guarantee a perfect plan or a satisfactory result, he does by [*his/her*] contract imply that [*he/she*] enjoys ordinary skill and ability in [*his/her*] profession and that [*he/she*] will exercise these attributes without neglect and with a certain exactness of performance to effectuate work properly done.

- Professional Negligence – Proof of Damages § 8.3B, DEL. P.J.I. CIV. § 8.3B (2000)
  - A [*identify profession*] has the duty to possess and exercise ordinary care and diligence in the application of [*his/her*] professional knowledge. A failure by [*defendant's name*] to conform to this duty is negligence. [*Plaintiff's name*] must prove by a preponderance of the evidence that:

    1) a professional relationship existed between [*defendant's name*] and [*plaintiff's name*];

    2) [*defendant's name*] negligently [__describe professional service__]; and

    3) such negligence proximately caused a loss to [*plaintiff's name*].

    If you find that [*plaintiff's name*] has failed to prove any one of these elements, then you must find for [*defendant's name*].

FLORIDA

STANDARD OF CARE

In Florida, the phrase "design professional" includes licensed architects, interior designers, engineers, surveyors, and geologists. "Professionals rendering professional services are to perform such services in accordance with the standard of care used by similar professionals in the community under similar circumstances." See, e.g., Moransais v. Heathman, 744 So. 2d 973, 975-76 (Fla. 1999); Trikon Sunrise Assocs., LLC v. Brice Bldg. Co., 41 So. 3d 315 (Fla. 4th DCA 2010); Id. at 318 ("A professional duty may arise in favor of a third party as a result of a matter of law or as a result of a contract between parties, or by virtue of a gratuitous undertaking.").

Absent a contractual provision to the contrary, a design professional's work need not be perfect or free from error. In the Florida Supreme Court case of Bayshore Development Co. v. Bonfoey, Bayshore, a property developer, sued Bonfoey, an architectural firm, for negligence in designing and constructing two residential buildings. 75 Fla. 455, 457 (1918). Namely, Bayshore alleged that Bonfoey negligently supervised the construction of the stucco work on the buildings. Id. at 462. The court disagreed with Bayshore, noting that the contract between the parties contained no guarantee or warranty that the stucco work would be of the high quality Bayshore had argued. Additionally, the court stated that "[t]he architect's undertaking does not imply or guarantee a perfect plan or satisfactory result[.]" Id. at 463. The court therefore found in favor of Bayshore on the negligence claim. See also School Bd. of Broward County v. Pierce Goodwin Alexander & Linville, 137 So. 3d 1059, 1065 (Fla. 4th DCA 2014) (holding that architect's work need not be perfect, but need only evidence ordinary and reasonable skill used by similar professionals).

RESTATEMENT

Florida has not expressly adopted or rejected the Restatement (Second) of Torts § 299A, with no state or federal courts in Florida citing it in any published opinion.

ELEMENTS OF A CLAIM

Florida generally articulates the elements of a claim for professional negligence, similarly to that of a typical negligence claim, as follows:

1) Existence of a legal duty

2) Breach of the duty

3) Proximate causation

4) Damages

See, e.g., Postel Indus., Inc. v. Abrams Group Const., L.L.C., 2012 WL 4194660 at *2 (M.D. Fla. Sep. 19, 2012).

Expert Testimony

"Where a duty is not so obvious as to be apparent to persons of common experience, as is generally the case with professional negligence, a plaintiff must offer expert testimony to establish the standard of care used by similar professionals in the community under similar circumstances." Transportation Engineering, Inc. v. Cruz, 152 So. 3d 37, 49 (Fla. 5th DCA 2014).

Relevant Statutes and Regulations

- Fla. Stat. Ann. § 481.20:

  "Architect" is "a natural person who is licensed under this part to engage in the practice of architecture." Id. at § 481.20(3). The statute also defines "architecture as "the rendering or offering to render services in connection with the design and construction of a structure or group of structures which have as their principal purpose human habitation or use, and the utilization of space within and surrounding such structures. These services include planning, providing preliminary study designs, drawings and specifications, job-site inspection, and administration of construction contracts." Id. at § 481.20(6). Finally, of relevant note, § 481.20 defines "interior design" as "designs, consultations, studies, drawings, specifications, and administration of design construction contracts relating to nonstructural interior elements of a building or structure. 'Interior design' includes, but is not limited to, reflected ceiling plans, space planning, furnishings, and the fabrication of nonstructural elements within and surrounding interior spaces of buildings. 'Interior design' specifically excludes the design of or the responsibility for architectural and engineering work, except for specification of fixtures and their location within interior spaces."

- Fla. Stat. Ann. § 471.005:

  "Engineering" is defined very broadly, and includes "any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning, and design of engineering works and systems, planning the use of land and water, teaching of the principles and methods of engineering design, engineering surveys, and the inspection of construction for the purpose of determining in general if the work is proceeding in compliance with drawings and specifications, any of which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, and industrial or consumer products or equipment of a mechanical, electrical, hydraulic, pneumatic, or thermal nature, insofar as they involve safeguarding life, health, or property; and includes such other professional services as may be necessary to the planning, progress, and completion of any engineering services."

Economic Loss Doctrine

In Florida, the economic loss doctrine no longer applies to claims for professional negligence. Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Co., 110 So. 3d 399, 407 (Fla. 2013) (holding that the economic loss rule should be limited to products liability cases, rendering the Moransais exception—that the economic loss rule does not bar a cause of action in professional negligence—moot). Therefore, a plaintiff can bring a claim for professional negligence even if there is a contract governing the performance at issue. However, the plaintiff still must demonstrate that the damages sought in tort are independent of the damages sought for the breach of contract. Id. at 408-09.

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Florida provides for two different statutes of limitations periods in actions against design professionals:
    - Four years, for "[a]n action founded on the design, planning, or construction of an improvement to real property." Florida Statutes, Section 95.11(3)(c).
    - Two years, for professional malpractice brought by privity claimants or those in direct privity of contract with the professional. Fla. Stat. Ann, § 95.11(4)(a). Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Ass'n, 581 So. 2d 1301, 1302 (Fla. 1991).
- Statute of Repose:
  - 10 years, for work founded upon the design, planning, or construction of an improvement to real property. Specifically, "except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, the action must be commenced within 10 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest." Fla. Stat. Ann., § 95.11(3)(c).

Pattern Jury Instructions

The following standard jury instruction applies to all nonmedical professional negligence claims:

> Negligence is the failure to use reasonable care. Reasonable care on the part of a (identify professional) is the care that a reasonably careful (identify professional) would use under like circumstances. Negligence is doing something that a reasonably careful (identify professional) would not do under like circumstances or

failing to do something that a reasonably careful (identify professional) would do under like circumstances.

Florida Standard Jury Instruction 402.5.

GEORGIA

STANDARD OF CARE

In Georgia, "[a] general rule of law is that persons performing architectural, engineering and other professional and skilled services assume an obligation to exercise a reasonable degree of care, skill and ability, which, generally, is taken and considered to be that degree of care and skill as, under similar conditions and like surrounding circumstances, is ordinarily employed by their respective professions." Chastain v. Atlanta Gas Light Co., 176 S.E.2d 487, 491 (Ga. Ct. App. 1970); see also Dep't of Transp. v. Mikell, 493 S.E.2d 219, 223 (Ga. Ct. App. 1997). In any lawsuit alleging malpractice or negligence against an architect or engineer, the plaintiff must file with the complaint an expert affidavit, stating the applicable standard of care and how the professional failed to satisfy the standard. GA. CODE § 9-11-9.1.

A design professional can also be sued for negligent construction, which is separate from a breach of contract claim. "[A] negligent construction claim arises . . . from breach of a duty implied by law to perform the work in accordance with industry standards." Schofield Interior Contractors, Inc. v. Standard Bldg. Co., 668 S.E.2d 316, 318 (Ga. Ct. App. 2008); see also Georgia-Pac. Cedar Springs LLC v. MOR PPM, Inc., No. 1:13-CV-198 (LJA), 2016 WL 9023600, at *10 (M.D. Ga. Aug. 29, 2016) (denying summary judgment on a negligence claim because there was a genuine dispute as to whether the defendant's conduct was within industry standards and, thus, a question of whether the duty was breached). "As a general rule, there is implied in every contract for work or services a duty to perform it skillfully, carefully, diligently, and in a workmanlike manner. The law imposes upon building contractors and others performing skilled services the obligation to exercise a reasonable degree of care, skill, and ability, which is generally taken and considered to be such a degree of care and skill as, under similar conditions and like surrounding circumstances, is ordinarily employed by others of the same profession." Id. (applying this rule to supervision of construction work); see also Francis v. Teague, No. 1:07-CV-1274-CC, 2009 WL 10665635, at *5 (N.D. Ga. Feb. 13, 2009) (claim for negligence in constructing homes).

RESTATEMENT

Georgia does not follow the Restatement (Second) of Torts § 299A.

ELEMENTS OF A CLAIM

Georgia generally articulates the elements of a claim for negligence as follows:

1) The existence of a duty on the part of the defendant

2) A breach of such duty

3) Causation of the alleged injuries

4) Damages resulting from the alleged breach

See, e.g., Georgia-Pac. Cedar Springs LLC v. MOR PPM, Inc., No. 1:13-CV-198 (LJA), 2016 WL 9023600, at *9 (M.D. Ga. Aug. 29, 2016).

Expert Testimony

The standard of care in a negligence action against a design professional is the subject of expert opinion, and expert testimony is required to support a claim of professional negligence. See Dep't of Transp. v. Mikell, 493 S.E.2d 219, 223 (Ga. Ct. App. 1997); Chastain v. Atlanta Gas Light Co., 176 S.E.2d 487, 491 (Ga. Ct. App. 1970). In addition, when filing the complaint, the plaintiff must also file an expert affidavit that sets forth the standard of care and what actions or omissions did not meet this standard. Ga. Code § 9-11-9.1.

Relevant Statutes and Regulations

- Ga. Code § 9-11-9.1:

  > In any action for damages alleging professional malpractice against . . . [architects, professional engineers, and land surveyors], the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim." (*i.e.*, the affidavit should address the applicable standard of care for the design professional and what actions or inactions failed to satisfy that standard).

- Ga. Code § 51-1-2:

  > In general, ordinary diligence is that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances. . . . The absence of such diligence is termed ordinary negligence.

Economic Loss Doctrine

The economic loss doctrine does not preclude a claim brought for negligent construction in Georgia. See, e.g., Rowe v. Akin & Flanders, Inc., 525 S.E.2d 123, 126 (Ga. Ct. App. 1999).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Four years, for a negligence claim against a design professional. Ga. Code Ann. § 9-3-30(a). The statute of limitations begins to run "when there is a negligent act couple with a proximately resulting injury." U-Haul Co. of W. Georgia v. Abreu & Robeson, Inc., 247 Ga. 565, 566 (1981). However, if the action concerns the negligent design or installation of synthetic exterior siding, then the cause of action accrues when the damage is discovered or reasonably should have been discovered. Ga. Code Ann. § 9-3-30(b).

- Six years after the contract becomes due and owing, for actions based on breach of a written contract. Ga. Code Ann. § 9-3-24.

- Four years, if the action for breach of an express or implied warranty is not based on a written contract. Ga. Code Ann. § 9-3-26.

- Statute of Repose:

  - Eight years, after the construction's substantial completion. Ga. Code Ann. § 9-3-51. This does not extend the limitations period found in Section 9-30-30, but rather is an outside time limit. Armstrong v. Royal Lakes Assoc., 502 S.E.2d 758 (Ga. Ct. App. 1998).

Additional Issues

- In Georgia, a professional architect "may contract away liability to the other party for the consequences of his own negligence[.]" Precision Planning, Inc. v. Richmark Communities, Inc., 679 S.E.2d 43, 46 (Ga. Ct. App. 2009).

- "The general rule applied by the Georgia courts is that one cannot be held liable for professional negligence to a party not in privity with the professional." Samuelson v. Lord, Aeck & Sergeant, Inc., 423 S.E.2d 268, 271 (Ga. Ct. App. 1992). However, there is an exception where the injury to a third party is foreseeable, such as when an architect's design defect is imminently dangerous to third persons. Id. Exceptions include "where the work is a nuisance per se, or inherently or intrinsically dangerous" and "the work done and turned over by him is so negligently defective as to be imminently dangerous to third persons." Id.

- If there is a manual that is "the exclusive source of engineering and design standards," then a plaintiff can rely on the manual to establish the standard of care. Dep't of Transp. v. Mikell, 493 S.E.2d 219, 223 (Ga. Ct. App. 1997).

- An individual can be held liable for their own misfeasance and negligence "in undertaking to supervise the construction work as the servant and employee of the corporation." Howell v. Ayers, 202 S.E.2d 189, 191 (Ga. Ct. App. 1973). It is not a defense that the individual "was acting in a representative capacity for the corporation or that the damages were occasioned by breach of duty imposed by a contract between the plaintiff and [the individual's] employer." Id.

- "In the absence of the contractual right or responsibility to supervise and control the construction work including site safety, the architect/engineer should incur no liability for injuries to workmen proximately caused by ordinary negligence at the site." Yow v. Hussey, Gay, Bell & Deyoung Int'l, Inc., 412 S.E.2d 565, 566-7 (Ga. Ct. App. 1991). In other words, "one should not be held responsible for that over which one does not exercise any control." Id.

Pattern Jury Instructions

Georgia has a specific pattern jury instruction for a negligent construction claim, which reads as follows:

> The plaintiff has alleged that the defendant is liable in damages for negligent construction. I charge you that an action for negligent construction arises when one fails to perform work in accordance with industry standards. From the evidence, you must first determine what the standards of the construction industry are with respect to the improvements made by the defendant for the plaintiff. You then must decide whether the defendant's construction was done in a manner that was in conformity with those standards. If you find that the defendant failed to meet industry standards and that the failure resulted in damages to the plaintiff, you would be authorized to return a verdict for the plaintiff. If you find that the defendant met those standards, your verdict would be for the defendant.

Georgia Suggested Pattern Jury Instructions – Civil 62.740.

There is also a pattern jury instruction for ordinary negligence, which reads as follows:

> Ordinary negligence means the absence of or the failure to use that degree of care that is used by ordinarily careful persons under the same or similar circumstances. Before a plaintiff can recover damages from a defendant in a case such as this, there must be injury to the plaintiff resulting from the defendant's negligence.

Georgia Suggested Pattern Jury Instructions – Civil 60.010.

HAWAII

STANDARD OF CARE

Hawaii does not have a particularized standard of care for architects, engineers, and design professionals. Rather, it appears that it is the general negligence standard — reasonable care. Hawaii cases often articulate the standard of care for design professionals as follows:

> A contractor generally has a duty to use reasonable care both in his or her work and in the course of performing such work; however, the duty of reasonable care is not, of course, owed to the world at large, but only to those who might reasonably be foreseen as subject to injury by their breach.

Pulawa v. GTE Hawaiian Tel, 143 P.3d 1205, 1218 (Haw. 2006). Thus, "the defendant's obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous." Id.

Furthermore, "[e]ven in the absence of privity of contract between the design professional and a project owner, the law does not impose a duty in tort if it would disrupt the contractual relationships between and among the various parties." Leis Family Ltd. P'ship v. Silversword Eng'g, 273 P.3d 1218, 1225 (Haw. Ct. App. 2012) (internal quotation omitted). "The Hawaii Supreme Court has held that design professionals in privity of contract with the plaintiff are not liable in tort for economic damages." Id. at 1226.

Notably, in Hawaii, before a malpractice claim against design professionals, including engineers, architects, and surveyors, can be filed in court, the claim must be submitted to the Design Claim Conciliation Panel (DCCP), which will render an advisory opinion on the issues of liability and damages. HRS §§ 672B-3; 672B-5; 672B-7; 672B-11.

RESTATEMENT

Hawaii does not follow the Restatement (Second) of Torts § 299A.

ELEMENTS OF A CLAIM

Hawaii generally articulates the elements of a claim for negligence as follows:

1) A duty requiring the defendant to conform to a certain standard of conduct to protect others against unreasonable risks

2) The defendant's failure to conform to that standard (breach of the duty)

3) Causation

4) Damages

See, e.g., Molfino v. Yuen, 339 P.3d 679, 682 (Haw. 2014).

Expert Testimony

"In a claim for professional negligence, an architect's or engineer's standard of care must be established by expert testimony," and, without such testimony, a prima facie case of negligence is not established. City Express v. Express Partners, 959 P.2d 836, 838 (Haw. 1998).

Relevant Statutes and Regulations

- Haw. Rev. Stat. § 672B-5:

  All malpractice claims against design professionals must be submitted to the DCCP before a lawsuit can be brought in court.

- Haw. Rev. Stat. §§ 672B-3; 672B-7:

  The DCCP is responsible for conducting informal conciliation hearings on claims against design professionals, including engineers, architects, and surveyors.

- Haw. Rev. Stat. §§ 672B-3; 672B-11:

  The decisions of the DCCP on issues of liability and damages are advisory in nature and are not binding on the parties, in the event that any party still wishes to pursue the matter in court.

- Haw. Rev. Stat. § 672B-16:

  It shall be the duty of every person who files a claim with the design claim conciliation panel, every design professional against whom the claim is made, and every insurance carrier or other person providing professional tort liability insurance for the design professional, to cooperate with the design claim conciliation panel for the purpose of achieving a prompt, fair, and just disposition or settlement of the claim; provided that cooperation shall not prejudice the substantive rights of those persons. Any party may apply to the panel to have the costs of the action assessed against any party for failure to cooperate with the panel.

  The panel may award costs, or a portion thereof, including attorney's fees, witness fees, including those of expert witnesses, filing fees, and costs of the design claim conciliation panel hearing to the party applying therefor.

Economic Loss Doctrine

In Hawaii, the economic loss doctrine has been found to preclude the recovery of purely economic loss under tort theories against design professionals. See, e.g., City Express v. Express Partners, 959 P.2d 836, 838-40 (Haw. 1998) (architectural firm); One Wailea Dev., LLC v. Warren S. Unemori Eng'g, Inc., 375 P.3d 1289, (Haw. Ct. App. 2016) (engineering); Leis Family Ltd.

P'ship v. Silversword Eng'g, 273 P.3d 1218, 1224 (Haw. Ct. App. 2012) (economic loss doctrine bars the recovery of purely economic losses, even in the absence of privity of contract).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Two years after the cause of action accrues, to recover damages for any injury to real or personal property or to persons, "arising out of any deficiency or neglect in the planning, design, construction, supervision and administering of construction, and observation of construction relating to an improvement to real property." HRS § 657-8(a). A cause of action accrues "when the plaintiff knows, or in the exercise of reasonable care should have discovered that an actionable wrong has been committed." Bd. of Dirs. of Ass'n of Apartment Owners v. Regency Tower Venture, 2 Haw. App. 506, 511 (1981).
  - Six years from the time of the breach, for breach of contract actions. HRS § 657-1.
- Statute of Repose:
  - 10 years, for actions "arising out of any deficiency or neglect in the planning, design, construction, supervision, and administering of construction, and observation of construction relating to an improvement to real property." HRS § 657-8(a).
  - When a construction defect claim arises, a party must serve the contractor with a written notice of claim at least ninety days before filing suit. HRS § 672E-3. The notice-of-claim process does *not* toll the statute of limitations or statute of repose.

Additional Issues

- Hawaii has enacted a statute to invalidate clauses in contracts that cause contractors, engineers, or architects to assume liability for others' negligence. See HRS § 431:10-222. The statute specifically states that "[a]ny covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance or appliance, including moving, demolition or excavation connected therewith, purporting to indemnify the promisee against liability for bodily injury to persons or damage to property caused by or resulting from the sole negligence or wilful misconduct of the promisee, the promisee's agents or employees, or indemnitee, is invalid as against public policy, and is void and unenforceable[.]" HRS § 431:10-222.

Pattern Jury Instructions

Hawaii does not have a specific pattern jury instruction for the standard of care for engineers or design professionals. Nevertheless, Hawaii Pattern Civil Jury Instruction No. 6.1 for general negligence reads as follows:

Negligence is doing something which a reasonable person would not do or failing to do something which a reasonable person would do. It is the failure to use that care which a reasonable person would use to avoid injury to himself, herself, or other people or damage to property. In deciding whether a person was negligent, you must consider what was done or not done under the circumstances as shown by the evidence in this case.

IDAHO

STANDARD OF CARE

The Supreme Court of Idaho articulated the standard of care applicable to design professionals in Stephens v. Stearns:

> An architect may be liable for negligence in failing to exercise the ordinary skill of his profession, which results in the erection of an unsafe structure whereby anybody lawfully on the premises is injured. . . . They are under a duty to exercise such reasonable care, technical skill and ability, and diligence as are ordinarily required of architects in the course of their plans, *inspections* and supervisions during construction for the protection of any person who foreseeably and with reasonable certainty might be injured by the failure to do so.

678 P.2d 41, 47 (Idaho 1984) (quoting Conklin v. Cohen, 287 So. 2d 56, 61 (Fla. 1973)).

RESTATEMENT

Idaho has not adopted the Restatement (Second) of Torts § 299A.

ELEMENTS OF A CLAIM

Idaho does not articulate a separate legal test for a professional negligence claim as opposed to a claim for ordinary negligence. A cause of action for negligence requires proof of:

1) A duty, recognized by law, requiring the defendant to conform to a certain standard of conduct

2) A breach of duty

3) A causal connection between the defendant's conduct and the resulting injuries

4) Actual loss or damage

Cramer v. Slater, 204 P.3d 508, 513 (Idaho 2009) (concerning negligence action brought against doctors) (citation omitted).

EXPERT TESTIMONY

While some Idaho cases involving negligence actions against engineers and architects involved expert testimony, see Pinnacle Engineers, Inc. v. Heron Brook, LLC, 86 P.3d 470, 472-73 (Idaho 2004) and Smith v. David S. Shurtleff & Assocs., 858 P.2d 778, 780 (Idaho Ct. App. 1993), there do not appear to be any Idaho cases mandating expert testimony to establish the standard of care in an action for professional negligence against an architect, engineer, or design professional. Nevertheless, Idaho courts require expert testimony in legal malpractice actions and medical malpractice actions. See, e.g., Samuel v. Hepworth, Nungester & Lezamiz, Inc., 996 P.2d 303, 308 (Idaho 2000) ("A plaintiff must normally produce expert evidence of negligence and causation of

damages to establish a prima facie case of legal malpractice."); Schmechel v. Dille, 219 P.3d 1192, 1199 (Idaho 2009) (holding that expert testimony is required to establish the standard of care in a medical malpractice action). While the precise issue may not have been presented to appellate courts in Idaho, it seems likely that expert testimony would be required in a professional negligence action against an architect, engineer, or design professional, based on the rationale set forth by the Supreme Court of Idaho in Samuel, that the reason for requiring expert testimony "in malpractice actions against other professionals, is that 'the factors involved ordinarily are not within the knowledge or experience of laymen composing the jury.'" 996 P.2d at 308 (quoting Corey v. Wilson, 454 P.2d 951, 955 (Idaho 1969)).

Relevant Statutes and Regulations

- Idaho Admin. Code r. 10.01.02.005 (sets forth the standard of care applicable to licensed professional engineers and land surveyors):

  > **01. Primary Obligation.** All Licensees and Certificate Holders must at all times recognize their primary obligation is to protect the safety, health and welfare of the public in the performance of their professional duties. (5-8-09)
  >
  > **02. Standard of Care.** Each Licensee and Certificate Holder must exercise such care, skill and diligence as others in that profession ordinarily exercise under like circumstances. (3-29-10)

Economic Loss Doctrine

Although the "general rule in Idaho is that there is no recovery for pure economic loss in a negligence action, as there is no 'duty' to prevent economic loss to another," there are two exceptions: (1) "where a special relationship exists"; and (2) "where the occurrence of a unique circumstance requires a different allocation of risk." Nelson v. Anderson Lumber Co., 99 P.3d 1092, 1100 (Idaho Ct. App. 2004).

"The 'special relationship' exception generally pertains to claims for personal services provided by professionals, such as physicians, attorneys, architects, engineers, and insurance agents." Id. at 1100 (citing Eliopulos v. Knox, 848 P.2d 984, 992 (Idaho Ct. App. 1992)). A special relationship may also exist where a party "holds itself out to the public as performing a specialized function and induces reliance on superior knowledge and skill." Id.

"It is the subject of the transaction that determines whether a loss is property damage or economic loss, not the status of the party being sued." Blahd v. Richard B. Smith, Inc., 108 P.3d 996, 1001 (Idaho 2005) (finding that, where the transaction at issue involved real property, including a house, damages to the plaintiff's house were purely economic).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Two years, as per Idaho Code § 5-219(4) for professional malpractice, which begins to

run "as of the time of the occurrence, act or omission complained of.". See Stephens, 678 P.2d at 46.

- "A cause of action founded in professional malpractice arising out of the design or construction of improvements to real property must be brought within two years of the discovery of the alleged malpractice and in no event later than eight years following the completion of the construction." Stephens, 678 P.2d at 47 (quoting Twin Falls Clinic & Hospital Bldg. Corp. v. Hamill, 644 P.2d 341, 345 (Idaho 1982)).

- The statute of limitations for professional malpractice does not begin to run until the plaintiff would have a cause of action against the professional. Because some damage is required to have a cause of action for negligence, the cause of action cannot accrue until there is some damage. "Although damage must be objectively ascertainable, I.C. § 5-219(4) does not require the plaintiff to have discovered the damage before the statute of limitations begins to run. . . . Damages are 'objectively ascertainable' when there is objective proof that would support the existence of an actual injury." Blahd, 108 P.3d at 1002 (citations omitted).

- Idaho Code § 5-241 sets a limit of six years, at which time a tort cause of action arising out of the design or construction of improvement to real property will be deemed to have accrued, if not previously accrued. See Stephens, 678 P.2d at 46. The text of the statute reads:

> Actions will be deemed to have accrued and the statute of limitations shall begin to run as to actions against any person by reason of his having performed or furnished the design, planning, supervision or construction of an improvement to real property, as follows:
>
> (a) Tort actions, if not previously accrued, shall accrue and the applicable limitation statute shall begin to run six (6) years after the final completion of construction of such an improvement.

Additional Issues

- Attorneys fees are not recoverable in a professional negligence action. See Smith, 858 P.2d at 781-82: "Our Supreme Court in Fuller v. Wolters, 119 Idaho 415, 807 P.2d 633 (1991), specifically rejected I.C. § 12–120(3) as a basis for a fee award in an action for professional negligence. . . . Shurtleff provides no compelling reason why the same result should not obtain in an action to recover for alleged professional negligence of an architect. Accordingly, we conclude that the award of attorney fees cannot stand."

PATTERN JURY INSTRUCTIONS

The Supreme Court of Idaho's Civil Jury Instructions[2] do not include an entry for professional negligence or negligence with respect to design professionals.

[2] https://isc.idaho.gov/main/civil-jury-instructions

ILLINOIS

STANDARD OF CARE

Illinois does not have a particularized standard of care for architects, engineers, and design professionals. Rather, "[t]he same general standard of care applies to all professionals, that is, the same degree of knowledge, skill and ability as an ordinarily careful professional would exercise under the circumstances." Introduction to Illinois Pattern Jury Instructions (Civil), § 105.00 – Professional Negligence.

Notwithstanding the aforementioned generality, Illinois cases often articulate the standard of care for design professionals as "the standard of skill and care exercised by others engaged in the same profession, and in the same locality."[3] For instance:

> [A]bsent an express contractual provision to the contrary, an architect does not guarantee the owner a perfect plan or a satisfactory result. The architect is not liable for mere errors of judgment, and liability attaches only when the architect's conduct falls below the standard of skill and care exercised by others engaged in the same profession, and in the same locality.

Bd. Of Managers of Park Point at Wheeling Condominium Ass'n v. Park Point at Wheeling, LLC, 2015 IL App (1st) 123452, ¶15 (citing Sam A. Mackie, *Architect's Negligence,* 33 Am.Jur. Proof of Facts 3d 57, § 5 (1995)). See also Rosos Litho Supply Corp. v. Hansen, 123 Ill.App.3d 290 (1st Dist.1984). In Bd. of Managers, the plaintiff condominium association brought suit against its architect for breaching the implied warranty of habitability. The plaintiff alleged that water and air infiltration was damaging interior flooring and finishes and that this damage resulted from latent defects in the design, material, and construction of the common elements and limited common elements of the building. Id. at ¶4. In affirming the dismissal of the plaintiff's claims against the architect, the court stated that "engineers and design professionals such as the [defendant architectural firm] provide a service and do not warrant the accuracy of their plans and specification." Id., at ¶15. The court further noted that architects and design professionals are not subject to implied warranty claims, as they are not required to guarantee a perfect plan. Id.

RESTATEMENT

Illinois follows the Restatement (Second) of Torts, § 299A. See Loman v. Freeman, 229 Ill. 2d 104, 119 (2008).

ELEMENTS OF A CLAIM

Illinois generally articulates the elements of a claim for professional negligence as follows:

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[3] It should be noted, however, that the locality rule has largely faded from current practice. See, e.g., Purtill v. Hess, 111 Ill.2d 229 (1986).

1) The existence of a professional relationship

2) A breach of duty arising from that relationship

3) Causation

4) Damages

See, e.g., MC Baldwin Financial Co. v. DiMaggio, Rosario & Veraja, 845 N.E.2d 22, 30 (Ill. App. Ct. 2006).

Expert Testimony

Illinois requires a plaintiff to introduce expert testimony to "establish both a professional's standard of care, as an element of negligence, and the professional's deviation from the standard of care." Thompson v. Gordon, 241 Ill.2d 428, 431 (2011).

Relevant Statutes and Regulations

- 225 ILCS 330/4(k):

  > "Standard of care" means the use of the same degree of knowledge, skill, and ability as an ordinarily careful and reasonable professional land surveyor would exercise under similar circumstances.

- 225 ILCS 325/4 (l):

  > "Negligence in the practice of professional engineering" means the failure to exercise that degree of reasonable professional skill, judgment and diligence normally rendered by professional engineers in the practice of professional engineering.

- 68 Ill. Admin. Code § 1150.90(a)(2):

  > An architect engaging in the practice of architecture shall act with reasonable care and competence, and shall apply the technical knowledge and skill that are ordinarily applied by licensed architects of good standing, practicing in the same locality.

Economic Loss Doctrine

In Illinois, the economic loss doctrine has been found to preclude the recovery of purely economic loss under tort theories, including architectural malpractice. See, e.g., 2314 Lincoln Park West Condomin. Ass'n v. Mann, 555 N.E.2d 346 (Ill. 1990) (barring claims for malpractice against architect).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - "(a) Actions based upon tort, contract or otherwise against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or should reasonably have known of such act or omission." 735 ILCS 5/13–214(a).
  - The statute of limitations does not begin to run until the plaintiff discovers or reasonably should have discovered the alleged defect. "The Illinois Supreme Court has interpreted the knowledge requirement or "discovery period" in the statute of limitations in construction cases to begin when a person knows or reasonably should know of his injury and when a person knows or reasonably should know that it was wrongfully caused." LaSalle Nat. Bank v. Skidmore, Owings & Merrill, 262 Ill. App. 3d 899, 902 (1st Dist. 1994). "Persons have knowledge that an injury is wrongfully caused when they possess enough information about the injury to alert a reasonable person to the need for further inquiries to determine if the cause of the injury is actionable at law." Id.
- Statute of Repose:

"(b) No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission. However, any person who discovers such act or omission prior to the expiration of 10 years from the time of such act or omission shall in no event have less than 4 years to bring an action as provided in subsection (a) of this Section." 735 ILCS 5/13–214(b).

Additional Issues

- A design professional may not be sued under an implied warranty theory for providing professional services. Furthermore, "the principle that an architect does not warrant or guarantee perfection in his or her plans and specifications is a long standing principle." Bd. Of Managers of Park Point at Wheeling Condominium Ass'n v. Park Point at Wheeling, LLC, 2015 IL App (1st) 123452, ¶17.
- Architects and builders are not relieved of liability merely because work has been completed and accepted by owner, inasmuch as when building is designed and built, it is foreseeable that it will not be changed in material manner for some time to come, it is foreseeable that owner will not install safety features that have been omitted, and underlying purpose of tort law of providing for public safety through deterrence of negligent architects and builders cannot be accomplished if they are insulated from liability

simply by act of delivery to owner. Johnson v. Equip. Specialists, Inc., 58 Ill.App.3d 133, 140 (4th Dist. 1978).

- Evidence of standards promulgated by industry, trade, or regulatory groups or agencies may be relevant and admissible to aid the trier of fact in determining the standard of care in a negligence action "even though the standards have not been imposed by statute or promulgated by a regulatory body and therefore do not have the force of law" Ruffiner v. Material Serv. Corp., 116 Ill.2d 53, 106 Ill.Dec. 781, 506 N.E.2d 581, 584 (1987).

- Architects and engineers may contractually limit their duty of care to specific tasks. Thompson v. Gordon, 241 Ill.2d 428, 445 (2011). Stated another way, "an engineer's duty is dependent only on his contractual obligations." Ferentchak v. Vill. of Frankfort, 105 Ill.2d 474, 554 (1985).

Pattern Jury Instructions

Although Illinois does not have a specific pattern instruction for design professionals' standard of care, Illinois Pattern Instruction 105.01 instructs juries on the duty of care for professional negligence and reads as follows:

1) An [architect, engineer, or design professional] must possess and use the knowledge, skill, and care ordinarily used by a reasonably careful [architect, engineer, or design professional].

2) The failure to do something that a reasonably careful [architect, engineer, or design professional] [practicing in the same or similar localities] would do, or the doing of something that a reasonably careful [architect, engineer, or design professional] would not do, under circumstances similar to those shown by the evidence, is "professional negligence."

3) The phrase "deviation from the standard of [care] [practice] means the same thing as "professional negligence."

4) The law does not say how a reasonably careful [architect, engineer, or design professional] would act under these circumstances. That is for you to decide. In reaching your decision, you must rely upon opinion testimony from qualified witnesses [and] [or similar evidence]. You must not attempt to determine how a reasonably careful [architect, engineer, or design professional] would act from any personal knowledge you may have.

See IPI 105.01 (Professional Negligence – Duty).

INDIANA

STANDARD OF CARE

"The responsibility of an architect is similar to that of a lawyer or physician. 'When he possesses the requisite skill and knowledge, and in the exercise thereof has used his best judgment, he has done all the law requires.'" Mayberry Cafe, Inc. v. Glenmark Constr. Co., 879 N.E.2d 1162, 1173 (Ind. Ct. App. 2008) (quoting Lukowski v. Vecta Educational Corp., 401 N.E.2d 781, 786 (Ind. Ct. App. 1980)).

"[T]he key question in determining whether an architect has been negligent is not whether error occurred, but whether the architect breached a duty to exercise 'the degree of competence ordinarily exercised in like circumstances by reputable members of the profession . . . .'" Mayberry, 879 N.E.2d at 1173 (quoting Walters v. Kellam & Foley, 360 N.E2d 199, 206 (Ind. Ct. App. 1977)). "Absent a special agreement, an architect does not imply or guarantee a perfect plan. . . . Furthermore, an architect 'is not a warrantor of his plans and specifications. The result may show a mistake or defect, although he may have exercised the reasonable skill required.'" Mayberry, 879 N.E.2d at 1173 (quoting Lukowski v. Vecta Educational Corp., 401 N.E.2d 781, 786 (Ind. Ct. App. 1980)).

RESTATEMENT

It does not appear that Indiana has adopted the Restatement (Second) of Torts § 299A. Although Comment g to this section of the Restatement was cited in Weinstock v. Ott, 444 N.E.2d 1227, 1234 (Ind. Ct. App. 1983), this case only included the citation as part of a string cite in evaluating an expert witness's competency to testify based upon their familiarity with local practice in a medical malpractice case. There is no indication that Indiana has otherwise adopted this section of the Restatement.

ELEMENTS OF A CLAIM

In Vaughn v. Daniels Co. *(W. Virginia), Inc.*, the court explained that recovering for a common law negligence claim requires:

1) Duty to conform his conduct to a standard of care arising out of his relationship with the plaintiff

2) Failure on the part of the defendant to conform his conduct to the requisite standard of care

3) Injury proximately caused by breach

841 N.E.2d 1133, 1143 (Ind. 2006) (internal citations omitted) (case involving the designer of a coal preparation plant). The standard negligence elements of duty, breach, causation, and damages apply to a claim for negligent design. See Id. at 1145.

There is no requirement in a professional negligence action against a design professional that the end result be "unreasonably defective." Rather, "as with all negligence actions, the question is

whether the defendant's conduct breached the relevant standard of care." Smith v. Walsh Constr. Co. II, LLC, 95 N.E.3d 78, 90-91 (Ind. Ct. App. 2018).

Expert Testimony

"Expert testimony is required when alleging a breach of" the standard of care for design professionals. Smith v. Walsh Constr. Co. II, LLC, 95 N.E.3d 78, 90 (Ind. Ct. App. 2018) (citing Troutwine Estates Dev. Co., LLC v. Comsub Design & Eng'g, Inc., 854 N.E.2d 890, 902 (Ind. Ct. App. 2006)).

Relevant Statutes and Regulations

- Ind. Code § 25-4; 31:

  Indiana Code Title 25 contains laws relating to the regulation of professions and occupations, with Article 4 addressing provisions relating to architecture. Article 31 contains provisions relating to professional engineers. However, none of the provisions in either of these articles includes guidance relating to the standard of care applicable to actions against architects or engineers.

- 804 Ind. Admin. Code 1.1-4-2(a); 804 Ind. Admin. Code 1.1-4-2(c):

  Architects are governed by regulations set forth by the Board of Registration for Architects and Landscape Architects under Title 804 of the Indiana Administrative Code. Article 1.1, Rule 4 sets forth the standard of competence for architects: "(a) In practicing architecture or landscape architecture, a registrant shall act with reasonable care and competence, and shall apply the technical knowledge and skill which is ordinarily applied by registrants of good standing, practicing in the same locality." ("A registrant shall undertake to perform professional services only when he, together with those whom the architect or landscape architect may engage as consultants, is qualified by education, training, and experience in the specific technical areas involved.").[4]

- 864 Ind. Admin. Code 1.1-11:

  Professional engineers are governed by regulations set forth by the State Board of Registration for Professional Engineers under Title 864 of the Indiana Administrative Code. Article 1.1, Rule 11, sets forth rules of professional conduct.

[4] A court cited this regulatory provision in a breach of contract case against an architect alleged to have failed to perform architectural services in a workmanlike manner by not involving a structural engineer in the design process. See Sams Hotel Grp., LLC v. Environs, Inc., No. 1:09 CV 00930 TWP, 2012 WL 3139765, at *10 11 & n.14 (S.D. Ind. Aug. 1, 2012), aff'd, 716 F.3d 432 (7th Cir. 2013).

- 865 Ind. Admin. Code 1-11:

  Likewise, professional land surveyors are governed by similar regulations set forth by the State Board of Registration for Professional Surveyors under Title 865 of the Indiana Administrative Code. Article 1, Rule 10, sets forth rules of professional conduct.

- IND. CODE ANN. § 22 8 1.1 1:

  The Dangerous Occupation Act, (now found at IND. CODE ANN. § 22-8-1.1-1 *et seq.*), was advanced as a basis for statutory liability against an architect and engineer in Walters v. Kellam and Foley, 360 N.E.2d 199 (Ind. Ct. App. 1977). However, it was found to be inapplicable in that case because the defendants did not assume an obligation to supervise and control the actual day-to-day construction of the project:

  > Because the Dangerous Occupation Act has been consistently construed to exculpate from liability all except those in "charge of" or "responsible for" the work for which scaffolding is required, these defendants could be charged with negligence in violating the safety statute only if they could be found to have an obligation for the safe conduct of actual day-to-day construction by control of methods and procedures, a duty above and beyond the obligation to assure that the construction project conforms to the plans and specifications.

  Id. at 211. The architect and engineer, despite being present on-site for the installation of the project, were not involved in supervising the manner or installation of the project. Instead, the control "extended only to approving or rejecting equipment or materials which did not conform to the plans and specifications." Id. at 208. Thus, the evidence compelled "the conclusion that the duty to exercise reasonable care for plaintiff's safety was not assumed by virtue of the conduct of these two defendants." Id. However, to the extent that an architect or engineer assumes an obligation to supervise and control the actual day-to-day construction of a project, then the Dangerous Occupation Act should be on their radar as a potential basis for liability.

ECONOMIC LOSS DOCTRINE

"[T]he 'economic loss doctrine' precludes tort liability for purely economic loss -- that is, pecuniary loss unaccompanied by any property damage or personal injury (other than damage to the product or service itself)." Indiana Farm Bureau v. CNH Indus. Am., LLC, 130 N.E.3d 604, 614 (Ind. Ct. App. 2019).

Indiana courts have discussed the general applicability of the economic loss doctrine in the construction context:

> "Construction claims are not necessarily based on defective goods or products, but nonetheless are subject to the economic loss doctrine. In general, a claim that a product or service did not perform as expected is best left to contract law remedies." As we observed in Gunkel, "The central theory underlying 'economic loss' is that the law should permit the parties to a transaction to allocate the risk that an item sold or a service performed does not live up to expectations."

Indianapolis-Marion Cty. Pub. Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 737 (Ind. 2010) (quoting Gunkel v. Renovations, Inc., 822 N.E.2d 150, 155 (Ind. 2005)).

The economic loss doctrine bars tort liability in a major construction project for pure economic loss caused unintentionally by design professionals:

> [T]here is no liability in tort to the owner of a major construction project for pure economic loss caused unintentionally by contractors, subcontractors, engineers, design professionals, or others engaged in the project with whom the project owner, whether or not technically in privity of contract, is connected through a network or chain of contracts.

Indianapolis-Marion Cty. Pub. Library, 929 N.E.2d at 740 (applying the economic loss doctrine).

Note, however, that the economic loss rule "does not bar recovery in tort for damage that a separately acquired defective product or service causes to other portions of a larger product into which the former has been incorporated." Gunkel, 822 N.E.2d at 156.

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Indiana has a statute of limitations specifically applicable to professional services-related actions. *See* Ind. Code Ann. § 34-11-2-3 ("An action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, may not be brought, commenced, or maintained, in any of the courts of Indiana against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless the action is filed within two (2) years from the date of the act, omission, or neglect complained of."). See also Shaum v. McClure, 902 N.E.2d 853, 856 (Ind. Ct. App. 2009) (applying two-year statute of limitations in case brought against engineering firm for surveying work). This statute of limitations has been broadly applied to a number of different types of professional malpractice suits, including against surveyors and engineers. See Generali – U.S. Branch v. Lachel & Assocs., Inc., No. 4:17-cv-00168-TWP-DML, 2019 WL 688737, at *6 (S.D. Ind. Feb. 19, 2019).
- Statute of Repose:
  - Ind. Code Ann. § 32-30-1-5 states that an action to recover damages for a deficiency in the design, planning, supervision, construction, or observation of construction of an improvement to real property; personal injury; injury to property; or wrongful death

based upon improvements to real property may be brought within the earlier of 10 years after substantial completion of the improvement or 12 years after the completion and submission of plans to the owner if the action is for a design defect.

- Ind. Code Ann. § 32-30-1-6 further modifies this statute of repose in the event of personal injury or wrongful death. If personal injury or wrongful death occurs during the ninth or tenth year after substantial completion, then the action may be brought within two years after the date of injury. However, the action may not be brought more than 12 years after substantial completion, or 14 years after the completion and submission of plans to the owner if the action is for design defect, whichever comes first.

Additional Issues

- Indianapolis-Marion Cty. Pub. Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 738 (Ind. 2010) (citing Walters v. Kellam & Foley, 360 N.E.2d 199 (Ind. Ct. App. 1977)) (providing that "whether an architect or engineer owes any duty to the employees of independent contractors on a construction site—to prepare competent plans and specifications, to supervise the implementation of such plans and specifications properly, and to supervise the conduct of work methods with reasonable care—is to be determined from the various contracts governing them and from the actual conduct of the architect or engineer.").

- As discussed above under Relevant Statutes and Regulations, the court in Walters found that an architect and engineer did not owe a duty to a plaintiff injured on a construction site for a failure to supervise because they had not undertaken a duty to supervise the manner of work and installation at the construction site. The court explained that, "[t]o appropriately define the duty to supervise, the obligation to assure that construction conforms to the authorized plans is to be distinguished from the obligation to assume responsibility for the safety of persons lawfully on the construction site." Walters, 360 N.E.2d at 207. There, the architect and engineer, despite being present on-site for the installation of the project, were not involved in supervising the manner or installation of the project. Instead, the control "extended only to approving or rejecting equipment or materials which did not conform to the plans and specifications." Id. at 208. Thus, the evidence compelled "the conclusion that the duty to exercise reasonable care for plaintiff's safety was not assumed by virtue of the conduct of these two defendants." Id.

Pattern Jury Instructions

The Indiana Model Civil Jury Instructions (available on Westlaw) did not contain any instructions specifically on point for negligence cases against architectural, engineering, or design professionals. The only instructions included within the category of "Professional Negligence" pertained to legal malpractice cases. *See, e.g.*, Chapter 1700 Professional Negligence, 1707 Legal Negligence--Elements, Ind. Model Civ. Jury Inst. 1707. However, the elements of common law negligence are set forth in Civil Jury Instruction 1103:

[Plaintiff] claims [defendant] was [negligent][designate other type of fault].

To recover on this claim, [plaintiff] must prove by the greater weight of the evidence that:

1. [defendant] acted or failed to act [by][in one or more of the following ways]: [insert how plaintiff claims that defendant was negligent or otherwise at fault]; and

2. [defendant]'s act or failure to act was [negligent][designate other type of fault]; and

3. [defendant]'s act or failure to act was a responsible cause of [plaintiff]'s claimed injuries; and

4. [plaintiff] suffered damages as a result of the injuries.

To recover an award of punitive damages, [plaintiff] must prove by clear and convincing evidence that:

[Here set out the elements of plaintiff's claim for punitive damages to correspond to the factual disputes raised by the evidence.]

[Defendant] denies [plaintiff]'s claims. [Defendant] is not required to disprove [plaintiff]'s claims.

A defendant may defend [himself][herself] by claiming certain specific ""defenses." In this case [defendant] claims: [Here set out the elements of defendant's affirmative defenses to correspond to the factual disputes raised by the evidence.] To prove these defenses, [defendant] must prove by the greater weight of the evidence that: [Here set out the elements of defendant's affirmative defenses to correspond to the factual disputes raised by the evidence.]

1103 Elements; Burden of Proof, Ind. Model Civ. Jury Inst. 1103.

IOWA

STANDARD OF CARE

"An architect may be held liable for negligence in failing to exercise the ordinary skill of his profession, which results in the erection of an unsafe structure. Whereby anyone lawfully on the premises is injured. An architect's liability for negligence resulting in personal injury or death may be based upon his supervisory activities or upon defects in the plans. The liability of the architect, moreover, is not limited to the owner who employed him; the modern view is that privity of contract is not a prerequisite to liability." Evans v. Howard R. Green Co., 231 N.W.2d 907, 913 (Iowa 1975) (quoting 5 Am. Jur. 2d, Architects, s 25, page 688).

As the Iowa Supreme Court has explained:

> A design engineer may be held liable for negligence in failing to exercise the ordinary skill of the profession in drafting plans and specifications or in supervising construction work. Evans v. Howard R. Green Co., 231 N.W.2d 907, 913 (Iowa 1975). An engineer's potential for liability is not limited to the party with which he contracts and extends beyond privity of contract. Id. However, the determination of whether a contract that employs a professional imposes a duty on a noncontractual party is a matter of law to be decided by the court.

Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc., 473 N.W.2d 612, 615 (Iowa 1991).

RESTATEMENT

Iowa has adopted Section § 299A of the Restatement. See Langwith, 793 N.W.2d at 220 n.2 (holding that hat the standard of care in a professional negligence action is established by section 299A); see also Hartig v. Francois, 562 N.W.2d 427, 430 n.2 (Iowa 1997) ("We have previously adopted § 299A as the law in Iowa with one change. We have substituted the phrase 'under like circumstances' for the phrase 'in similar communities.'" (quoting Menzel v. Morse, 362 N.W.2d 465, 471 (Iowa 1985))).

ELEMENTS OF A CLAIM

Iowa does not articulate a separate legal test for a professional negligence claim as opposed to a claim for ordinary negligence.

The elements of negligence are:

1) The existence of a duty to conform to a standard of conduct to protect others

2) A failure to conform to that standard

3) Proximate cause

4) Damages

Umthun v. IMT Ins. Co., 797 N.W.2d 621 (Iowa Ct. App. 2011); see also Hartig, 562 N.W.2d at 429 ("The elements of a negligence claim are familiar: existence of a duty to conform to a standard of conduct to protect others, failure to conform to that standard, proximate cause, and damages.").

Expert Testimony

Expert testimony is necessary to establish a breach of the standard of care for a design professional. See Karnes v. Keffer Overton Assocs., Inc., No. 00-0191, 2001 WL 1443512, at *2 (Iowa Ct. App. Nov. 16, 2001) (requiring expert testimony to establish professional negligence against architects and engineers for injuries that the plaintiff suffered from the collapse of a defective staircase). "Lay persons sitting as the trier of fact generally lack the knowledge to render a competent judgment as to negligence and proximate cause in complex matters requiring professional expertise." Id. "Specific negligence of a professional can be established through expert testimony showing a standard of care and its breach or through evidence showing a lack of care so obvious to be within the comprehension of a layperson such as an external injury to the body not being treated." City of Urbandale v. Frevert-Ramsey-Kobes, Architects-Engineers, Inc., 435 N.W.2d 400, 402 (Iowa Ct. App. 1988); see also John T. Jones Constr. Co., 543 F. Supp. 2d 982, 1009-10 (S.D. Iowa 2008) (finding that expert testimony was required in a professional negligence action brought against an engineer).

Relevant Statutes and Regulations

Various administrative agencies in Iowa have regulations applicable to architects, engineers, and professional land surveyors.

- Iowa Admin. Code r. 193B-4.1(2)(a):

> In practicing architecture, an architect shall act with reasonable care and competence, and shall apply the technical knowledge and skill which is ordinarily applied by architects of good standing, practicing in the same locality.

- Iowa Admin. Code r. 193C-8.2(2):

> *Competency for assignments.* Licensees shall undertake to perform engineering or land surveying assignments only when qualified by education or experience in the specific technical field of professional engineering or professional land surveying involved. Licensees shall engage experts or advise that experts and specialists be engaged whenever the client's or employer's interests are best served by such service. Licensees may accept an assignment on a project requiring education or experience outside their field of competence, but only to the extent that their services are restricted to those phases of the project in which they are qualified. All other phases of such projects shall be performed by qualified associates, consultants or employees.

This provision was cited in a federal case applying Iowa law, and there the court found that a violation of the professional ethical standards set forth in the applicable regulations was "some

evidence of negligence." John T. Jones Constr. Co. v. Hoot Gen. Constr., 543 F. Supp. 2d 982, 1010 (S.D. Iowa 2008), aff'd sub nom. John T. Jones Constr. Co. v. Hoot Gen. Constr. Co., 613 F.3d 778 (8th Cir. 2010).

- IOWA ADMIN. CODE r. 193D-4.1(2)(a):

> *a.* When practicing landscape architecture, a professional landscape architect shall act with reasonable care and competence, and shall apply the technical knowledge and skill which is ordinarily applied by a landscape architect of good standing practicing in the same locality.

ECONOMIC LOSS DOCTRINE

"The well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable." Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124, 126 (Iowa 1984) (holding that plaintiffs could not maintain a cause of action in negligence, in the absence of physical injury, against a defendant whose negligence caused the closing of a public bridge). "The [economic loss] doctrine applies to prevent one of two parties to a contract from bringing a negligence claim against the other over the injured party's defeated expectations." Vill. at White Birch Town Homeowners Ass'n v. Goodman Assocs., Inc., 824 N.W.2d 561 (Iowa Ct. App. 2012). As the Iowa Supreme Court has explained:

> We agree that the line to be drawn is one between tort and contract rather than between physical harm and economic loss. . . . When, as here, the loss relates to a consumer or user's disappointed expectations due to deterioration, internal breakdown or non-accidental cause, the remedy lies in contract.
>
> Tort theory, on the other hand, is generally appropriate when the harm is a sudden or dangerous occurrence, frequently involving some violence or collision with external objects, resulting from a genuine hazard in the nature of the product defect.

Determan v. Johnson, 613 N.W.2d 259, 262 (Iowa 2000). The lack of contractual privity will not defeat application of the economic loss doctrine. Id.

However, "[t]he economic loss rule is subject to qualifications. For example, purely economic losses are recoverable in actions asserting claims of professional negligence against attorneys and accountants." Annett Holdings, Inc. v. Kum & Go, L.C., 801 N.W.2d 499, 504 (Iowa 2011) (citing Van Sickle Constr. Co. v. Wachovia Commercial Mortg., 783 N.W.2d 684, 692 n.5 (Iowa 2010)). Accordingly, the economic loss rule was found to be inapplicable in a case brought against design professionals by an Iowa federal court applying Iowa law: "The economic loss rule does not apply to claims of professional negligence." John T. Jones Constr. Co. v. Hoot Gen. Constr., 543 F. Supp. 2d 982, 1009 (S.D. Iowa 2008), aff'd sub nom. John T. Jones Constr. Co. v. Hoot Gen. Constr. Co., 613 F.3d 778 (8th Cir. 2010). Thus, it appears that the economic loss doctrine may not bar negligence claims brought against design professionals for purely economic losses.

Note that the economic loss doctrine also does not preclude negligent misrepresentation claims when only purely economic losses have occurred. See Van Sickle Constr. Co., 783 N.W.2d at 694. The Van Sickle court reasoned that doing so would contradict the plain language of Section 552 of the Restatement (Second) of Torts and would virtually eliminate claims for negligent misrepresentation. Section 552 of the Restatement (Second) of Torts describes such a cause of action as follows:

> 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.

Restatement (Second) of Torts § 552.

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Two years, for actions based on personal injury. Iowa Code Ann. § 614.1(2).
  - Five years, in general, for actions based on unwritten contracts, injuries to property, and fraud. Iowa Code Ann. § 614.1(4).
  - 10 years, for actions based upon written contracts. Iowa Code Ann. § 614.1(5).
  - The limitations period begins to run when the cause of action accrues, and "[i]t is well settled that no cause of action accrues under Iowa law until the wrongful act produces loss or damage to the claimant." Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc., 507 N.W.2d 405, 408 (Iowa 1993). Iowa also has a discovery rule, which holds that a negligence cause of action does not accrue until a plaintiff has discovered they have suffered an injury or through the exercise of reasonable diligence should have discovered it. See Id. at 408-09.
- Statute of Repose:
  - For actions based upon improvements made to real property, Iowa limits in two ways: 10 years in the case of residential construction and eight years for any other kind of improvement to real property. See Iowa Code Ann. § 614.1(11). An action arising from intentional misconduct or fraudulent concealment of an unsafe condition of an improvement to real property has a 15-year limitation period. See Id. The Supreme Court of Iowa has defined an improvement to real property as "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." St. Paul's Evangelical Lutheran Church v. City of Webster City, 766 N.W.2d 796, 798 (Iowa 2009) (quoting Krull v. Thermogas Co., 522 N.W.2d 607, 611 (Iowa 1994)). While Iowa has a discovery rule,

this rule does not apply to cases barred by § 614.1(11). See Bob McKiness, 507 N.W.2d at 408-09.

Additional Issues

- Jorgensen v. Horton, 206 N.W.2d 100, 103 (Iowa 1973) ("Violation of standards in such [private safety] codes is evidence on the issue of negligence but not negligence per se.").

- Iowa courts have rejected the argument that an architect's duty to exercise reasonable care does not apply until construction of the project at issue is completed. Instead, an architect may be found liable when the design plans and specifications are faulty and defective. This liability may attach, for example, where the design otherwise fails to take proper measures for the safety of those on the premises. See Evans v. Howard R. Green Co., 231 N.W.2d 907, 912-13 (Iowa 1975).

Pattern Jury Instructions

The Iowa Bar Association maintains Civil and Criminal Pattern Jury Instructions, https://www.iowabar.org/page/PracticeTools, but the instructions are only accessible to members of the Iowa State Bar Association, and it is unclear whether Iowa courts have adopted these model instructions.

KANSAS

STANDARD OF CARE

A contractor may be *contractually* liable "to persons in privity with him," for a violation of plans and specifications, but that violation alone does not create liability to third parties. See McKee ex rel. McKee v. City of Pleasanton, 750 P.2d 1007, 1012 (Kan. 1988). Instead, a plaintiff must show that the substitution was an unreasonable deviation "from relevant architectural and engineering professional standards," or that it created a dangerous defect or condition that was known or should have been discovered through inspection. Id.

Professional negligence cases brought against architects and engineers are not identical to those brought against lawyers and doctors because the nature of the duties performed in each profession are different:

> Based on our decision in Malone v. University of Kansas Medical Center, 220 Kan. 371, 552 P.2d 885, it can be said certain professionals, such as doctors and lawyers, are not subject to such an implied warranty. However, an architect and an engineer stand in much different posture as to insuring a given result than does a doctor or lawyer. The work performed by architects and engineers is an exact science; that performed by doctors and lawyers is not. A person who contracts with an architect or engineer for a building of a certain size and elevation has a right to expect an exact result. See Hanna v. Huer, Johns, Neel, Rivers & Webb, 233 Kan. 206, 662 P.2d 243 (1983). The duty of the architect is so strong and inherent in the task, we hold it gives rise to an implied warranty of workmanlike performance. An injured party under these circumstances may choose his remedy from express contract (if applicable), implied warranty or negligence.

Tamarac Dev. Co. v. Delamater, Freund & Assocs., P.A., 675 P.2d 361, 365 (Kan. 1984).

RESTATEMENT

Kansas has not adopted Restatement (Second) of Torts § 299A. Comment d to Section § 299A was cited favorably in Foster v. Klaumann, 216 P.3d 671, 687 (Kan. Ct. App. 2009) for the proposition that a medical specialist should have been held to a higher standard of care of a specialist rather than the general physician standard of care, but the Supreme Court of Kansas reversed this specific determination in Foster ex rel. Foster v. Klaumann, 294 P.3d 223 (Kan. 2013). Foster v. Klaumann was the only Kansas case citing this specific provision of the Restatement. Thus, it appears Kansas courts have not adopted this section.

ELEMENTS OF A CLAIM

The elements for a claim of professional negligence are the same as those for ordinary negligence.

1) Duty

2) Breach of duty

3) The breach was the proximate cause of the injury

4) Damages

See Moore v. Associated Material & Supply Co., 948 P.2d 652, 659 (Kan. 1997). The Supreme Court of Kansas has explained: "[N]egligence . . . is a breach of a duty of care. Obviously, to recover in an action for negligence, causation and damages must also be proven. However, it is incorrect to state that a finding of negligence includes causation, as a person may be negligent but fail to cause any damages, in which case the negligence is not actionable." Id.

EXPERT TESTIMONY

Expert testimony is required to prove the standard of care in a professional negligence action against a design professional. Where a plaintiff seeks to "establish negligence based upon a departure from the reasonable standard of care in a particular profession, expert testimony is required to establish such a departure." Moore v. Associated Material & Supply Co., 948 P.2d 652, 659 (Kan. 1997). "[A]rchitectural standards and practices are, in most instances, sufficiently technical to require the use of expert testimony to establish negligence or lack of reasonable care on the part of an architect." Id. (quoting McKee ex rel. McKee v. City of Pleasanton, 750 P.2d 1007, 1008 (Kan. 1988)).

RELEVANT STATUTES AND REGULATIONS

- Kan. Stat. Ann. § 74-70:

  > Kansas Statutes Annotated sets forth laws applicable to the State Board of Technical Professions, which sets qualifications for licensing architects (KAN. STAT. ANN. § 74-7019), landscape architects (KAN. STAT. ANN. § 74-7020), professional engineers (KAN. STAT. ANN. § 74-7021), and professional surveyors (KAN. STAT. ANN. § 74-7022).

- Kan. Stat. Ann. § 74-7003(v):

  > 'Standard of care' means the duty to exercise the degree of learning and skill ordinarily possessed by a reputable licensee practicing in Kansas in the same or similar locality and under similar circumstances.

However, Kansas cases have not cited this specific provision to define the standard of care applicable in a negligence action against a design professional.

"[W]hile an architect's license may be taken away for 'gross negligence, incompetency, or misconduct' in the practice of the profession (K.S.A. 74-7026), there is not a specific statute . . . establishing a duty owed by an architect." Tamarac Dev. Co. v. Delamater, Freund & Assocs., P.A., 675 P.2d 361, 364 (Kan. 1984).

Economic Loss Doctrine

"The economic loss doctrine is a judicially created rule that governs the ability of a plaintiff to bring a tort action when the only damages claimed by such plaintiff are economic losses." Coker v. Siler, 304 P.3d 689, 693 (Kan. App. Ct. 2013). "The economic loss doctrine's often-stated purpose is to preserve distinctions between tort and contract law." Rinehart v. Morton Bldgs., Inc., 305 P.3d 622, 627 (Kan. 2013).

In David v. Hett, the Supreme Court of Kansas overruled prior precedent and held that the economic loss doctrine did not apply to homeowners' claims against a residential contractor: "[W]e reject the Prendiville court's determination that the same reasons justifying the economic loss doctrine's limitation in product liability lawsuits apply with equal force against a service contractor in the residential construction context." David v. Hett, 270 P.3d 1102, 1114 (Kan. 2011).

Although the economic loss doctrine does not preclude a plaintiff from seeking economic damages for negligently performed residential construction services, Id. at 1115, a tort claim will survive only if the plaintiff can establish that the construction worker owed the plaintiff a duty imposed by law, independent of the underlying construction contract. Id. at 1114 (citation omitted). "To do this, the pleadings must be examined to determine the nature of the duty alleged to have been breached." Id. The Hett court described this distinction:

> Whether a claim sounds in tort or contract is determined by the nature and substance of the facts alleged in the pleadings. Nelson v. Nelson, 288 Kan. 570, 582, 205 P.3d 715 (2009); Malone, 220 Kan. at 374, 552 P.2d 885. A breach of contract claim is the failure to perform a duty arising from a contract, and a tort claim is the violation of duty imposed by law, independent of the contract. 220 Kan. at 374, 552 P.2d 885. But the fact that the parties have a contractual relationship does not necessarily control the inquiry because legal duties may arise even though the parties also have a contract.

Id.

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Two years, for an "action for injury to the rights of another, not arising on contract." Kan. Stat. Ann. § 60-513(a)(4).
- Statute of Repose:
  - Section 60-513(b) sets forth the rule as to when a cause of action in tort is deemed to accrue, which is not "until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until sometime after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, *but in no event shall an action be commenced more than 10 years* beyond the time of the act giving rise to the cause of action." (emphasis added). The Court of Appeals of Kansas has held that

whether an injury is "reasonably ascertainable" depends not on a plaintiff's knowledge of the extent of the injury, but the fact of the injury. See Roof-Techs Int'l, Inc. v. State, 57 P.3d 538, 546 (Kan. Ct. App. 2002) ("The fact Roof–Techs may not have fully comprehended the impact of the delays is insufficient to toll the statute of limitations.").

Additional Issues

- The economic loss doctrine does not apply in the context of negligent misrepresentation claims: "We hold negligent misrepresentation claims are not subject to the economic loss doctrine because the duty at issue arises by operation of law and the doctrine's purposes are not furthered by its application under these circumstances. We leave for another day whether the doctrine should extend elsewhere." Rinehart v. Morton Bldgs., Inc., 305 P.3d 622, 632-33 (Kan. 2013).

Pattern Jury Instructions

The Kansas Pattern Civil Jury Instructions contain a civil jury instruction for professional negligence, but not a specific instruction for architectural, engineering, or design professionals. However, the instruction is listed as applying to "Other Professions" apart from the medical and legal fields:

> In performing professional services, *(a)(an)*_____ has a duty to use that degree of care and skill which would be used by a reasonably competent _____providing similar services *(in the same community or similar communities)* and acting in similar circumstances.

Pattern Inst. Kan. Civil 123.70. The notes for this instruction provide:

> This instruction should be used when the claim of liability is founded upon breach of a duty imposed by law. The particular profession (accountant, architect, engineer, pharmacist, surveyor, etc.) should be inserted. Liability may be claimed for breach of an express contract or a fiduciary duty. *See* PIK 4th Chapter 124.00, Contracts, and PIK 4th Chapter 125.00, Fiduciary Relationships. The action may also be based upon breach of implied warranty. In those rare or unusual cases in which the standard of care may be determined by the locality, the material in parentheses should be included.

Pattern Inst. Kan. Civil 123.70.

KENTUCKY

Standard of Care

"The duty of care in Kentucky of licensed professionals, such as engineers and architects, who present themselves as having special knowledge, skill or expertise is to perform according to the standards of the profession . . . ." Logsdon v. Cardinal Indus. Insulation Co., No. 2004-CA-002516-MR, 2006 WL 2382501, at *4 (Ky. Ct. App. Aug. 18, 2006) (citing Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d 245, 249 (Ky. 1992)). "To determine whether the degree of care and skill exercised by a professional in a given case meets the standard of care, the act or failure to act is judged by the quality of professional conduct customarily provided by members of that profession." Id. at *5 (citing Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky. 1979)).

Specifically, "[a]n architect is liable for damages occasioned by defective plans but he does not undertake that plans will be absolutely perfect, and is liable only for a failure to exercise reasonable skill in the preparation of the plans." Id. at *6 (citing Kortz v. Kimberlin, 165 S.W. 654, 655 (Ky. 1914)).

Restatement

Kentucky has not adopted Restatement (Second) of Torts § 299A. A footnote in Blair v. Eblen, 461 S.W.2d 370, 373 (Ky. 1970) referred to § 299A, but the court cited this section of the Restatement as part of a general discussion regarding the "community standard" rule in medical malpractice cases and how courts were increasingly rejecting this approach, in disagreement with the Restatement. There are no other Kentucky cases citing this section.

Elements of a Claim

Negligence requires proof that:

1) The defendant owed the plaintiff a duty of care

2) The defendant breached the standard by which his or her duty is measured

3) Consequent injury

Pathways, Inc. v. Hammons, 113 S.W.3d 85, 88 (Ky. 2003).

> "Consequent injury" consists of what hornbooks separate into two distinct elements: actual injury or harm to the plaintiff *and* legal causation between the defendant's breach and the plaintiff's injury. Duty, the first element, presents a question of law. Breach and injury, are questions of fact for the jury to decide. The last element, legal causation, presents a mixed question of law and fact.

Id. at 88-89 (citations omitted). "To recover for negligence, there must be, at a minimum, a negligent act or omission and legally cognizable damages." Alagia, Day, Trautwein & Smith v. Broadbent, 882 S.W.2d 121, 126 (Ky. 1994).

Expert Testimony

"In a professional negligence case, expert testimony is ordinarily required to establish the standard of care; an exception is recognized where the negligence of the professional is so apparent that a layperson would have no difficulty recognizing it." Logsdon v. Cardinal Indus. Insulation Co., No. 2004-CA-002516-MR, 2006 WL 2382501, at *5 (Ky. Ct. App. Aug. 18, 2006) (citing Baptist Health Care Sys., Inc. v. Miller, 177 S.W.3d 676, 681 (Ky. 2005)). The court in Logsdon held that establishing the proper standard of care applicable to architects and engineers in an asbestos exposure case required expert testimony because professional architects' and engineers' use of asbestos in commercial construction in the 1950s was not within the common knowledge of laypersons. Id.

Relevant Statutes and Regulations

- 201 Ky. Admin. Regs. 10:030.:

  Kentucky's Board of Landscape Architects has promulgated a code of ethics applicable to professional landscape architects.

- 201 Ky. Admin. Regs. 18:142.:

  Kentucky's Board of Licensure for Professional Engineers and Land Surveyors has set forth a code of professional practice and conduct.

- 201 Ky. Admin. Regs. 19:095.:

  Section 2. Gross Incompetence and Gross Negligence Defined. The following acts or omissions by an architect shall be deemed to be gross incompetence or gross negligence within the meaning of the law:

  (1) Willfully failing to use reasonable care and diligence in his professional practice, resulting in a building or structure being improperly constructed to the detriment of the occupants.

  (2) Willfully failing to use reasonable care and diligence in preparing drawings, specifications, and other documents relating to the design and construction of buildings for the protection of a client in all relationships as agent of the client.

The above regulations were not cited or applied in any Kentucky cases involving negligence actions against engineers, architects, or land surveyors.

Economic Loss Doctrine

The economic loss doctrine is alive and well in Kentucky. "Faced squarely with a classic case for application of the economic loss rule, we hold that the rule applies in Kentucky." Giddings & Lewis, Inc. v. Indus. Risk Insurers, 348 S.W.3d 729, 738 (Ky. 2011) (holding that Kentucky applies the economic loss doctrine in a products liability case).

The economic loss doctrine has been held applicable to claims brought against an engineering firm for the negligent installation of a faulty transformer. See Cincinnati Ins. Companies v. Staggs & Fisher Consulting Eng'rs, Inc., No. 2008-CA-002395-MR, 2013 WL 1003543, at *4 (Ky. Ct. App. Mar. 15, 2013) (affirming dismissal of claims based on economic loss doctrine). Note, however, that this case was later called into doubt by the Court of Appeals of Kentucky in D.W. Wilburn, Inc. v. K. Norman Berry Assocs., Architects, PLLC, No. 2015-CA-001254-MR, 2016 WL 7405774, at *6-7 (Ky. Ct. App. Dec. 22, 2016). The court questioned whether the economic loss rule should be extended beyond the realm of products liability actions but ultimately did not answer the question. Instead, the court in D.W. Wilburn found that the economic loss doctrine was inapplicable to claims of negligent misrepresentation:

> Whatever limitations on the economic loss rule that our Supreme Court ultimately accepts or rejects, we are convinced that it does not apply to a claim under Section 552 [of the Restatement] where there is no contractual relationship between the parties. It is the very purpose of the tort to compensate purely economic losses when there is no contractual remedy available but there is a breach of the duty described in that Section. To apply the rule would essentially eviscerate the tort.

D.W. Wilburn, Inc., 2016 WL 7405774, at *7 (holding that "the economic loss doctrine does not apply to a claim of negligent misrepresentation in the architect/contractor scenario.").

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - One year, as it pertains to the rendering of professional services. See Ky. Rev. Stat. Ann. § 413.245. Kentucky defines "professional services" as "any service rendered in a profession required to be licensed, administered and regulated as professions in the Commonwealth of Kentucky, except those professions governed by KRS 413.140." Ky. Rev. Stat. Ann. § 413.243. The one-year limitations period set forth in Section 413.245 has been applied to cases involving engineering services. See Generali-U.S. Branch v. Lachel & Assocs., Inc., No. 3:16-CV-595-DJH, 2017 WL 6999998, at *3 (W.D. Ky. Aug. 7, 2017). "The statute of limitations begins to run when a plaintiff encounters a defect or incident from which the plaintiff can be certain that damages would flow." Lakeshore Eng'g v. Richmond Utils. Bd., No. CIV.A. 12-121-KKC, 2013 WL 1314192, at *2 (E.D. Ky. Mar. 27, 2013) (applying Ky. Rev. Stat. Ann. § 413.245) (internal quotations omitted).
  - One year, for claims brought against professional land surveyors. See Ky. Rev. Stat. Ann. § 413.140(1)(l).
- Statute of Repose:
  - While Kentucky has two relevant statutes of repose, one has been held unconstitutional and the other is unlikely to be upheld if properly challenged. First, Ky. Rev. Stat. Ann. § 413.135, requires claims arising out of an improvement to real property to be brought within seven years, but this statute was held unconstitutional. See Perkins v. Ne. Log

Homes, 808 S.W.2d 809, 817 (Ky. 1991); see also Bray v. KMR Const. Co., No. 2003-CA-000618-MR, 2004 WL 758392, at *1 (Ky. Ct. App. Apr. 9, 2004) (recognizing the unconstitutionality of Ky. Rev. Stat. Ann. § 413.135).

- The second applicable statute of repose requires a personal injury action against the builder of a home or other improvements to be brought within five years. See Ky. Rev. Stat. Ann. § 413.120(13) ("An action for personal injuries suffered by any person against the builder of a home or other improvements. This cause of action shall be deemed to accrue at the time of original occupancy of the improvements which the builder caused to be erected."). A predecessor statute with nearly identical language was held unconstitutional in Saylor v. Hall, 497 S.W.2d 218, 224 (Ky. 1973) in an action against a builder regarding personal injury caused by a latent defect. A later decision by the Court of Appeals of Kentucky applied Ky. Rev. Stat. Ann. § 413.120(13) to a case involving an open and obvious defect and found that the reasoning in Saylor was inapplicable due to this distinguishing fact. While the plaintiff also challenged the constitutionality of Ky. Rev. Stat. Ann. § 413.120(13), the court found that the plaintiff had not followed the proper procedure to do so, and thus the question regarding the statute's constitutionality was not properly presented to the court. See Breedlove v. Smith Custom Homes, Inc., 530 S.W.3d 481, 485-86 (Ky. Ct. App. 2017).

PATTERN JURY INSTRUCTIONS

Kentucky does not have a specific pattern instruction for the standard of care for design professionals or professional negligence.

LOUISIANA

STANDARD OF CARE

In Louisiana, an architect, engineer, or design professional will not be held liable for negligence so long as they performed their services "with the same degree of skill and care exercised by others in the same profession in the same general area." See Holzenthal v. Sewerage & Water Bd. of New Orleans, 2006-0796, p. 46 (La. App. 4 Cir. 1/10/07); 950 So. 2d 55, 83; see also Greenhouse v. C.F. Kenner Assocs. Ltd. P'ship, 98-0496, p. 7 (La. App. 4 Cir. 11/10/98); 723 So. 2d 1004, 1008.

Similarly, in Seiler v. Ostarly, 525 So. 2d 1207, 1209 (La. Ct. App. 1988), the court explained:

> [I]n the absence of an express contractual provision to the contrary, the architect *does not guarantee the owner a perfect plan* or a satisfactory result. He is not liable for mere errors of judgment. His liability attaches only when his conduct falls below the standard of skill and care exercised by others engaged in the same profession in the same locality.

In Seiler, the court determined that the defendant, Mouledous, was not acting in the full capacity as an architect, but rather was assisting the plaintiff "in some specified function and charged accordingly." Id. at 1209. Although the plans contained drawings for a slab, they did not contain specifications for footing construction, nor did they contain full specifications and general conditions for the construction. Thus, the trial court concluded that Mouledous was hired to draw line plans for the triplex and was paid an hourly rate for his work and his "draftsman's work." Id. Nevertheless, Mouledous did inquire of the parish building inspector and other architects in the area as to whether pilings were used in the area and was informed pilings were unnecessary. Also, Mouledous had constructed apartments for himself in the subdivision, one of which was no more than 300 feet from the plaintiff's property, without using pilings. Therefore, the court noted, in dicta, that a close review of the expert testimony indicated Mouledous acted with the same skill and care customarily employed by others in his profession. Thus, even if the court had concluded Mouledous's duty went further than mere preparation of line plans, it found that Mouledous's acts were not below the appropriate standard for the locality.

RESTATEMENT

Louisiana has not expressly adopted the Restatement (Second) of Torts § 299A.

ELEMENTS OF A CLAIM

To succeed against an architect, engineer, or design professional, a plaintiff must establish:

1) A standard of care

2) The professional's breach of the standard

3) That the breach caused the plaintiff's damages

Holzenthal, 950 So. 2d at 82.

EXPERT TESTIMONY

"Unless lay persons can infer negligence by applying common sense standard, expert testimony is required to establish the applicable standard of care." Greenhouse, 723 So. 2d at 1008. Given this, failure to submit expert testimony to prove the standard of care is considered a "fatal omission." Id. (affirming dismissal of the plaintiff's claims on summary judgment, where the plaintiff's expert offered no testimony that the engineering firms' services deviated from the standard of care applicable to engineers in the New Orleans area); see also Sams v. Kendall Const. Co., 499 So. 2d 370, 374 (La. Ct. App. 1986) ("In this case, there was no expert testimony presented to establish the required standard of care for this locality, nor was there any expert testimony offered to establish that [the architect's] conduct fell below that standard. Under these circumstances we cannot determine if [the architect] breached its duty to Plaintiff or any other party to the contract. Because of this failure of proof, we reverse the judgment against [the architect].").

Note, however, that expert testimony is not always required to establish the standard of care if "lay persons can infer negligence" by using a "common sense standard." Colbert v. B.F. Carvin Const. Co., 600 So. 2d 719, 729 (La. Ct. App. 1992) (citing Milton J. Womack, Inc. v. House of Representatives of State, 509 So. 2d 62, 65 (La. Ct. App. 1987)).

RELEVANT STATUTES AND REGULATIONS

- La. Civ. Code Ann. art. 2315:

  > A. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.
  >
  > B. Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person. Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease. Damages shall include any sales taxes paid by the owner on the repair or replacement of the property damaged.

- La. Civ. Code Ann. art. 2316:

  > Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill.

Economic Loss Doctrine

Louisiana has not adopted the economic loss doctrine. See Cedarholley Inv., LLC v. Pitre, 2016-0641, p. 4-5 (La. App. 1 Cir. 12/22/16); 209 So. 3d 850, 853 ("[T]he Louisiana Supreme Court abandoned a mechanical application of the economic-loss rule in favor of a case-by-case application of the traditional duty/risk analysis.").

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - "An action against a contractor or an architect on account of defects of construction, renovation, or repair of buildings and other works is subject to a liberative prescription of ten years." La. Civ. Code Ann. art. 3500; see also La. Civ. Code Ann. art. 3492 (providing a one-year statute of limitations for delictual actions, which include intentional misconduct, *negligence*, abuse of right, and liability without negligence). "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained." Id. See also La. Civ. Code Ann. art. 3493 ("When damage is caused to immovable property, the one year prescription commences to run from the day the owner of the immovable acquired, or should have acquired, knowledge of the damage.").

- Statute of Repose:
  - Except as otherwise provided in this Subsection, no action, whether ex contractu, ex delicto, or otherwise, including but not limited to an action for failure to warn, to recover on a contract, or to recover damages, or otherwise arising out of an engagement of planning, construction, design, or building immovable or movable property which may include, without limitation, consultation, planning, designs, drawings, specification, investigation, evaluation, measuring, or administration related to any building, construction, demolition, or work, shall be brought against any person performing or furnishing land surveying services, as such term is defined in R.S. 37:682, including but not limited to those services preparatory to construction, or against any person performing or furnishing the design, planning, supervision, inspection, or observation of construction or the construction of immovables, or improvement to immovable property, including but not limited to a residential building contractor as defined in R.S. 37:2150.1:

    (1)(a) More than ***five years*** after the date of registry in the mortgage office of acceptance of the work by owner.

    (b) If no such acceptance is recorded within six months from the date the owner has occupied or taken possession of the improvement, in whole or in part, ***more than five year***s after the improvement has been thus occupied by the owner.

    La. Stat. Ann. § 9:2772 (emphasis added).

PATTERN JURY INSTRUCTIONS

- § 3:11. Specific duties—Architects and engineers, 18 La. Civ. L. Treatise, Civil Jury Instructions § 3:11 (3d ed.): "In an action such as this, plaintiff has to prove negligence on the part of the defendant architect [engineer]. As with other professionals, an architect [engineer] is required to exercise that degree of professional care and skill customarily employed by other architects [engineers] in a similar community under similar circumstances. In order to prove negligence on the part of the defendant, plaintiff must demonstrate that the defendant did not have that customary degree of skill or care, or failed to exercise it, and that plaintiff was damaged as a result."

MAINE

STANDARD OF CARE

Maine has not adopted a specialized standard of care for engineers, architects, or design professionals. However, in other professional negligence cases, including medical and attorney malpractice cases and negligence cases against land surveyors, the appropriate standard is the skill, prudence, diligence, and/or care that an ordinarily competent professional would provide under like circumstances. See Graves v. S.E. Downey Registered Land Surveyor, P.A., 885 A.2d 779, 782 (Me. 2005).

RESTATEMENT

Maine has cited the Restatement (Second) of Torts § 299A in cases involving contractor/subcontractor disputes, see Maravell v. R.J. Grondin & Sons, 914 A.2d 709, 714 n.4 (Me. 2007), and social workers, see Rowe v. Bennett, 514 A.2d 802, 804 (Me. 1986), but there are no reported cases applying the standard to architects, engineers, or design professionals.

ELEMENTS OF A CLAIM

In Maine, the standards for demonstrating the elements of professional negligence do not differ from profession to profession. Graves, 885 A.2d at 782. Rather, the plaintiff in a professional negligence action must:

1) Establish the appropriate standard of care

2) Demonstrate that the defendant deviated from that standard

3) Prove that the deviation caused the plaintiff's damages

Id.

EXPERT TESTIMONY

"In most cases, the plaintiff must show by expert testimony that the practice followed by the defendant was something other than that which the average and reasonably skilled professional would have followed," unless the harmful results are sufficiently obvious as to lie within common knowledge. Leavitt v. Waltman & Co., Inc., No. CIV.A. CV-03-033, 2003 WL 23185872, at *2 (Me. Super. Dec. 11, 2003).

RELEVANT STATUTES AND REGULATIONS

- ME. REV. STAT. ANN. tit. 24, § 2903; ME. REV. STAT. ANN. tit. 24, § 2853:

To initiate an action for professional negligence, the claimant is required to serve a written notice of claim on the person accused of professional negligence under Section 2903. The notice must set forth, "under oath, the professional negligence alleged and the nature and circumstances of the injuries and damages alleged," pursuant to Section 2853.

- Me. Rev. Stat. tit. 32, § 1251-1362:

  Maine also has statutes applicable professionals (architects, landscape architects, and interior designers.

- CODE ME. R. tit. 02-322 Ch. 4, § 2; ME. R. tit. 02-288 Ch. 10, § 1, et seq.:

  (regulations applicable to architects, landscape architects, and interior designers).

ECONOMIC LOSS DOCTRINE

Maine applies the economic loss doctrine to preclude recovery of purely economic losses under tort theories. See, e.g., Oceanside at Pine Point Condo. Owners Ass'n v. Peachtree Doors, Inc., 659 A.2d 267 (Me. 1995) (dismissing a plaintiff's tort claims for economic losses associated with defects in purchased condominium units); see also Bayreuther v. Gardner, No. CIV.A. CV-99-352, 2000 WL 33675355, at *2 (Me. Super. June 21, 2000) (applying the economic loss doctrine to a negligence claim against the designer of a defective septic system that allegedly diminished the value of the plaintiff's property). Nevertheless, at least one court has expressed reservation as to whether the economic loss doctrine is specifically applicable to service contracts. See Pendleton Yacht Yard, Inc. v. Smith, No. CIV.A. CV-01-047, 2003 WL 21714927, at *4 (Me. Super. Mar. 24, 2003) (discussing the evolution of the doctrine in Maine but declining to apply it in a case involving survey and design services in the marine industry, in part where disputed facts existed as to the nature of the contract between the plaintiff and defendant).

STATUTE OF LIMITATIONS AND STATUTE OF REPOSE

- ME. REV. STAT. ANN. tit. 14, § 752-A:
  - All civil actions for malpractice or professional negligence against architects or engineers duly licensed or registered under Title 32 shall be commenced within 4 years after such malpractice or negligence is discovered, but in no event shall any such action be commenced more than 10 years after the substantial completion of the construction contract or the substantial completion of the services provided, if a construction contract is not involved. The limitation periods provided by this section shall not apply if the parties have entered into a valid contract which by its terms provides for limitation periods other than those set forth in this section.

Additional Issues

- Champagne v. Mid-Maine Med. Ctr., 711 A.2d 842, 844 n.3 (Me. 1998) (finding that negligent infliction of emotional distress is "simply a *type* of professional negligence claim" and that, "[i]n the absence of any allegation of physical injury resulting from the Defendants' conduct, [Plaintiff's] cause of action for professional negligence is necessarily limited to NIED.").

- Pawlendzio v. Haddow, 148 A.3d 713, 715 (Me. 2016) (affirming summary judgment in favor of the defendant where the plaintiff failed to present any expert opinion establishing either the standard of care of an "ordinarily competent lawyer" or how the attorney's conduct deviated from that standard).

Pattern Jury Instructions

There are no pattern jury instructions publicly available for Maine.

MARYLAND

STANDARD OF CARE

In Maryland, architects, engineers, and design professionals are required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities. Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, 130 A.3d 1024, 1034 (Md. Ct. Spec. App. 2016) (citing Restatement (Second) of Torts § 299A (1965)), aff'd, 155 A.3d 445 (Md. 2017). Under Maryland law, "a party is presumed to have acted with due skill and care and a party alleging otherwise bears the burden of overcoming that presumption." Bd. of Trs. v. Patient First Corp., 120 A.3d 124, 135 (Md. 2015).

RESTATEMENT

The Maryland Court of Appeals has not explicitly adopted the Restatement (Second) of Torts § 299A, but the Court of Special Appeals of Maryland has recently relied upon this provision to articulate the standard of care in a professional negligence action. See Balfour, 130 A.3d at 1034.

ELEMENTS OF A CLAIM

In Maryland, the elements required to establish a cause of action for professional negligence are the same as those in a standard negligence action; the professional, however, is held to the standard of care that prevails in that profession. Balfour, 130 A.3d at 1034 (citing Crockett v. Crothers, 285 A.2d 612 (Md. 1972)). "[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." Id. (citing Restatement (Second) of Torts § 299A (1965)).

A complaint for a cause of action for negligence must allege facts sufficient to support a finding of:

1) A duty to the plaintiff (or to a class of which the plaintiff is a part)

2) A breach of that duty

3) A causal relationship between the breach and the harm

4) Damages suffered

Id. "Absent a duty of care, there can be no liability in negligence." Id.

EXPERT TESTIMONY

"[E]xpert testimony is generally necessary to establish the requisite standard of care owed by [a] professional." Malinowski v. The Lichter Grp., LLC, 165 F. Supp. 3d 328, 336–37 (D. Md. 2016) (quoting Schultz v. Bank of Am., N.A., 990 A.2d 1078, 1086 (Md. 2010)).

Relevant Statutes and Regulations

- Md. Code Ann., Cts. & Jud. Proc. § 3-2C-01, *et seq.*:

  > Maryland has court rules governing professional malpractice claims. Section 3-2C-02 requires, among other things, a plaintiff bringing a professional malpractice claim to file a Certificate of a Qualified Expert with the court within 90 days of filing the complaint, or else face dismissal of the claim.

- Md. Code Ann., Bus. Occ. & Prof. § 1-101 *et seq.*:

  > Maryland also has a statutory section titled "Business Occupations and Professionals." There are sections applicable to architects (Section 3-101 through 3-702), stationary engineers (Section 6.5-101 through 6.5-502), certified interior designers (Section 8.5-101 through 8.5-602), landscape architects (Section 9-101 through 9-702), and professional engineers (Section 14-101 through 14-602), but these provisions do not offer specific guidance as to the duty of care these professionals owe.

Economic Loss Doctrine

In Maryland, the economic loss doctrine has been found to preclude the recovery of purely economic loss, including claims for professional negligence brought by a contractor against design engineering firm. See, e.g., Balfour, 130 A.3d at 1036-38. "In Maryland, the economic loss doctrine bars recovery when the parties are not in privity with one another or the alleged negligent conduct did not result in physical injury or risk of severe physical injury or death." Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, 155 A.3d 445, 452 (Md. 2017). Thus, a construction contractor may only be able to recover for economic losses against a design professional where there is no contractual privity in limited situations involving death, personal injury, property damage, or the risk of death or serious personal injury. See Balfour, 130 A.3d at 1036-38. However, the economic loss doctrine may not always bar recovery of economic damages. See Balfour, 155 A.3d at 451-57 (discussing the development and contours of the doctrine in Maryland). In cases with no safety concerns, where the risk is purely economic and where there is a lack of contractual privity, the economic loss doctrine will apply unless there is an "intimate nexus" between the parties—otherwise known as a "privity equivalent"—which can form the basis for imposing a tort duty. Id. at 453-54.

> Put differently, the intimate nexus test requires the relationship between the parties to be sufficiently close—or intimate—to support finding a tort duty. In these cases, if an intimate nexus was established, a duty of care was owed, and the defendant could be held liable to the plaintiff for pecuniary losses.

Id. at 453. The Court of Appeals of Maryland in Balfour declined to extend the "privity-equivalent nexus test" to design professionals in a case involving government construction projects, therefore refusing to create an exception to the economic loss doctrine in that context. Nevertheless, the

court's holding was narrow, and the court explicitly noted that "we do not hold that the test cannot apply to design professionals in other contexts." Id. at 461; see also Balfour, 130 A.3d at 1039 n.12 ("We limit our holding to cases involving government construction cases and do not reach whether or not intimate nexus concepts of extra-contractual duty may be applied in a private-sector construction case.").

STATUTE OF LIMITATIONS AND STATUTE OF REPOSE

- Statute of Limitations:
  - Three years, for civil matters. See Md. Code Ann., Cts. & Jud. Proc. § 5-101. Maryland applies the discovery rule, which provides that the "limitations begin to run when a claimant gains knowledge sufficient to put her on inquiry . . . [a]s of that date, she is charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation. Lumsden v. Design Tech Builders, Inc., 749 A.2d 796, 801 (Md. 2000).
  - Under Maryland's discovery rule, the statute of limitations begins to run when a claimant gains knowledge sufficient to put the claimant on inquiry. As of that date, the claimant is charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation. Lumsden v. Design Tech Builders, Inc., 358 Md. 435 (2000).
- Statute of Repose:
  - 20 years, for injuries resulting after improvements to property, which starts to accrue "after the date the entire improvement first becomes available for its intended use." See MD. CODE ANN., CTS. & JUD. PROC. § 5-108. Under subsection (b) of this statute, an even shorter statute of repose applies to architects, professional engineers, and contractors, precluding a cause of action for damages "when wrongful death, personal injury, or injury to real or personal property, resulting from the defective and unsafe condition of an improvement to real property, occurs more than **10 years** after the date the entire improvement first became available for its intended use." (emphasis added).

ADDITIONAL ISSUES

- The Maryland Court of Appeals has held that builders and architects have a duty, even where no privity exists between the parties, to use due care in the design, inspection, and construction of a project that extends to "persons foreseeably subjected to the risk of personal injury because of a latent and unreasonably dangerous condition resulting from that negligence." Council of Co-Owners Atlantis Condo., Inc. v. Whiting-Turner Contracting Co., 517 A.2d 336, 338 (Md. 1986).
  - Where a dangerous condition is discovered before it results in injury, an action in negligence will lie for the recovery of the reasonable cost of correcting the condition. Id.

Pattern Jury Instructions

- Maryland has pattern jury instructions for general negligence claims (Chapter 19) and for medical and legal professional liability claims (Chapter 27), but no specific instructions applicable to architects, engineers, or design professionals.

MASSACHUSETTS

STANDARD OF CARE

Massachusetts does not have a particularized standard of care for architects, engineers, and design professionals. Rather, "[a]rchitects and engineers, like other professionals, must act with reasonable care. In this sense, the general rules governing the liability of architects and engineers do not differ markedly from those governing lawyers and accountants. What does differ is that the relationship between an owner and an architect or engineer will almost always be the subject of a detailed contract. These contracts will usually define with some precision the scope of the undertaking and may affect the standard of care in a particular instance." Massachusetts Superior Court Civil Practice Jury Instructions, Volume II, Chapter 18, Section 13.

As stated by the Superior Court of Massachusetts, "[b]ut whether Plaintiff's duty of care required it to design a building that would comply with local zoning requirements is a question of fact. The standard of care owed by architects is a duty to do as good a job as one should expect from professionals in the same field in similar circumstances. Architects, like other professionals, do not have a duty to be perfect in their work, but rather are expected to exercise that skill and judgment which can be reasonably expected from similarly situated professionals. Establishing the applicable standard of care owed by a member of some specialized profession typically requires expert testimony by someone with sufficient knowledge of the practices of professionals in the same filed to assert that the average qualified practitioner would, or would not, take a particular course of action in the relevant circumstances." Rauhaus Freedenfeld & Associates, LLP v. Prince, 2014 WL 12721282 (Superior Court of Massachusetts) (2014).

Notwithstanding the aforementioned generality, Massachusetts cases often articulate the standard of care for design professionals as:

> Architects, like other professionals, do not have a duty to be perfect in their work, but rather are expected to exercise "that skill and judgment which can be reasonably expected from similarly situated professionals."

LeBlanc v. Logan Hilton Joint Venture, 463 Mass. 316, 329 (Supreme Judicial Court of Massachusetts, Suffolk) (2012) (citing Klein v. Catalano, 386 Mass. 701, 718, 437 N.E.2d 514 (1982)). See also Van Sicklin v. Nantucket Surveyors, LLC, 94 Mass.App.Ct. 1106, *3 (Appeals Court of Massachusetts) (2018).

RESTATEMENT

Massachusetts appears to follow the Restatement (Second) of Torts § 299A.See, e.g., McCormick v. B.F. Goodrich Co., 8 Mass. App. Ct. 885 (Mass. App. Ct. 1979).

ELEMENTS OF A CLAIM

Massachusetts generally articulates the elements of a claim for negligence as follows:

1) The defendant owed the plaintiff a legal duty

2) Breach of that duty proximately caused injury to the plaintiff

See, e.g., Milton v. Mavridis, 138 N.E. 3d 1052, **2 (Appeals Court of Massachusetts) (2019) (citing Petrell v. Shaw, 453 Mass. 377, 385 (2009).

Expert Testimony

Under Massachusetts law, "[e]xpert testimony is generally needed to establish this professional standard of care, … [except] where the malpractice 'is so gross or obvious that laymen can rely on their common knowledge to recognize or infer negligence.'" Rauhaus Freedenfeld & Associates, LLP v. Prince, 2019 WL 1597455, *1 (Superior Court of Massachusetts, Suffolk County) (2019) (internal quotation omitted).

Relevant Statutes and Regulations

- 231 CMR 4.01: Rules of Professional Conduct:

  > (a) In practicing architecture, an architect shall act with reasonable care and competence, and shall apply the technical knowledge and skill which is ordinarily applied by architects of good standing, practicing in the same locality.

Economic Loss Doctrine

In Massachusetts, the economic loss doctrine has been applied to preclude the recovery of purely economic loss under tort theories, including engineering malpractice. See, e.g., 695 Atlantic Ave. Co., LLC v. Commercial Construction Consulting, Inc., 64 Mass. App. Ct. 1109 (Appeals Court of Massachusetts) (2005).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - "Action of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property, other than that of a public agency as defined in section thirty-nine A of chapter seven shall be commenced only within three years next after the action accrues." Massachusetts General Laws Annotated 260 § 2 B.
  - The Supreme Court of Massachusetts articulated "[a] statute of limitations limits the time in which a plaintiff may bring an action after the cause of action accrues. A cause of action does not accrue until a plaintiff knows or reasonably should know that he or she has suffered harm and that the harm was caused by the [defendant's] conduct. Consequently, the statute of limitations clock does not begin to run until a plaintiff knows, or should know, that he or she has suffered an injury arising from the defendant's conduct. If that knowledge is delayed because the defendant has fraudulently concealed the injury, or otherwise misled the plaintiff regarding the cause of his or her injury, the clock is tolled until the plaintiff is put on reasonable notice of

the defendant's responsibility for his or her injury. The statute of limitations for actions of tort for damages arising out of any negligence in the design, planning, improvement, or construction of real property of real property is three years." Bridgwood v. A.J. Wood Construction, Inc., 480 Mass. 349, 359 (Supreme Judicial Court of Massachusetts) (2018) (citations omitted).

- Similarly, "[u]nder our discovery rule, a cause of action for negligence accrues when a plaintiff knows or reasonably should know that it has sustained appreciable harm as a result of a defendant's negligence. What a plaintiff knew or should have known is a question of fact that is often unsuited for summary judgment…However, when the facts regarding discovery of harm are disputed, the question may be decided as matter of law." Massachusetts Housing Opportunities Corp. v. Whitman & Bingham Associates, P.C., & another, 83 Mass. App. Ct., 325, 328 (Appeals Court of Massachusetts) (2013).

- Statute of Repose:

  - As described by the Supreme Court of Massachusetts, "[s]tatutes of repose and statutes of limitations are different kinds of limitations on actions. A statute of limitations specifies the time limit for commencing an action after the cause of action has accrued, but a statute of repose is an absolute limit which prevents a cause of action from accruing after a certain period which begins to run upon occurrence of a specific event." Bridgwood v. A.J. Wood Construction, Inc., 480 Mass. 349, 351 (Supreme Judicial Court of Massachusetts) (2018). See also, Klein v.Catalano, 386 Mass. 701 (Supreme Judicial Court of Massachusetts) (1982).

  - Massachusetts provides for a six-year statute of repose triggered by certain occurrences.

  - ",,,provided, however that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner." Massachusetts General Laws Annotated 260 § 2B

ADDITIONAL ISSUES

- "We add that an architect may provide an express warranty of a certain result. In that event, the plaintiff may maintain an action for breach of an express warranty. But in this case, the architect did not expressly guarantee a specific result." Klein v. Catalano, 386 Mass. 701, 718 (1982).

- Where a design professional "assure[d a party] that its work would be fit for an intended purpose … such an assurance [may] impose a higher standard of performance on [said design professional] than its implied warranty of reasonable care." Anthony's Pier Four v. Crandall Dry Dock Engineers, Inc., 396 Mass. 818, 828 (1986) (a design professional's assurances that its work would be fit for the intended purpose of permanently mooring a ship led to its having a higher standard of care).

PATTERN JURY INSTRUCTIONS

Massachusetts has specific pattern instruction for the standard of care for design professionals. Massachusetts Superior Court Civil Practice Jury Instructions, Volume II, Chapter 18, Section 13 instructs juries on the duty of care for professional negligence and reads as follows:

1) An architect's duty is measured by the rule of ordinary and reasonable skill usually exercised by a person in that profession. In the absence of a special agreement, an architect does not imply or guarantee a perfect plan or a satisfactory result, nor does [*he/she*[5]] impliedly guarantee that the work is fit for its intended purpose.

2) The existence and scope of the relevant standard of care, and whether or not the defendant architect [*engineer*] breached the standard, must be based on the expert testimony presented in this case.

3) The owner's approval of an architect's plans does not mean an unqualified acceptance of the plans in all of their details. The owner's acceptance does not excuse the architect from exercising ordinary care in preparing the plans. The owner has the right to rely on the architect's skill and judgment in preparing the plans.

4) An architect or engineer is liable for injuries or damage caused by [*his/her*] negligence to persons with whom [*he/she*] has no contractual relation, even though [*his/her*] work is completed and accepted by the owner before the injury or damage occurred, if it is foreseeable that the services, if negligently done, may cause damage to the property or injury to the persons using the premises.

5) The architect is the agent of the owner. As such, the architect will usually have actual or apparent authority to bind the owner. There will be no apparent authority if the contractor or other third party has actual knowledge of limitations on the architect's apparent authority.

6) Ordinarily, an architect or engineer is not liable to a person with whom [he/she] has no contractual relationship for a failure to disclose information, provided that the information the architect or engineer does disclose is accurate and not so incomplete as to be misleading.

7) In the absence of a contract provision to the contrary, an architect must use reasonable care and reasonable professional judgment when certifying the value of work to the owner. The architect may be liable to the owner for overpayments if the overpayments were caused by the architect's breach of this duty.

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[5] The portions in italics are intended to be completed by the parties.

MICHIGAN

STANDARD OF CARE

Michigan courts have articulated the standard of care for design professionals as follows: "The responsibility of an architect is similar to that of a lawyer or a physician. The law requires the exercise of ordinary skill and care common to the profession. Ambassador Baptist Church v. Seabreeze Heating and Cooling Co., c, 426 (1970) (citation omitted). See also Francisco v. Manson, Jackson & Kane, Inc., 145 Mich. App. 255, 261-262 (1985).

RESTATEMENT

Michigan follows the Restatement (Second) of Torts § 299A. See, e.g., Midwest Memorial Group LLC v. Citigroup Global Markets Inc., 2015 WL 5519398, (Court of Appeals of Michigan 2015), Stein, Hinkle, Dawe & Associates, Inc. v. Continental Cas. Co., 110 Mich. App. 410 (Court of Appeals of Michigan 1981);

ELEMENTS OF A CLAIM

Michigan generally articulates the elements of a claim for professional negligence as follows:

1) The defendant owed the plaintiff a legal duty

2) The defendant breached the legal duty

3) The plaintiff suffered damages

4) The defendant's breach was a proximate cause of the plaintiff's damages

See, e.g., Auburn Hills Tax Increment Finance Authority v. Haussman Construction Company, 2018 WL 385057, *3 (Mich. App. Jan. 11, 2018).

EXPERT TESTIMONY

Under Michigan law, "[g]enerally, expert testimony is required in a professional negligence case to establish the applicable standard of care and to demonstrate that the professional breached that standard." Nofar v. Eikenberry, 1998 WL 1989500, *1 (Mich. App. Oct. 30, 1998); see also Posen Const., Inc. v. City of Dearborn, 2015 WL 339761, *11 (Mich. App. Jan. 27, 2015).

RELEVANT STATUTES AND REGULATIONS

- Mich. Admin. Code R 339.15041:

> Rule 401.(1) In practicing architecture, an architect shall act with reasonable care and competence and shall apply the technical knowledge and skill which is ordinarily applied by architects of good standing who practice in the same or similar locality.

(2) In designing a project, an architect shall take into account all applicable state and municipal building laws and regulations. While an architect may rely on the advice of other professionals, such as attorneys, engineers, or other qualified persons, as to the intent and meaning of such laws and regulations, an architect shall not knowingly design a project in violation of such laws and regulations.

(3) An architect shall undertake to perform professional services only when he or she, together with those whom the architect may engage as consultants, is qualified by education, training, and experience in the specific technical areas involved.

(4) Professional services shall be offered and performed as follows:

A licensee shall undertake to participate only in those phases of a project in which the licensee is competent by education, training, and experience. In the areas of a project involving professional engineering or land surveying in which the licensee lacks competence, the licensee shall retain licensed or registered professional associates for those phases of that project.

An architect shall not sign or affix a seal as architect to any plans, specifications, drawings, or other related documents or work products which were not prepared by the licensee or under the licensee's direction and supervision.

Economic Loss Doctrine

In Michigan, "[i]n order for the economic loss doctrine to bar recovery in tort, there must be a transaction that provides an avenue by which the parties are afforded the opportunity to negotiate to protect their respective interests." Quest Diagnostics, Inc. v. MCI WorldCom, Inc., 254 Mich. App. 372, 381 (Court of Appeals of Michigan 2002). In Quest Diagnostics, a contractor damaged a water main while performing repair work, causing the plaintiffs to close their business for several days due to lack of running water. Id. at 374. The Court of Appeals of Michigan held that, because there was no contract governing the relationship between the plaintiffs and the contractor who performed work on the water main, the economic loss doctrine did not prevent the plaintiffs from claiming economic damages as a result of the contractor's alleged negligence, because the plaintiffs did not have any remedies in contract. Id. at 381-382. Although there was no Michigan case law directly on point related to a contract for design professionals, the Court of Appeals for Michigan has held that contracts for services do not fall within the Uniform Commercial Code (UCC) and therefore the exclusive remedy is not that of the UCC. See Higgins v. Lauritzen, 209 Mich. App. 266 (Court of Appeals of Michigan 1995). Therefore, it is unclear whether the economic loss doctrine would bar recovery for economic losses as a result of a design professionals negligence.

STATUTE OF LIMITATIONS AND STATUTE OF REPOSE

- Statute of Limitations:
  - Michigan Compiled Laws Annotated § 600.5839:

1) A personal shall not maintain an action to recover damages for injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of an improvement to real property, or an action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, unless the action is commenced within either of the following periods:

   (1) Six years after the time of occupancy of the completed improvement, use or acceptance of the improvement.

   (2) If the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer, 1 year after the defect is discovered or should have been discovered. However, an action to which this subdivision applies shall not be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

- Statute of Repose:
  - The Supreme Court of Michigan has held that § 600.5839 is both a statute of limitations and a statute of repose. "Moreover, it does not render any portion of MCL 600.5805 nugatory to hold that MCL 600.5839(1) is, as it plainly appears on its face, both a statute of repose and a statute of limitations. The periods of limitations of MCL 600.5805 for malpractice and general negligence actions remain applicable to any claim that does not involve a state licensed architect, professional engineer, land surveyor, or contractor and that is not based on an improvement to real property." Ostroth v. Warren Regency, G.P., L.L.C., 474 Mich. 36 (Supreme Court of Michigan 2006).

ADDITIONAL ISSUES

- "The duty of the architect is owed to any person lawfully on the premises; privity of contract is not required." Francisco v. Manson, Jackson & Kane, Inc., 145 Mich. App. 255, 261 (1985).

Pattern Jury Instructions

Michigan has specific pattern instruction for the standard of care for design professionals. Michigan Model Civil Jury Instructions, Chapter 30, Section 13, sets forth the pattern instruction on the duty of care for professional negligence and reads as follows:

> [1] "Professional" negligence and "malpractice" are the same. They mean the failure to do something that a [*name profession*] of ordinary learning, judgment and skill in [this community or a similar one/ [*name particular specialty*]] would do, under the same or similar circumstances as in this case. Professional negligence, or malpractice, can also mean doing something that a [*name profession/name particular specialty*] of ordinary learning, judgment and skill would not do, under the same or similar circumstances as in this case. It is for you to decide, based upon the evidence, what the ordinary [*name profession/name of particular specialty*] of ordinary learning, judgment or skill would do or would not do under the same or similar circumstance.

Further, Michigan has additional pattern jury instructions related to violations of rules and regulations promulgated by statutory authority. Specifically, Michigan Model Civil Jury Instructions, Chapter 12, Section 5, reads as follows:

> The [*name of state agency*] in Michigan has adopted certain regulations pursuant to authority given to it by a state statute. [Rule/Rules] _____ of [name of state agency] [provides/provide] that [*here quote or paraphrase applicable parts of regulation(s) as construed by the courts*].
>
> If you find that defendant violated [*this regulation/one or more of these regulations*] before or at the time of the occurrence, such [*violation/violations*] [*is/are*] evidence of negligence which you should consider, together with all the other evidence, in deciding whether defendant was negligent. If you find that defendant was negligent, you must then decide whether such negligence was a proximate cause of the [*injury/damage*] to plaintiff.

MINNESOTA

STANDARD OF CARE

Minnesota does not have a particularized standard of care for architects, engineers, and design professionals. Rather, Minnesota courts often generally articulate the standard of care for design professionals as:

> As to the existence of a duty of care, "[o]ne who undertakes to render professional services is under a duty … to exercise such care, skill, and diligence as men in that profession ordinarily exercise under like circumstances."

Pond Hollow Homeowners Ass'n v. The Ryland Group, Inc., 779 N.W.2d 920, 923 (Minn. Ct. App. 2010) (citing City of Eveleth v. Ruble, 302 Minn. 249, 253 (Minn. 1974)). See also Prichard Bros., Inc. v. Grady Co., 436 N.W.2d 460, 465 (Court of Appeals of Minnesota) (Minn. Ct. App. 1989); Gammel v. Ernst & Ernst, 245 Minn. 249, 254 (Minn. 1955) ("Ordinarily, the standards of reasonable care which apply to the conduct of auditors or public accountants are the same as those applied to lawyers, doctors, architects, engineers, and other professional men engaged in furnishing skilled services for compensation.").

The standards of professional practice are: A (*public accountant*)(*architect*)(*engineer*)(_____) must use the same degree of skill and learning as a practitioner would use who is:

1) In good standing, and

2) In a similar practice, and

3) In similar circumstances.

A (*public accountant*)(*architect*)(*engineer*)(____) must use reasonable care in applying that skill and learning in serving a client.

RESTATEMENT

Minnesota follows the Restatement (Second) of Torts § 299A. City of Eveleth v. Ruble, 302 Minn. 249, 253 (Minn. 1974).

ELEMENTS OF A CLAIM

Minnesota generally articulates the elements of a claim for professional negligence as follows:

1) The existence of a duty

2) A breach of that duty

3) The negligence was the proximate cause of the plaintiff's damages.

4) A different outcome would have been reached but for the defendant's negligence.

See, e.g., Southern Minnesota Beet Sugar Cooperative v. Agri Systems, 2019 WL 6873050, *4 (D. Minn. 2019).

Expert Testimony

Under Minnesota law, "[o]rdinarily, expert testimony is required to establish the prevailing standard of care and the consequences of departure from that standard." Pond Hollow Homeowners Ass'n v. The Ryland Group, Inc., 779 N.W.2d 920, 923 (Minn. Ct. App. 2010) (citing City of Eveleth v. Ruble, 302 Minn. 254-55 (Minn. 1974)).

Relevant Statutes and Regulations

- Minn. Stat. Ann. § 544.42:

> "professional" means a licensed attorney or architect, certified public accountant, engineer, land surveyor, or landscape architect licensed or certified under chapter 326 or 326A; and
>
> "action" includes an original claim, cross-claim, counterclaim, or third-party claim. An action does not include a claim for damages requiring notice pursuant to section 604.04;
>
> Subd. 2. Requirement. In an action against a professional alleging negligence or malpractice in rendering a professional service where expert testimony is to be used by a party to establish a prima facie case, the party must:
>
> unless otherwise provided in subdivision 3, paragraph (a), clause (2) or (3), serve upon the opponent with the pleadings an affidavit as provided in subdivision 3; and
>
> serve upon the opponent within 180 days of commencement of discovery under the Rules of Civil Procedure, rule 26.04(a) an affidavit as provided in subdivision 4.

Economic Loss Doctrine

"Minnesota has long allowed negligence actions for the recovery of economic losses resulting from the negligent performance of professional services. See City of Eveleth v. Ruble, 302 Minn. 249, 225 N.W.2d 521 (1974); Northern Petrochemical Co. v. Thorsen & Thorshov, Inc., 297 Minn. 118, 211 N.W.2d 159 (1973).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Two years, typically. Minnesota Statutes Annotated § 541.051 states:

(1) Limitation; service or construction of real property; improvements. (a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, shall be brought against anyone performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after the cause of action accrues, as specified in paragraph (c).

- "Minnesota follows the damage-accrual rule, which provides that a cause of action accrues and the statute of limitations begins to run when some damage has occurred as a result of the alleged negligence. Some damage is defined broadly, and the cause of action accrues on the occurrence of any compensable damage, whether specifically identified in the complaint or not." Veit v. ProSource Technologies, Inc., 879 N.W.2d 8, 10 (Minn. Ct. App. 2016).

- Statute of Repose:

  - 10 years. Minnesota Statutes Annotated § 541.051 states:

    …nor in any event shall such a cause of action accrue more than ten years after substantial completion of the construction. Date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose.

Additional Issues

- "The reasonable skill and judgment expected of professionals must be rendered to those who foreseeably rely upon the services." Waldor Pump & Equipment Co. v. Orr-Schelen Mayeron & Associates, Inc., 386 N.W.2d 375, 377 (Minn. Ct. App. 1986).

- "The circumstances to be considered in determining the standard of care, skill, and diligence to be required in this case include the terms of the employment agreement, the nature of the problem which the supplier of the service represented himself as being competent to solve, and the effect reasonably to be anticipated from the proposed remedies upon the balance of the system." City of Eveleth v. Ruble, 302 Minn. 249, 253 (Minn. 1974).

Pattern Jury Instructions

Minnesota has specific pattern instruction for the standard of care for design professionals. Minnesota Civil Jury Instructions Guide, Category 80, Section 75 sets forth the model instruction for the duty of care for professional negligence and reads as follows:

A (public accountant)(architect)(engineer) () must use the same degree of skill and learning as a practitioner would use who is:

1. In good standing, and

2. In a similar practice, and

3. In similar circumstances.

A (public accountant)(architect)(engineer) () must use reasonable care in applying that skill and learning in serving a client.

Duty of Public Accountant, Architect, Engineer, and Other Professional, 4A Minn. Prac., Jury Instr. Guides--Civil CIVJIG 80.75 (6th ed.).

MISSISSIPPI

STANDARD OF CARE

Mississippi does not have a statutory standard of care for architects, engineers, and design professionals. Rather, Mississippi courts often articulate the standard of care as follows: "In Mississippi the design professionals (architects/engineers) have a duty to exercise ordinary professional skill and diligence." Holmes v. Wink, 811 So. 2d 330, 334 (Miss. Ct. App. 2001) (citing Magnolia Const. Co. v. Mississippi Gulf South Engineers, Inc., 518 So. 2d 1194, 1202 (Miss. 1988); See also Family Dollar Stores of Mississippi, Inc. v. Montgomery, 946 So. 2d 426, 430 (Miss. Ct. App. 2006) ("Engineers and architects are held to a duty to 'exercise ordinary professional skill and diligence,' duties usually controlled by the contracts between the parties.") (citations omitted); Hobson v. Waggoner Engineering, Inc., 878 So. 2d 68, 77 (Miss. Ct. App. 2003)

By way of example, in Evan Johnson & Sons Const., Inc. v. State, a dispute arose between the state of Mississippi and Evan Johnson & Sons Construction, Inc., over the construction of an armory in Mississippi. Evan Johnson & Sons Const., Inc. v. State, 877 So. 2d 360 (Miss. 2004). Specifically, a dispute arose over the design and implementation of a curved roof. Id. at 361. Significantly, although Evan Johnson sued under a theory of negligent design, the court held that this case was truly a breach of contract dispute because the real dispute was over whether it was impossible to perform under the contract due to negligent design. Id. at 367. Ultimately, the court held that it was not an impossible contract to perform because a second contractor was able to complete the roof with the desired result. Id. at 367.

RESTATEMENT

Mississippi follows the Restatement (Second) of Torts § 299A. See, e.g., George B. Gilmore Co. v. Garrett, 582 So. 2d 387, 391 (Miss. 1991); DiMa Homes, Inc. v. Stuart, 873 So. 2d 140, 143 (Miss. Ct. App. 2004).

ELEMENTS OF A CLAIM

Mississippi generally articulates the elements of a claim for professional negligence as follows:

1) Duty or standard of care

2) Breach of that duty or standard

3) Proximate causation

4) Damages or injury

See, e.g., Arnona v. Smith, 749 So. 2d 63, 66 (Miss. 1999).

Expert Testimony

"The general rule in Mississippi is that expert testimony is not required where the facts surrounding the alleged negligence are easily comprehensible to a jury." Wal-Mart Stores, Inc. v. Johnson, 807 So. 2d 382, 388 (Miss. 2001).

Relevant Statutes and Regulations

- Miss. Code Ann. § 83-58-3:

  (a) "Builder" means any person, corporation, partnership, or other entity which constructs a home or engages another to construct a home, including a home occupied initially by its builder as his residence, for the purpose of sale.

- Miss. Code Ann. § 83-58-5:

  (1) Subject to the exclusions provided in this section, every builder warrants the following to the owner:

  (a) One (1) year following the warranty commencement date, the home will be free from any defect due to noncompliance with the building standards.

  (b) Six (6) years following the completion date, the home will be free from major structural defects due to noncompliance with the building standards.

- Miss. Code Ann. § 83-58-9:

  Any action to enforce any warranty provided in this chapter shall commence thirty (30) days after the expiration of the appropriate time period provided.

- Miss. Code Ann. § 83-58-7:

  Before undertaking any repair himself, except repair to minimize loss or damage as provided in Section 83-58-5(2)(d), or instituting any action under Section 83-58-17, the owner shall give the builder written notice within ninety (90) days after knowledge of the defect by registered or certified mail, advising him of the defects and giving the builder a reasonable opportunity to repair the defect. The builder shall give the owner written notice of the requirements of this chapter at the time of closing. If the builder does not provide such notice, the warranties provided in this chapter shall be extended for a period of time equal to the time between the warranty commencement date and date notice was given.

- Miss. Code Ann. § 83-58-13:

  Any warranty imposed under the provisions of this chapter and any insurance benefit shall automatically transfer, without charge, to a subsequent owner who

acquires title to a home. Any transfer of the home shall not extend the duration of any warranty or insurance coverage.

- Miss. Code Ann. § 83-58-17:

  (1) If a builder violates any of the provisions of this chapter by failing to perform as required by the warranties provided in this chapter, any affected owner shall have a cause of action against the builder for actual damages, including attorney fees and court cost, arising out of the violations.

  (2) Nothing in this chapter shall prevent the owner from filing a cause of action based on breach of contract and remedies attendant to such cause of action.

  (3) If the owner files a civil action without first complying with the provisions of this chapter, the court shall dismiss the action without prejudice, and the action may not be refiled until the claimant has complied with the notice requirements of this chapter.

- Miss. Code Ann. § 83-58-15:

  The damages with respect to a single defect shall not exceed the reasonable cost of repair or replacement necessary to cure the defect, and damages with respect to all defects in the home shall not exceed the original purchase price of the home.

  The parties may provide for the arbitration of any claim in dispute. Any arbitration may be binding only to the extent provided by law.

Economic Loss Doctrine

In Mississippi, the economic loss doctrine has been found to preclude the recovery of purely economic loss under tort theories. See, e.g., State Farm Mut. Auto. Ins. Co. v. Ford Motor Co., 736 So. 2d 384, 388 (1999) ("There is no genuine issue as to any material fact as appellants suffered only economic loss to the car itself. The economic loss doctrine bars recovery for such loss under theories of tort.").

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Six years. Mississippi Code Annotated § 15-1-41 states:

    "No action may be brought to recover damages for injury to property, real or personal, or for an injury to the person, arising out of any deficiency in the design, planning supervision or observation of construction, or construction of an improvement to real property, and no action may be brought for contribution or indemnity for damages sustained on account of such injury except by prior written agreement providing for such contribution or indemnity, against any

person, firm or corporation performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than six (6) years after the written acceptance or actual occupancy or use, whichever occurs first, of such improvement by the owner thereof. This limitation shall apply to actions against persons, firms and corporations performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property for the State of Mississippi or any agency, department, institution, or political subdivision thereof as well as for any private or nongovernmental entity.

This limitation shall not apply to any person, firm or corporation in actual possession and control as owner, tenant, or otherwise of the improvement at the time the defective and unsafe condition of such improvement causes injury.

- Under Mississippi law, the statute of limitations or repose runs upon acceptance and occupancy of the residence. "Therefore, since there was no allegation of fraudulent concealment and since the Mississippi decisions and statute of limitation do not justify the adoption of the 'know or ought to know' rule, we conclude that the trial court erred and that the case must be reversed because the action was barred by the six year statute of limitation." M.T. Reed Const. Co. v. Jackson Plating Co. 222 So.2d 838, 841 (Miss. 1969).

- Statute of Repose:

  - Mississippi's statute of limitations is also a statute of repose. See, e.g. J. Criss Builder, Inc. v. White, 35 So. 3d 541 (Miss. Ct. App. 2009).

Additional Issues

- "Since an architect's duty to exercise professional engineering judgment is non-delegable, any reliance by Clark-Dietz on information provided by ECI or other specialty firms concerning cement-bentonite slurry is legally irrelevant. Although an architect does not guarantee his design or the final work product unless he so contracts, he is responsible for his own work and warrants that he has exercised ordinary professional skill and diligence." Mayor and City Council of City of Columbus, Miss. v. Clark-Dietz and Associates-Engineers, 550 F. Supp. 610, 624 (N.D. Miss. 1982).

- "Unless the architect has undertaken by conduct or contract to supervise a construction project, he is under no duty to notify or warn workers or employees of the contractor or subcontractor of hazardous conditions on the construction site." Jones v. James Reeves Contractors, Inc., 701 So. 2d 774, 786 (Miss. 1997).

Pattern Jury Instructions

Mississippi does not have specific pattern instruction for the standard of care for design professionals.

MISSOURI

STANDARD OF CARE

Missouri courts have articulated the standard of care for design professionals as:

> An action for professional negligence exists where, in the context of the contractual relationship, the professional negligently discharges the duties arising from that relationship. A professional person owes a client a duty of care commensurate with the degree, skill and proficiency commonly exercised by ordinarily skillful, careful and prudent professionals.

Rosemann v. Sigillito, 956 F. Supp. 2d 1082, 1109-1110 (E.D. Mo. 2013) (citing Lumbermens Mut. Cas. Co. v. Thornton, 92 S.W.3d 259, 265) (Mo. App. Ct. 2002); See also Annen v. Trump, 913 S.W.2d 16, 19 (Mo. App. Ct. 1995) ("An architect is not a guarantor or an insurer but as a member of a learned and skilled profession he is under a duty to exercise the ordinary, reasonable technical skill, ability and competence that is required of an architect in a similar situation."). See also, Chubb Group of Ins. Companies v. C.F. Murphy & Associates, Inc., et al., 656 S.W.2d 766, 774 (Mo. App. 1983) (citing Annen v. Trump, 913 S.W.2d 16, 19 (Mo. App. Ct. 1995).

As stated by the federal courts in Missouri, "[a]n action for professional negligence exits where, in the context of a contractual relationship, the professional negligently discharges the duties arising from that relationship. A professional person owes a client a duty of care commensurate with the degree of care, skill and proficiency commonly exercised by ordinarily skillful, careful, and prudent professionals." Rosemann v. Sigillito, 2014 WL 11321630, *4 (April 23, 2014 E.D. Mo. 2014).

RESTATEMENT

It is not clear whether Missouri follows the Restatement (Second) of Torts § 299A, as that section has only been cited in one Missouri decision. Hester v. Barnett, 723 S.W. 2d 544, 551 (Mo. App. 1987).

ELEMENTS OF A CLAIM

Missouri generally articulates the elements of a claim for professional negligence as follows:

1) The existence of a legal duty owed to the plaintiff

2) Breach of that duty through a negligent act by the defendant

3) Proximate causation between the breach and the resulting injury

4) Resulting damages

See, e.g., Rosemann v. Sigillito, 956 F. Supp. 2d 1082, 1109 (E.D. Mo. 2013); Ostrander v. O'Banion, 152 S.W.3d 333, 337 (Mo. App. Ct. 2004).

Expert Testimony

Under Missouri law, "[i]n cases of professional malpractice, the plaintiff must offer expert testimony to establish the appropriate standard of care that should have been employed by the defendant." Blevens v. Holcomb, 2006 WL 27114, *1 (W.D. Mo. January 5, 2006). Simply put, "[i]n a professional malpractice case, the plaintiff must present the testimony of a qualified professional as to the degree of care and skill that is generally accepted by those engaged in the profession." Brennan v. St. Louis Zoological Park, 882 S.W.2d 271, 273 (Mo. App. Ct. 1994). However, "[t]here are exceptions to this rule. Expert testimony is not required if the negligence in question is "clear and palpable to a jury of laymen." Rosemann v. Sigillito, 785 F. 3d 1175, 1180 (8th Cir. 2015).

Relevant Statutes and Regulations

- 20 CSR 2030-2.010:

  (1) Definitions.

  (A) Board – The Missouri Board of Architects, Professional Engineers, Professional Land Surveyors, And Professional Landscape Architects.

  (B) Licensee – Any person licensed as an architect, professional engineer, professional land surveyor, or professional landscape architect under the provisions of Chapter 327, RSMo.

  (2) The Missouri Rules of Professional Conduct for Architects, Professional Engineers, Professional Land Surveyors, and Professional Landscape Architects Preamble reads as follows: Pursuant to section 327.041.2, RSMo, the board adopts the following rules, referred to as the rules of professional conduct. These rules of professional conduct are binding for every licensee. Each person licensed pursuant to Chapter 327, RSMo, is required to be familiar with Chapter 327, RSMo, and the rules of the board. The rules of professional conduct will be enforced under the powers vested in the board. Any act or practice found to be in violation of these rules of professional conduct may be grounds for a complaint to be filed with the Administrative Hearing Commission.

  (3) In practicing architecture, professional engineering, professional land surveying, or professional landscape architecture, a licensee shall –

  (A) Act with reasonable care and competence and apply the technical knowledge and skill which are ordinarily applied by architects, professional engineers, professional landscape architects of good standing, practicing in Missouri. In the performance of professional services, licensees hold their primary responsibility to the public welfare which should not be compromised by any self-interest of the client or licensee.

(B) Undertake to perform architectural, professional engineering, professional land surveying, and professional landscape architectural services only when they are qualified by education, training, and experience in the specific technical areas involved.

- V.A.M.S. 327.091:

1. Any person practices as an architect in Missouri who renders or offers to render or represents himself or herself as willing or able to render service or creative work which requires architectural education, training and experience, including services and work as consultation, evaluation, aesthetic and structural design, the preparation of drawings, specifications and related documents, and the coordination of services furnished by structural, civil, mechanical and electrical engineers and other consultants as they relate to architectural work in connection with the construction or erection of any private or public building, building structure, building project or integral parts or parts of buildings or any of additions or alterations thereto; or who uses the title "architect" or the terms "architect" or "architecture" or "architectural" alone or together with any words other than "landscape" that indicate or simply imply that such person is or holds himself or herself out to be an architect.

- V.A.M.S. 327.411:

1. Each architect and each professional engineer and each professional land surveyor and each professional landscape architect shall have a personal seal in a form prescribed by the board, and he or she shall affix the seal to all final technical submissions. Technical submissions shall include, but are not limited to, drawings, specifications, plats, surveys, exhibits, reports, and certifications of construction prepared by the licensee, or under such licensee's immediate personal supervision. Such licensee shall either prepare or personally supervise the preparation of all documents sealed by the licensee and such licensee shall be held personally responsible for the contents of all such documents sealed by such licensee, whether prepared or drafted by another licensee or not.

Economic Loss Doctrine

In Missouri, the economic loss doctrine has been applied to preclude the recovery of purely economic loss under tort theories alleged against design professionals. See, e.g., Fleischer v. Hellmuth, Obata & Kassabaum, Inc., 870 S.W.2d 832, 853 (Mo. App. Ct. 1993) ("For the reasons set out herein, we hold that an architect owes no tort duty of care and is not liable to a general contractor or construction manager for damages for economic losses arising as a result of the architect's negligent performance of its contract with the owner.").

Statute of Limitations and Statute of Repose

- Statute of Limitations:

- 10 years. V.A.M.S. § 516.097 states:

  1. Any action to recover damages for economic loss, personal injury, property damage or wrongful death arising out of a defective or unsafe condition of any improvement to real property, including any action for contribution or indemnity for damages sustained on account of the defect or unsafe condition, shall be commenced within ten years of the date on which such improvement is completed.

  2. This section shall only apply to actions against any person whose sole connection with the improvement is performing or furnishing, in whole or in part, the design, planning or construction, including architectural, engineering or construction services, of the improvement.

- Missouri also has a discovery rule:

  "In Missouri, discovery of the damage is not the event that triggers the statute of limitations. The statute of limitations begins to run when the right to sue arises. The damage must be actually sustained and capable of ascertainment before the statute of limitations begins to run. The phrase capable of ascertainment refers to the fact of damage rather than the exact amount. Damage resulting from one wrong that continues and becomes more serious over time does not extend the time within which suit may be brought." Business Men's Assur. Co. of America v. Graham, 891 S.W.2d 438, 445-446 (Mo. Ct. App. 1994).

☐ Statute of Repose:

- V.A.M.S. § 516.097 is also a statute of repose. See, e.g., Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822 (Mo. 1991).

Pattern Jury Instructions

Missouri does not have specific pattern instruction for the standard of care for design professionals, but this is the general instruction for negligence:

Missouri Approved Jury Instruction 11.02 – Negligence of Adult

I. The term "negligent" or "negligence" as used in this [these] instruction[s] means the failure to use that degree of care that an ordinarily careful person would use under the same or similar circumstances.

II. The term "negligent" or "negligence" as used in this [these] instruction[s] means the failure to use that degree of care that a very careful person would use under the same or similar circumstances.

MONTANA

STANDARD OF CARE

An architect, "as a member of a learned and skilled profession, … is under the duty to exercise the ordinary, reasonable technical skill, ability and competence that is required of an architect in a similar situation; and if by reason of a failure to use due care under the circumstances, a foreseeable injury results, liability accrues." Northern Montana Hosp. v. Knight, 248 Mont. 310, 318 (Mont. 1991) (citing Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc., 392 F.2d 472, 476–77 (8th Cir. 1968)). Further, "[a]n architect whose contractual duties include supervision of a construction project has the duty to supervise the project with reasonable diligence and care" Id., and "a general contractor, who has a duty to perform a construction contract with due care and in a good workmanlike manner, may be liable to the owner for damages when an independent contractor hired by the general contractor performs negligently and causes property damage to the owner." St. Paul Cos. v. Constr. Mgmt. Co., 96 F. Supp. 2d 1094, 1097 (D. Mont. 2000).

Montana has, however, adopted the principle that the standard of care does not equate to perfection: "An engineer is not an insurer of a project against defects nor does he guarantee that he will complete it to perfection. He is required to exercise the care and competence expected of a member of his profession." Morrison-Maierle, Inc. v. Selsco, 186 Mont. 180, 185, (1995).

In Morrison, the plaintiff alleged that the defendant-engineer failed to sufficiently inspect the project, a large campground lagoon. Id. In affirming judgment on behalf of the defendant-engineer, and highlighting that perfection is not the standard, the court noted that the defendant-engineer made continuous inspections and that "West Yellowstone United Campgrounds was a very large project and it is predictable that some faulty workmanship would go undetected by even careful inspection." Id.

RESTATEMENT

Montana has not expressly adopted the Restatement (Second) of Torts § 299A.

ELEMENTS OF A CLAIM

In a professional negligence action, the plaintiff must prove that:

1) The allegedly negligent professional owed the plaintiff a duty

2) The professional failed to live up to that duty

3) The professional's failure to live up to their professional duty caused the plaintiff's harm

Western Sec. Bank v. Eide Bailly LLP, 359 Mont. 34, 39 (Mont. 2010); Carlson v. Morton, 229 Mont. 234, 238 (Mont. 1987); Fort Smith Water and Sewer Dist. v. Great West Engineering, Inc., 2017 WL 8773153, at *3 (Mont. Dist. Sep. 14, 2017) (applying to professional negligence claim against engineer).

Expert Testimony

Architects are included in the group of professional fields requiring expert testimony to establish the standard of care. See Pierce v. ALSC Architects, P.S., 270 Mont. 97, 116 (Mont. 1995) (citing Prosser and Keeton, The Law of Torts, § 32 (5th ed. 1984); Zimmerman v. Robertson, 259 Mont. 105, 107 (Mont. 1993).

Relevant Statutes and Regulations

- Mont. Code Ann. § 27-2-208:

> [A]n action to recover damages (other than an action upon any contract, obligation, or liability founded upon an instrument in writing) resulting from or arising out of the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property or resulting from or arising out of land surveying of real property may not be commenced more than 10 years after completion of the improvement or land surveying.
>
> (2) Notwithstanding the provisions of subsection (1), an action for damages for an injury that occurred during the 10th year after the completion of the improvement or land surveying may be commenced within 1 year after the occurrence of the injury.
>
> (3) The limitation prescribed by this section may not affect the responsibility of any owner, tenant, or person in actual possession and control of the improvement or real property that is surveyed at the time a right of action arises.
>
> (4) As used in this section:
>
> (a) "completion" means that degree of completion at which the owner can utilize the improvement for the purpose for which it was intended or when a completion certificate is executed, whichever is earlier;
>
> (b) "land surveying" means the practice of land surveying, as defined in 37-67-101.
>
> (5) This section may not be construed as extending the period prescribed by the laws of this state for the bringing of any action.

Economic Loss Doctrine

Montana courts have refused to apply the economic loss doctrine to bar claims against design professionals. For example, in Jim's Excavating Service, Inc. v. HKM Associates, the Montana Supreme Court held that a contractor could sue a design professional under the Restatement (Second) of Torts § 552 under a theory of negligent misrepresentation. 265 Mont. 494, 506 (Mont. 1994).

STATUTE OF LIMITATIONS AND STATUTE OF REPOSE

- Statute of Limitations:
  - Three years for claims in tort and eight years for claims in contract. Tin Cup Cty. Water and Sewer Dist. v. Garden City Plumbing & Heating, Inc., 347 Mont. 468, 474 (2008). "The contract statute of limitations applies only if the alleged breach of a specific provision in a contract provides the basis of the plaintiff's claims. The action sounds in tort, and the tort statute of limitations applies, if the plaintiff claims breach of a legal duty imposed by law that arises during the performance of the contract." Id.
  - The statute of limitations does not begin to run until "the plaintiff was aware, or in the exercise of due diligence should have been aware, of the injury." Johnston v. Centennial Log Homes & Furnishings, Inc., 2013 MT 179, ¶54. But, "it is not necessary for the plaintiff to know the total extent of damages that an act causes in order to begin the running of the statutory bar. Moreover, the failure to understand the causal relationship between the wrongful conduct and the injury does not serve to toll the statutory bar." Id.
- Statute of Repose:
  - 10 years. "[A]n action to recover damages (other than an action upon any contract, obligation, or liability founded upon an instrument in writing) resulting from or arising out of the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property or resulting from or arising out of land surveying of real property may not be commenced more than 10 years after completion of the improvement or land surveying." MONT. CODE ANN. § 27-2-208.

ADDITIONAL ISSUES

- The doctrine of accepted work is no longer available as an affirmative defense in Montana. Pierce v. ALSC Architects, P.S., 270 Mont. 97, 106 (Mont. 1995).

PATTERN JURY INSTRUCTIONS

The following are sample jury instructions that have been given in professional negligence cases against design professionals:

> This lawsuit is based on claims of Negligence. Every person or entity is responsible for injury to the person of another, caused by his/her/its negligence.
>
> Negligence is the failure to use reasonable care. Negligence may consist of action or inaction. A person is negligent if he/she/ it fails to act as an ordinarily prudent person would act under the circumstances. [. . . .]
>
> In performing professional services, engineers, contractors and other construction professionals have the duty to use that degree of learning and skill ordinarily used by professionals practicing in the same field. A failure to perform this duty is negligence.

Kent v. City of Columbia Falls, 2016 WL 5415503 (Mont. Dist. May 9, 2016) (Jury Instruction)

> It is the duty of a licensed professional engineer to use that skill and learning ordinarily used in like cases by other engineers in good standing practicing in that same field and who hold the same professional license.
>
> The violation of this duty is negligence.

W Construction, LLC v. Waring, 2017 WL 4392177 (Mont. Dist. June 2, 2017) (Jury Instruction).

NEBRASKA

STANDARD OF CARE

"If there is an express contract for architectural services, an architect's duties are determined by the contract for the architect's employment." Getzschman v. Miller Chemical Co., Inc., 232 Neb. 885, 889 (1989). "Implicit in every contract for architectural services is the duty of the architect to exercise skill and care which are commensurate with requirements of the profession." Id.; see also Overland Constructors, Inc. v. Millard School Dist. No. 17, Douglas Cty., 220 Neb. 220, 228 (1985) ("The test is whether the architect has exercised that degree of skill and diligence ordinarily exercised under like circumstances by architects in good standing in the same or similar communities.").

Additionally, in Nebraska, an architect or engineer has a duty to inspect the project through the entire duration of the construction. Bd. of Regents of Univ. of Nebraska v. Wilscam Mullins Birge, Inc., 230 Neb. 675, 683 (Neb. 1988). An architect or engineer is also duty-bound to make full disclosures of all matters of which they had or should have had knowledge that was important for clients to know. Durand Assocs., Inc. v. Guardian Inv. Co., 186 Neb. 349, 354–55 (Neb. 1971). Architects and engineers are supposed to be skilled in estimating costs of construction and have an affirmative duty give clients a definite idea of a project's reasonable costs. Id. See also, City of Omaha, Neb. v. Figg Bridge Engineers, Inc., 2009 WL 187692 (D. Nebraska) (citing Durand Assocs., Inc., 186 Neb. at 354-55). But, an architect does not act as a guarantor when estimating costs. See Overland Constructors, Inc. v. Millard School Dist. No. 17, Douglas Cty., 220 Neb. 220, 228 (1985) ("It would seem that one must say that a building constructed for an amount which exceeds its estimated cost by 1% is constructed for its estimated cost.").

Further, where an architectural firm undertakes a supervisory role at construction site, it has a duty to protect the safety of the workers at that site. Simon v. Omaha Pub. Power Dist., 189 Neb. 183, 201-02 (Neb. 1972); See also, Braddock v. Primus Group, Inc., 2014 WL 12605519 (D. Neb. Feb. 5, 2014) (citing Simon, 189 Neb. at 201-02).

RESTATEMENT

Nebraska has not adopted the Restatement (Second) of Torts § 299A.

ELEMENTS OF A CLAIM

To recover for professional negligence against a design professional, a plaintiff must prove:

1) Duty

2) Breach

3) Causation

4) Damages

City of Ralston, Nebraska v Icon Architectural Group, PLLC, 2017 WL 9472544, at *2 (Neb. Dist. Ct. June 30, 2017) (professional negligence claim against an architectural design firm) (citing World Radio Labs., Inc. v. Coopers & Lybrand, 251 Neb. 261, 276, 557 N.W.2d 1, 11 (Neb. 1996)).

Expert Testimony

In Overland Constructors, Inc. v. Millard Sch Dist., the court stated "that proof of alleged negligence in planning or document preparation requires 'a technical analysis of the specifications, drawings and manufacturer's specifications that was beyond the competence of ordinary lay persons, ...' and therefore required expert testimony." 369 N.W.2d 69, 76 (Neb. 1985).

Economic Loss Doctrine

Nebraska recognizes the economic loss doctrine only in certain, limited circumstances. Lesiak v. Cent. Valley Ag Co-op., Inc., 283 Neb. 103, 120 (Neb. 2012) ("[W]e hold that the economic loss doctrine precludes tort remedies only where the damages caused were limited to economic losses and where either (1) a defective product caused the damage or (2) the duty which was allegedly breached arose solely from the contractual relationship between the parties. And economic losses are defined as commercial losses, unaccompanied by personal injury or other property damage."). The phrase "other property" means property other than the property that was the subject of the contract. Homebuyers Inc. v. Watkins, 2019 WL 2361760, at *14 (Neb. Ct. App. June 4, 2019), review denied (Sept. 16, 2019).

We could not identify any Nebraska cases applying the economic loss doctrine to bar tort actions against a design professional. However, Thurston v. Nelson, a case against a construction company, suggests that a professional negligence claim seeking purely economic damages against a design professional could be barred under the economic loss rule. 21 Neb. App. 740, 755, 842 N.W.2d 631, 644 (Neb. Ct. App. 2014). In Thurston, the homeowners brought an action against a contractor for breach of contract, negligence, and breach of the implied warranty of workmanlike performance, seeking damages for alleged construction defects resulting from the contractor's work in building an addition to and remodeling their house. Id. The court held that the evidence did not establish any duty or damages based on negligence that was not coextensive with those encompassed by the breach of contract theory on which the jury was instructed, and that it was not in error for the court to not give a jury instruction on professional negligence. Id.

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Two years, unless the plaintiff did not and reasonably could not have discovered the architect's or engineer's negligent act or omission until after that time, in which case the plaintiff must bring the claim within one year of reasonable discovery. Neb. Rev. Stat § 25-222.
- Statute of Repose:

- 10 years after the service is rendered, for professional negligence claims. NEB. REV. STAT § 25-222. This 10-year period of repose for actions involving professional negligence, as applicable to an architect who has a duty to inspect throughout construction, begins to run when construction is completed. Bd. of Regents of Univ. of Nebraska v. Wilscam Mullins Birge, Inc., 230 Neb. 675, 682 (Neb. 1988).

ADDITIONAL ISSUES

- A plaintiff's action against an architectural firm for injuries the plaintiff incurred when he fell 30 feet due to the absence of a wall, which was called for in the building plans but was never actually constructed, constituted an action for professional negligence based on the firm's alleged failure to properly supervise and see that the required wall was actually constructed, and thus the applicable 10-year limitations period barred the action, notwithstanding the plaintiff's claim that the action was based on the firm's failure to find the missing wall, which did not constitute a professional act. Williams v. Kingery Const. Co., 225 Neb. 235, 240 (Neb. 1987).

- An engineer who was hired to design center-pivot agricultural irrigation systems by a manufacturer of systems was acting in his professional capacity when he rendered services, so the professional negligence statute of limitations applied to the manufacturer's claims against the engineer, regardless of whether the claims against him were pleaded in tort or contract. Reinke Mfg. Co., Inc. v. Hayes, 256 Neb. 442, 450 (Neb. 1999).

PATTERN JURY INSTRUCTIONS

Nebraska does not have any jury instructions specific to claims of professional negligence against architects, engineers, or design professional. NJI2d Civ. 12.04, however, provides the pattern jury instruction for professional negligence generally:

> NJI2d Civ. 12.04 Duty of One Rendering Professional and Skilled-Trade Services—In General. A (here identify profession or trade group) has the duty to use the skill and knowledge ordinarily possessed by other (here identify profession or trade group) in good standing in the (profession, trade), in the same or similar localities.

NJI2d Civ. 12.04.

NEVADA

STANDARD OF CARE

In Nevada, a professional generally owes a duty of care that exists independently of any contractual obligation. Orcutt v. Miller, 95 Nev. 408, 313 (Nev. 1979) (applying the Restatement (Second) of Torts § 299A in a medical malpractice action). Thus, in Nevada, an architect, engineer, or design professional is not required to be perfect, but "is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." Id.; see also NRS 623.270(5)(c) (defining design professional negligence as "a deviation from the normal standard of professional care exercised generally by other members in the profession of architecture or residential design.")

RESTATEMENT

Nevada follows the Restatement (Second) of Torts § 299A. See Orcutt v. Miller, 95 Nev. 408, 313 (Nev. 1979).

ELEMENTS OF A CLAIM

In Nevada, to assert a claim for professional negligence generally, a party must show:

1) A duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise

2) Breach of that duty

3) Proximate causal connection between the negligent conduct and resulting injury

4) Actual loss or damage resulting from the professional's negligence

Morgano v. Smith, 110 Nev. 1025, 1028 n.2 (Nev. 1994). The applicable standard of care applicable to architects, engineers, and design professionals must be determined by expert testimony. Afusia v. Phillips, 2011 WL 4903154, *1 (Nev. Dist. Ct. July 18, 2011) (requiring expert testimony to establish the standard of care for an architect).

EXPERT TESTIMONY

Expert testimony is required to maintain an action against engineers as design professionals. In re City Center Constr. & Lien Master Litig., 129 Nev. 669, 675-76 (2013).

RELEVANT STATUTES AND REGULATIONS

- Nev. Rev. Stat. § 40.645(1):

  > (1) [...]before a claimant commences an action or amends a complaint to add a cause of action for a constructional defect against a contractor, subcontractor,

supplier or design professional, the claimant: (a) Must give written notice by certified mail...to the contractor[...]

- Nev. Rev. Stat. § 40.645(4):

  Notice is not required pursuant to this section before commencing an action if: (a) The contractor, subcontractor[...]has filed an action against the claimant; or (b) The claimant has filed a formal complaint with a law enforcement agency against the contractor, subcontractor[...] for threatening to commit or committing an act of violence or a criminal offense against the claimant or the property of the claimant.

- Nev. Rev. Stat. § 40.680:

  [B]efore a claimant commences an action or amends a complaint to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or design professional, the matter must be submitted to mediation, unless mediation is waived in writing by the contractor, subcontractor, supplier or design professional and the claimant.

- Nev. Rev. Stat. § 11.258:

  1. Except as otherwise provided in subsection 2, in an action involving nonresidential construction, the attorney for the complainant shall file an affidavit with the court concurrently with the service of the first pleading in the action stating that the attorney:

  (a) Has reviewed the facts of the case;

  (b) Has consulted with an expert;

  (c) Reasonably believes the expert who was consulted is knowledgeable in the relevant discipline involved in the action; and

  (d) Has concluded on the basis of the review and the consultation with the expert that the action has a reasonable basis in law and fact.

  2. The attorney for the complainant may file the affidavit required pursuant to subsection 1 at a later time if the attorney could not consult with an expert and prepare the affidavit before filing the action without causing the action to be impaired or barred by the statute of limitations or repose, or other limitations prescribed by law. If the attorney must submit the affidavit late, the attorney shall file an affidavit concurrently with the service of the first pleading in the action stating the reason for failing to comply with subsection 1 and the attorney shall consult with an expert and file the affidavit required pursuant to subsection 1 not later than 45 days after filing the action.

3. In addition to the statement included in the affidavit pursuant to subsection 1, a report must be attached to the affidavit. Except as otherwise provided in subsection 4, the report must be prepared by the expert consulted by the attorney and must include, without limitation:

(a) The resume of the expert;

(b) A statement that the expert is experienced in each discipline which is the subject of the report;

(c) A copy of each nonprivileged document reviewed by the expert in preparing the report, including, without limitation, each record, report and related document that the expert has determined is relevant to the allegations of negligent conduct that are the basis for the action;

(d) The conclusions of the expert and the basis for the conclusions; and

(e) A statement that the expert has concluded that there is a reasonable basis for filing the action.

4. In an action in which an affidavit is required to be filed pursuant to subsection 1:

(a) The report required pursuant to subsection 3 is not required to include the information set forth in paragraphs (c) and (d) of subsection 3 if the complainant or the complainant's attorney files an affidavit, at the time that the affidavit is filed pursuant to subsection 1, stating that he or she made reasonable efforts to obtain the nonprivileged documents described in paragraph (c) of subsection 3, but was unable to obtain such documents before filing the action;

(b) The complainant or the complainant's attorney shall amend the report required pursuant to subsection 3 to include any documents and information required pursuant to paragraph (c) or (d) of subsection 3 as soon as reasonably practicable after receiving the document or information; and

(c) The court may dismiss the action if the complainant and the complainant's attorney fail to comply with the requirements of paragraph (b).

5. An expert consulted by an attorney to prepare an affidavit pursuant to this section must not be a party to the action.

6. As used in this section, "expert" means a person who is licensed in a state to engage in the practice of professional engineering, land surveying, architecture or landscape architecture.

Economic Loss Doctrine

In Nevada, the economic loss doctrine bars claims of negligence against design professionals who provided services in the process of developing or improving property when the plaintiffs' damages are purely financial. Terracon Consultants W., Inc. v. Mandalay Resort Grp., 125 Nev. 66, 78 (Nev. 2009).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - 10 years, absent fraud. Nev. Rev. Stat. § 11.202.
- Statue of Repose:
  - 10 years, absent fraud. Nev. Rev. Stat. § 11.202.

Additional Issues

- Pleading is void *ab initio*, under a statute requiring an affidavit from the plaintiff's attorney and an expert report in an action involving nonresidential construction malpractice where the pleading is served without a concurrent filing of the required attorney affidavit and expert report. Reif by & through Reif v. Aries Consultants, Inc., 135 Nev. Adv. Op. 51 (Nev. 2019).
- Professional engineers are not qualified to testify as to the standard of care for architects. Afusia v. Phillips, 2011 WL 4903154 (Nev. Dist. Ct. July 18, 2011) (granting a motion to preclude expert testimony).
- Lack of contractual privity between the parties is not a defense in an action for tortious negligence. Hanneman v. Downer, 110 Nev. 167, 179-80 (Nev. 1994) (citing Long v. Flanigan Warehouse Co., 79 Nev. 241, 245 (Nev. 1963) (the absence of contractual privity is not a defense to tort liability)). Further, Nevada case law suggests that a design professional's duty may extend to future purchasers of the property. Hanneman, 110 Nev. at 179–80 (extending surveyor's duty to future purchasers of the property).

Pattern Jury Instructions

Nevada does not have any jury instructions specific to claims of professional negligence against architects, engineers, or design professional. NEV. J.I. 4.02 sets forth the pattern jury instruction applicable to general negligence claims and reads: "In order to establish a claim of negligence, the plaintiff must prove the following elements by a preponderance of the evidence:

> 1. That the defendant was negligent; and 2. That the defendant's negligence was a [proximate] [legal] cause of damage to the plaintiff." NEV. J.I. 4.03 provides definitions of negligence and ordinary care and reads:

> Negligence is the failure to exercise that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances
>
> Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others.
>
> [You will note that the person who conduct we set up as a standard is not the extraordinarily cautious individual, not the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be administered and encouraged, the law does not demand it as a general standard of conduct.]

NEV. J.I. 4.10 sets forth the use of evidence to provide evidence of custom in relation to ordinary care and reads:

> Evidence as to whether or not a person conformed to a custom that has grown up in a given locality or business is relevant and ought to be considered, but is not necessarily controlling on that question of whether or not he exercised ordinary care; for that question must be determined by the standard of care that has been stated to you.

NEW HAMPSHIRE

STANDARD OF CARE

In New Hampshire, architects and contractors have extra-contractual duties to design and construct in accordance with their respective professional standards of care. See Bruzga v. PMR Architects, P.C., 141 N.H. 756, 759 (N.H. 1997); Blanchard Pointe Condo. Owners Ass'n v. Bowers Landing of Merrimack Dev. Grp., 2011 WL 7500368, *1 (N.H. Super. Jan 13, 2011). Among those duties is the duty to design and construct safe structures. Bruzga, 141 N.H. at 759. Architects owe duties to those whom they may reasonably foresee suffering damages as a result of the architect's negligent design. Blanchard Pointe Condo. Owners Ass'n, 2011 WL 7500368 at *1.

In Blanchard Pointe Condominium Owners Ass'n, a New Hampshire trial court rejected the existence of a cause of action for implied warranty against an architect. Id. The court reasoned:

> Architects, doctors, engineers, attorneys, and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance. Thus, doctors cannot promise that every operation will be successful; a lawyer can never be certain that a contract he drafts is without latent ambiguity; and an architect cannot be certain that a structural design will interact with natural forces as anticipated. Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.

Id. (internal citation omitted)

The duty of care imposed on design professionals "is not limitless." Bruzga, 141 N.H. at 759 (holding that "[a]rchitects and contractors should not be exposed to endless suicide liability when they have relinquished their authority and control over the facility to the owner.").

RESTATEMENT

New Hampshire has not adopted the Restatement (Second) of Torts § 299A.

ELEMENTS OF A CLAIM

In New Hampshire, the elements of a general common law professional negligence claim are:

1) The standard of care

2) That that standard of care had been breached

3) That that breach caused injuries that otherwise would not have occurred

Francoeur v. Piper, 146 N.H. 525, 527 (N.H. 2001)(citing Leighton v. Sargent, 27 N.H. 460 (N.H. 1853)).

Expert Testimony

Expert testimony is required whenever "the matter to be determined is so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman" — including engineers and design professionals. Lemay v. Burnett, 139 N.H. 633, 635, (1995).

Relevant Statutes and Regulations

- N.H. Rev. Stat. Ann. § 338-A:1:

  > Indemnification agreements prohibited. Any agreement or provision whereby an architect, engineer, surveyor or his agents or employees is sought to be held harmless or indemnified for damages and claims arising out of circumstances giving rise to legal liability by reason of negligence on the part of any said persons shall be against public policy, void and wholly unenforceable.

- N.H. Rev. Stat. Ann. § 508:4-b(IV):

  > IV. In all actions for negligence in design or construction described in paragraph I, the standard of care used to determine negligence shall be the standard of care applicable to the activity giving rise to the cause of action at the time the activity was performed, rather than a standard applicable to a later time.

- N.H. Rev. Stat. Ann. § 447:2:

  > I. If any person shall perform labor, provide professional design services, or furnish materials to the amount of $15 or more for erecting or repairing a house or other building or appurtenances, or for building any dam, canal, sluiceway, well or bridge, or for consumption or use in the prosecution of such work, other than for a municipality, by virtue of a contract with the owner thereof, he or she shall have a lien on any material so furnished and on said structure, and on any right of the owner to the lot of land on which it stands.
  >
  > II. In this section, "professional design services" means any services provided by a licensed architect, licensed landscape architect, licensed engineer, permitted septic designer, certified wetland scientist, certified soil scientist, or licensed land surveyor that is directly related to the improvement of real property.

ECONOMIC LOSS DOCTRINE

In New Hampshire, the general rule is that "persons must refrain from causing personal injury and property damage to third parties, but no corresponding tort duty exists with respect to economic loss." Plourde Sand & Gravel v. JGI E., Inc., 154 N.H. 791, 795 (2007).

But, where a duty lies outside the terms of the contract, a plaintiff in New Hampshire may recover economic loss in tort against a defendant contracting party. Penta Corp. v. Town of Newport, 2015 WL 11182532, at *6 (N.H. Super. Nov. 20, 2015), 162 N.H. 406, 410 (N.H. 2011). This principle is the so-called professional negligence doctrine, which provides that "the economic loss rule will not apply against design professionals where there is a 'special relationship' be between the design professional and the contractor." E.D. Swett, Inc. v. Town of Hooksett, 2018 WL 6930279, at *6 (N.H. Super. Dec. 31, 2018). This narrow exception to the economic loss doctrine only applies in circumstances where the contracting party expects that independent tort duty would exist. Id. We have likened the duty owed in such a relationship to that owed by a promisor to an intended third-party beneficiary: "[A] third-party beneficiary relationship exists if the contract is so expressed as to give the promisor reason to know that a benefit to a third party is contemplated by the promisee as one of the motivating causes of his making the contract. Plourde, at 796.

STATUTE OF LIMITATIONS AND STATUTE OF REPOSE

- Statute of Limitations:
  - Three years, for negligence actions against design professionals. Lamprey v. Britton Const., Inc., 163 N.H. 252, 256 (2012). This statue, however, is subject to the discovery rule. Id. The discovery rule is two-pronged, and both prongs must be satisfied before the statute of limitations begins to run. Id. First, a plaintiff must know or reasonably should have known that they have been injured; second, a plaintiff must know or reasonably should have known that the defendant's conduct proximately caused the injury. Id. Thus, the discovery rule exception only applies if the plaintiff did not discover, and could not reasonably have discovered, either the alleged injury or its causal connection to the defendant's alleged act.
- Statute of Repose:
  - N.H. REV. STAT. ANN. § 508:4-b(I)-(III):

    I. Except as otherwise provided in this section, all actions to recover damages for injury to property, injury to the person, wrongful death or economic loss arising out of any deficiency in the creation of an improvement to real property, including without limitation the design, labor, materials, engineering, planning, surveying, construction, observation, supervision or inspection of that improvement, shall be brought within 8 years from the date of substantial completion of the improvement, and not thereafter.

> II. The term "substantial completion" means that construction is sufficiently complete so that an improvement may be utilized by its owner or lawful possessor for the purposes intended. In the case of a phased project with more than one substantial completion date, the 8-year period of limitations for actions involving systems designed to serve the entire project shall not begin until all phases of the project are substantially complete.
>
> III. If an improvement to real property is expressly warranted or guaranteed in writing for a period longer than 8 years, the period of limitation set out in paragraph I shall extend to equal the longer period of warranty or guarantee.

Additional Issues

- Allegations that a nonresident engineer, retained by a nonresident design/construction firm to prepare construction documents for a private preparatory school's new field house, negligently designed footings and foundation work used in construction, thereby causing injury in the state, brought the engineer within the scope of the long-arm statute, in the school's professional negligence action, even if the engineer's work was completed outside the state, and even though the school argued in the alternative that the engineer's design was negligently executed. Kimball Union Acad. v. Genovesi, 165 N.H. 132, 137 (N.H. 2013).

- The statute of repose (above) bars third-party actions by a property owner defendant (in a premises liability action) for indemnity and/or contribution against architects involved in the design of the improvement to real property, which the injured plaintiff alleges was dangerous and did not meet applicable building codes. Rankin v. S. St. Downtown Holdings, Inc., 172 N.H. 500, 502, (2019).

Pattern Jury Instructions

New Hampshire does not have a model jury instruction applicable specifically to professional negligence claims against design professionals. Civil Jury Instruction 13.1 (Legal Fault: Negligence and Causation (Professional Negligence Cases)) provides instructions for professional negligence claims generally, but the language seems more geared to medical malpractice claims. Therefore, as copied below, we altered the language to be more appropriate for claims against design professionals (e.g., changing "treatment" to "performance"):

Introduction

The fact that a lawsuit has been brought following injury does not necessarily mean that anyone is legally responsible. This lawsuit is simple the means by which controversy is brought by the court to be resolved by you.

In order to recover the plaintiff must prove that the defendant is legally at fault for the injury. To do this, the Plaintiff must prove the defendant is legally at fault for the injury. To do this, the plaintiff must prove that the defendant was negligent and that such negligence was the legal cause of the injury. Now I will define both negligence and as it relates to conduct of professionals, and legal cause.

Negligence

Professional negligence is the failure to exercise reasonable care. Reasonable professional care is the degree of care which an ordinary prudent [architect/engineer/design professional] would exercise under the same of similar circumstances.

The failure to exercise reasonable professional care may take the form of action or inaction. That is, professional negligence may consist of either: doing something that an ordinary, prudent [architect/engineer/design professional] would not do under the same or similar circumstances; or, failing to do something that an ordinary, prudent [architect/engineer/design professional] would do under the same or similar circumstances.

During the trial you may have heard the term "malpractice." This is merely a term commonly used to describe professional negligence. It does not mean a that difference standard is to be applied in evaluating the defendant's conduct. It does not mean that a finding of liability must be based on reckless or intentional misconduct by the defendant. The term "malpractice" means "professional negligence" and in deciding this case you must apply the standards for professional negligence which I describe in these instructions.

Legal Cause

Failure to exercise reasonable care amounts to legal fault if you find that it was a legal cause of the injury or harm. When is professional negligence a legal cause of harm? When the negligent conduct is a substantial factor is bringing about the harm, and if the harm would not have occurred without the conduct.

On the other hand, if negligent conduct is not a substantial factor in bringing about the harm, it cannot be a basis for a finding of legal harm.

In determining whether the defendant's conduct was a legal cause of the plaintiff's injury, you need now find that the defendant's conduct was the sole cause of the injury. You need only find that it was a substantial factor in bringing about the injury.

Proof of liability

Thus, in order to recover, the plaintiff is required to prove professional negligence and causation of injury. Understand that a [architect/engineer/design professional] cannot be found legally at faulty simply because his or her [performance] culminates in an unfortunate result. To find the defendant legally at fault, you must find that the unfortunate result was caused by the professional negligence.

There are three elements to the plaintiff's burden of proving liability. Each element must be proved through expert testimony, and each must be proved by a preponderance of the evidence.

1. First, the plaintiff must establish the standard of reasonable professional practice in the defendant's profession or specialty that is [architect/engineer/design professional] at the time the [performance] was rendered to the plaintiff.

2. Next, the plaintiff must prove that the defendant failed to act in accordance with the standard of care.

3. Finally, the plaintiff must prove that as a result of the defendant's acts or omissions, the plaintiff suffered injury which would not otherwise have occurred.

As to the standard of care, keep in mind that the plaintiff must prove what the applicable standard of care was at the time of [performance].

In determining whether or not the defendant acted in accordance with the standard of care, you must measure his/her performance against that of an ordinary prudent practitioner of his/her profession or specialty (that is ordinary prudent [architect/engineer/design professional]). Outstanding knowledge, skill, and care are not required.

Also, the defendant's conduct must be considered in light pf the facts and circumstances that existed at the time he/she rendered the [performance]. You must not evaluate the conduct of the defendant in light knowledge which he/she later acquired or by the results of the [performance].

Summary

To summarize—In order to recover, the plaintiff must rove through expert testimony what the applicable standard of care was at the time of [performance], that the defendant failed to act in accordance with that standard, and that the defendant's acts or omissions caused or substantially caused the claimed injuries, which would not otherwise have occurred.

NEW JERSEY

STANDARD OF CARE

In New Jersey, design professionals owe a duty of care to those who foreseeably rely upon the services that design professionals perform. Conforti v. John C. Morris Assocs., 175 N.J. Super. 341, 344, 418 A.2d 1290, 1292 (Law Div. 1980), aff'd 199 N.J. Super. 498, 489 A.2d 1233 (App. Div. 1985).

Architects, engineers, and design professionals are required by New Jersey common law to exercise reasonable care in the performance of their work, and to perform their services to a minimum standard of special knowledge and skill. Ziegelheim v. Apollo, 128 N.J. 250, 263, (1992). Thus, they must possess the same degree of learning and ability as that of other practitioners in similar communities who are in good standing. Travelers Indem. Co. v. Ewing, Cole, Erdman & Eubank, 711 F.2d 14, 17 (3d Cir. 1983); Rothenberg, Architect Liability for Defective Plans, 53 A.B.A.J. 522 (N.J. 1967); see also Levine v. Wiss & Co., 97 N.J. 242, 246 (N.J. 1984). But design professionals are not insurers of their work. Stated another way, perfection is not the standard. § 2.7 Architects and engineers—Standard of care to be exercised by project architect or engineer, 41 N.J. Prac., Construction Law § 2.7.

RESTATEMENT

New Jersey follows the Restatement (Second) of Torts § 299A. Levine v. Wiss & Co., 97 N.J. 242, 246 (1984).

ELEMENTS OF A CLAIM

1) In New Jersey, liability under a theory of negligence, including professional negligence, requires proof of the following elements:

2) The defendant owed a duty of care to the plaintiff

3) Defendant's breach of the duty of care owed

4) Harm to the plaintiff that was proximately caused by the defendant's breach

Endre v. Arnold, 300 N.J. Super. 136, 142 (App. Div. 1997) (citing Anderson v. Sammy Redd and Assoc., 278 N.J. Super. 50, 56 (App. Div.), cert. denied, 139 N.J. 441 (1995)).

EXPERT TESTIMONY

In a professional negligence case against a design professional, New Jersey law requires expert testimony from a member of the defendant's profession to establish a standard of care for that professional under the circumstances and that the professional somehow deviated from the applicable standard. Taylor v. DeLosso, 319 N.J. Super. 174, 179 (App. Div. 1999). (expert testimony from an architect is required to establish a deviation from the architectural standard of

care); Travelers Indemnity Co. v. Ewing, Cole, Erdman & Eubanks, 711 F.2d 14, 17 (3d Cir. 1983) (same).

Relevant Statutes and Regulations

- N.J. Stat. Ann. § 2A:53A-27:

> In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.
>
> In the case of an action for medical malpractice, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in section 7 of P.L.2004, c. 17 (C.2A:53A-41). In all other cases, the person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification or by devotion of the person's practice substantially to the general area or specialty involved in the action for a period of at least five years. The person shall have no financial interest in the outcome of the case under review, but this prohibition shall not exclude the person from being an expert witness in the case.

- N.J. Stat. Ann. § 2A:53A-29:

> If the plaintiff fails to provide an affidavit or a statement in lieu thereof, pursuant to section 2 or 3 of this act,1 it shall be deemed a failure to state a cause of action.

Economic Loss Doctrine

New Jersey case law suggests that economic loss doctrine bars tort claims against design professional where the claims seek to alter contractual remedies or replace a breach of contract action. SRC Constr. S.R.C. Const. Corp. of Monroe v. Atlantic City Housing Authority, 935 F. Supp. 2d 796, 800 (D.N.J. 2013).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Six years, for tort claims against design professionals. Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 91 (1996).
  - The statute of limitations, however, is subject to a discovery rule, under which a claim does not begin to accrue until plaintiffs are put on notice of a potential claim against a defendant. Id. at 115.
- Statute of Repose:
  - 10 years, beginning "one day after the completion of his/her work." Newark Beth Israel Med. Ctr. V. Gruzen and Partners, 124 N.J. 357, 366 (1991).

Additional Issues

- A New Jersey statute requiring plaintiffs suing a licensed person for negligence to file an affidavit of merit did not apply to willful or wanton misconduct claims against a parking garage architect brought by the estates of a driver and passenger killed in a parking garage accident. Martin v. Perinni Corp., 37 F. Supp. 2d 362, 364 (D.N.J. 1999).
- An affidavit of merit from a licensed engineer did not suffice to support a general contractor's claims against an architect and his architectural firm that alleged deviations of the professional standards of care in connection with a construction project; although there was degree of functional and licensure overlap between the engineering profession and the architecture profession, that overlap did not permit engineer to vouch for the merit of general contractor's malpractice and professional negligence claims it had levied against the architect and his firm. Hill Intern., Inc. v. Atlantic City Bd. of Educ., 438 N.J. Super. 562, 593. (App. Div. 2014), appeal granted 221 N.J. 283, appeal granted 222 N.J. 13, appeal dismissed 224 N.J. 523.
- When an architect becomes involved either as a principal or a retained professional in a real estate marketing venture, wherein he permits his services to be held out as part of what is being sold or provided by way of influencing purchasers to enter into contracts or to maintain contractual relationships, he becomes subject to New Jersey's Consumer Fraud Act (N.J.S.A. 56:8-1 to 56:8-91), just as every other person involved in inducing the sale or preserving the transaction may be. Blatterfein v. Larken Associates, 323 N.J. Super. 167, 182, 732 A.2d 555 (N.J. App. Div. 1999).

Pattern Jury Instructions

New Jersey Pattern Jury Charge 5.52 instructs juries on the duty of care for architects, engineers, and other design professionals. Although the rule itself uses the term "architect," the notes to the pattern charge make clear that "[t]his charge is equally appropriate for other design

professionals, such as: engineers, land surveyors, professional planners, etc." Pattern jury charge 5.52 reads:

A. General Duty Owing

In this action plaintiff contends that defendant was negligent because he/she did not comply with the standard of care that the law imposes upon him/her while performing the work of his/her contract with [*party name*]. Plaintiff contends that as a result of defendant's negligence plaintiff suffered injury for which damages are sought.

To decide this case properly you must know the standard of care imposed by law against which defendant's responsibilities as an architect should be measured.

An architect represents that he/she has and will use the degree of knowledge, skill, judgment and taste ordinarily possessed and used by the average architect in the profession. Further, the architect's conduct must be measured by the standard architectural practice, in the same or similar communities, at the time the architect was performing his/her services. Thus an architect has the duty to have and to use that degree of judgment, knowledge, skill and taste which architects of ordinary ability possess and exercise, in the same or similar communities, at the time the architect performs his/her services. This is the standard by which to judge the architect in this case.

The law does not expect or require perfection. Unsatisfactory results, alone, are not necessarily evidence of lack of skill or proper care. Thus, if you find that the architect has exercised that degree of knowledge, skill, judgment and taste which is possessed and used by the average architect, you may not find him/her liable for negligence even though unsatisfactory results may have occurred.

Further, where, according to standard architectural practice, the work involves matters to be subjected to the judgment of the architect, the architect is allowed to exercise that judgment. An architect is not liable if, in the exercise of that judgment, in accordance with accepted standard, a bad result occurs. If in the exercise of his/her judgment an architect selects one or two or more courses of action, each of which under the circumstances has substantial support as proper practice in the architectural profession, the architect is not negligent even if the course chosen produces a poor result.

However, an architect who departs from standard architectural practice cannot excuse himself/herself from the consequences by stating it was an exercise of his/her judgment. If the exercise of an architect's judgment causes him/her to do that which standard architectural practice forbids, he/she is negligent. Similarly, an architect is negligent if his/her judgment causes him/her to omit doing something which under the circumstances is required by standard architectural practice.

Simply stated, then, the obligation or duty which the law imposes on an architect is to bring to his/her client that knowledge, skill, judgment and taste ordinarily possessed and exercised in similar situations, in the same or similar communities, in his/her field

at the time of the undertaking. If you find that the defendant has complied with this standard, he/she is not liable to the plaintiff, regardless of the result of his/her work. On the other hand, if you find that the defendant has departed from this standard of care, and that such departure has resulted in injury or damage, then you should find the defendant liable for his/her negligence.

B. Expert Testimony to Prove Standard of Care [*The notes state that "If the failure of the architect's performance is so clear that professional negligence may be found without the aid of expert testimony, this instruction is unnecessary."*]

Negligence is conduct that falls below a standard of care required by law for the protection of persons or property from foreseeable risks of harm.

In a suit against an architect, jurors normally are not qualified to supply the standard of care by which to measure the defendant's conduct. Based upon their common knowledge alone, without technical training, jurors usually cannot know what conduct constitutes standard architectural practice. Therefore, ordinarily, when an architect is charged with negligence, the standard of practice by which his/her conduct is to be judged must be furnished by expert testimony; that is to say, by the testimony of persons who by knowledge, training or experience are deemed qualified to testify and to express their opinions on standard architectural practice.

As jurors, you should not speculate or guess about the standards which the average architect should follow. In a case such as this, you as jurors must determine what is standard architectural practice from the testimony of the expert witnesses who have been heard in this case. After hearing such testimony and deciding what standard architectural practice is in the circumstances of this case, you as jurors must then determine whether the defendant has complied with or whether defendant has departed from that standard of care. If you find that the defendant has complied with this standard, he/she is not liable to the plaintiff, regardless of the result of his/her work. On the other hand, if you find that the defendant has departed from this standard of care, and that such departure has resulted in injury or damage, then you should find the defendant liable for his/her negligence.

C. Common Knowledge May Furnish Standard of Care

Negligence is the failure to comply with the standard of care required by law to protect a person from foreseeable risks of harm. Negligence in an architect's practice is the architect's failure to comply with the standard of care required by law in the performance of his/her duties. Usually it is necessary to establish the standard of care by expert testimony, that is, by testimony of persons who are qualified by their training, study and experience to give their opinions on subjects not generally understood by persons who lack such special training or experience. In the usual case, standard architectural practice by which to judge defendant's conduct cannot be determined by the jury without the assistance of expert testimony.

However, in some cases, such as the case at hand, the jury may determine from its common knowledge and experience the standard of care by which to judge defendant's conduct. In this case, plaintiff contends that defendant violated the duty of care he/she owed to plaintiff by doing [*insert conduct*]/by failing to do [*insert conduct*]. In this case, therefore, it is for you, as jurors, to determine, based upon common knowledge and experience, what skill and care the average architect would have exercised in the same or similar circumstances. It is for you as jurors to say from your common knowledge and experience whether defendant did something which the average member of his/her profession would not have done or whether defendant failed to do something or failed to take some measure that the average member of his/her profession would have done or taken in the circumstances of this case.

After determining the standard of care required in the circumstances of this case, you should then consider the evidence to determine whether defendant has complied with or departed from that standard of care. If you find that defendant has complied with that standard, he/she is not liable to the plaintiff, regardless of the result of his/her work. On the other hand, if you find that the defendant has departed from that standard of care, and that such departure has resulted in an identifiable injury or damage, then you should find defendant liable for his/her negligence.

New Jersey Pattern Jury Charge 5.52.

NEW MEXICO

STANDARD OF CARE

In New Mexico, "[w]hen professional services arising from contract are substandard, a plaintiff may bring a cause of action for malpractice based on negligence or for breach of contract arising from the breach of the implied warranty to use reasonable skill," the standard of care in either case is measured by "the duty to apply the knowledge, care, and skill of reasonably well-qualified professionals practicing under similar circumstances." Adobe Masters, Inc. v. Downey, 118 N.M. 547, 578 (N.M. 1994). New Mexico courts generally use the terms "malpractice" and "professional negligence" interchangeably. Chisholm v. Scott, 86 N.M. 707, 708 (Ct. App. N.M. 1974).

RESTATEMENT

New Mexico does not follow the Restatement (Second) of Torts § 299A.

ELEMENTS OF A CLAIM

Generally, a plaintiff must prove the following elements to prevail on a claim for professional malpractice based on negligence:

1) The defendant's employment as a professional

2) The defendant's neglect of a reasonable duty

3) The negligence resulted in and was the proximate cause of the plaintiff's loss

Buke v. Cross Country Auto Sales, LLC, 331 P.3d 942, 954 (N.M. Ct. App. 2014) (quoting Hyden v. Law Firm of McCormick, Forbes, Caraway & *Tabor*, 848 P.2d 1086, 1090-91 (N.M. Ct. App. 1993)) (involving an accountant malpractice claim).

EXPERT TESTIMONY

In professional negligence cases, expert testimony must prove both breach of the implied warranty to use reasonable skill under contract law and negligence resulting in a finding of malpractice *unless* the case is one in which exceptional circumstances within the common experience or knowledge of a layman are present. Adobe Masters, Inc., 883 P.2d at 135.

RELEVANT STATUTES AND REGULATIONS

- N.M. STAT. ANN. § 60-13-3.1 (West):

> A. Except as provided in Subsection D of this section, for purposes of the employer and employee relationship within those construction industries subject to the Construction Industries Licensing Act, a contractor who is an employer shall consider a person providing labor or services to the contractor for compensation to be an employee of the contractor and not an independent

contractor unless the following standards indicative of an independent contractor are met:

(1) the person providing labor or services is free from direction and control over the means and manner of providing the labor or services, subject only to the right of the person for whom the labor or services are provided to specify the desired results;

(2) the person providing labor or services is responsible for obtaining business registrations or licenses required by state law or local ordinance for the person to provide the labor or services;

(3) the person providing labor or services furnishes the tools or equipment necessary to provide the labor or services;

(4) the person providing labor or services has the authority to hire and fire employees to perform the labor or services;

(5) payment for labor or services is made upon completion of the performance of specific portions of a project or is made on the basis of a periodic retainer; and

(6) the person providing labor or services represents to the public that the labor or services are to be provided by an independently established business. A person is engaged in an independently established business when four or more of the following circumstances exist:

(a) labor or services are primarily performed at a location separate from the person's residence or in a specific portion of the residence that is set aside for performing labor or services;

(b) commercial advertising or business cards are purchased by the person, or the person is a member of a trade or professional association;

(c) telephone or email listings used for the labor or services are different from the person's personal listings;

(d) labor or services are performed only pursuant to a written contract;

(e) labor or services are performed for two or more persons within a period of one year; or

(f) the person assumes financial responsibility for errors and omissions in labor or services as evidenced by insurance, performance bonds and warranties relating to the labor or services being provided.

B. The labor department shall administer and enforce the provisions of Subsection A of this section, including coordination with the construction industries division of the regulation and licensing department.

C. A contractor who intentionally and willfully reports to a state agency or other client that an employee is an independent contractor or who, for the purposes of a program administered by a state agency, intentionally and willfully treats or otherwise lists an employee as an independent contractor when the employee's status does not meet the standards indicative of an independent contractor as identified in Subsection A of this section is guilty of a misdemeanor and shall be punished by a fine of not more than five thousand dollars ($5,000) or by imprisonment for a definite term not to exceed six months or both. For the purposes of this subsection, "state agency" means an administration, board, commission, department or division of this state.

D. Conviction of a contractor for violating Subsection C of this section shall be grounds for the construction industries commission to take action to suspend, revoke or refuse to renew a license issued to that contractor by the construction industries division of the regulation and licensing department.

E. Subsections A, B and C of this section shall not be construed to affect or apply to a common law or statutory action providing for recovery in torts and shall not be construed to affect or change the common law interpretation of independent contractor status as it relates to tort liability.

ECONOMIC LOSS DOCTRINE

The New Mexico Court of Appeals adopted the economic loss rule in Utah Int'l, Inc. v. Caterpillar Tractor Co., 108 N.M. 539, 775 P.2d 741, 744 (1989). There, the court held that, "in commercial transactions, when there is no great disparity in bargaining power of the parties . . . economic losses from injury of a product to itself are not recoverable in tort actions; damages for such economic losses in commercial settings in New Mexico may only be recovered in contract actions." In a decision endorsing the Court of Appeals' adoption of the economic loss rule, the New Mexico Supreme Court observed that, "[a]s a matter of policy, the parties should not be allowed to use tort law to alter or avoid the bargain struck in the contract. The law of contract provides an adequate remedy." Farmers All. Mut. Ins. Co. v. Naylor, 480 F. Supp. 2d 1287, 1289 (D.N.M. 2007) (alterations in original) (citations omitted) (quoting In re Consol. Vista Hills Retaining Wall Litig., 893 P.2d 438, 446 (N.M. 1995)).

While, under New Mexico law, the economic loss rule applies to contracts for goods and services, New Mexico law does *not* permit an unhindered application of the economic loss rule to service contracts. Rather, tort duties that exist independent of a contract sharply limit the economic loss rule's application to service contracts. This limitation arises out of the unique relationship that often exists between service providers and their clients. Unlike buyers and sellers of goods, who can contractually define the expectations arising out of the commercial relationship, service providers are often licensed professionals who owe to their customers a duty of care that exists apart from the contractual agreements underlying their commercial relationship. Case law

in New Mexico reflects New Mexico's unwillingness to allow the economic loss rule to intrude on such professional relationships. As the New Mexico Supreme Court has observed, "[w]hen professional services arising from contract are substandard, a plaintiff may bring a cause of action for malpractice based on negligence or for breach of contract arising from the breach of the implied warranty to use reasonable skill." Id. at 1289-90 (quoting Adobe Masters, Inc. v. Downey, 883 P.2d 133, 134 (N.M. 1994)) (emphasis added).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Four years, for professional negligence. N.M. Stat. Ann. 1978, § 37-1-4.
- Statute of Repose:

> No action to recover damages for any injury to property, real or personal, or for injury to the person, or for bodily injury or wrongful death, arising out of the *defective or unsafe condition of a physical improvement to real property*, nor any action for contribution or indemnity for damages so sustained, against any person performing or furnishing the construction or the design, planning, supervision, inspection or administration of construction of such improvement to real property, and on account of such activity, shall be brought *after ten years from the date of substantial completion of such improvement*; provided this limitation shall not apply to any action based on a contract, warranty or guarantee which contains express terms inconsistent herewith. The date of substantial completion shall mean the date when construction is sufficiently completed so that the owner can occupy or use the improvement for the purpose for which it was intended, or the date on which the owner does so occupy or use the improvement, or the date established by the contractor as the date of substantial completion, whichever date occurs last.

Id. § 37-1-27 (emphasis added).

Additional Issues

- If a plaintiff establishes that professional services arising out of contract were substandard under both theories of negligence and breach of contract, the plaintiff must elect his damages. Adobe Masters, Inc., 883 P.2d at 134. Further, although New Mexico does not recognize cause of action against architects for breach of implied warranty to furnish plans and specifications adequate for a specified purpose, a breach of contract action against an architect is not limited to claims for breach of express warranty or complete nonperformance, and an action may be brought for breach of implied warranty to use reasonable skill. Id.

PATTERN JURY INSTRUCTIONS

New Mexico does not appear to utilize a standard jury instruction specifically pertaining to professional negligence of engineers or architects. The general negligence instruction states as follows:

13-1601. Negligence (of all persons); definition.

The term "negligence" may relate either to an act or a failure to act.

An act, to be "negligence", must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to [himself] [herself] or to another and which such a person, in the exercise of ordinary care, would not do.

A failure to act, to be "negligence", must be a failure to do an act which one is under a duty to do and which a reasonably prudent person, in the exercise of ordinary care, would do in order to prevent injury to [himself] [herself] or to another.

NEW YORK

STANDARD OF CARE

In New York, a professional "is held to the level of skill and care used by others in the community who practice the same profession." N.Y. Pattern Jury Instr.—Civil 2:15. Whereas "[a]n architect who prepares plans and specifications for a building impliedly represents that he or she has the reasonable degree of skill usually possessed by a member of the architectural profession and is familiar with the construction materials and practices in ordinary use in the construction of such a building and with the various building code provisions governing construction of such a building." N.Y. Pattern Jury Instr.—Civil 2:153.

"A claim of professional negligence requires proof that there was a departure from the accepted standards of practice and that the departure was a proximate cause of the injury." 143 Bergen St., LLC v. Ruderman, 42 N.Y.S.3d 252 (N.Y. App. Div. 2016) (architects); Kung v. Zheng, 901 N.Y.S.2d 334 (N.Y. App. Div. 2010) (same); Kung v. Zheng, 73 A.D.3d 862, 863 (N.Y. App. Div. 2010) (finding an issue of fact because the parties' experts did not agree on whether the architect deviated from the applicable professional standards). "Absent a guarantee of specific results, those engaged in the professions are held only to the standard generally followed in their particular profession and are required only to use due care in the performance of the professional services rendered." Queensbury Union Free Sch. Dist. v. Jim Walter Corp., 398 N.Y.S.2d 832 (N.Y. Sup. Ct. 1977). "The law does not expect or require absolute perfection, but tests the efficiency of the architect by the rule of ordinary and reasonable skill usually exercised by one of that profession." Major v. Leary, 241 A.D. 606, 606 (N.Y. App. Div. 1934) (finding that the alleged errors of the architect "appear to be to a large extent trivial and in other respects largely captious and artificial" and finding in the architect's favor); see also 530 E. 89 Corp. v. Unger, 54 A.D.2d 848, 848 (N.Y. App. Div. 1976) ("The mere failure to produce acceptable plans is not evidence of negligence" by an architect); Bd. of Ed. of Cent. Sch. Dist. No. 1 of Towns of Allegany, Carrollton, Humphrey & Olean, Cattaraugus Cty. v. Matthew L. Carroll, Inc., 157 N.Y.S.2d 775, 778 (Sup. Ct. 1956) (the architect's "obligation to supervise was met and discharged when the architect made adequate weekly supervision.").

"An architect must exercise reasonable care and diligence in performing his or her duties to his or her employer, act with reasonable judgment and taste, and without neglect. Architects are immune from malpractice liability for errors of judgment, as opposed to negligence[.]" 76 N.Y. Jur. 2d Malpractice § 21; Bd. of Educ., Cent. Sch. Dist. No. 1, Towns of Camillus, Onondaga, Van Buren, Geddes & Elbridge v. Hueber, 90 A.D.2d 685, 685 (N.Y. App. Div. 1982) (citing Topel v. Long Island Jewish Med. Ctr., 55 N.Y.2d 682, 689 (1981), which found that, as long as a professional "stays within the bounds of the accepted practice, he or she is immune from liability for pure errors of judgment or for mere lack of success;" however, if the professional departs from that standard, there is no immunity).

RESTATEMENT

New York follows the Restatement (Second) of Torts § 299A. See Abrams v. Bute, 138 A.D.3d 179, 184, 27 N.Y.S.3d 58, 63 (N.Y. App. Div. 2016) (finding that the Restatement applies to any

person "who undertakes to render services in the practice of a profession or trade," such as a pharmacist); Roizen v. Marder's Nurseries, Inc., 161 Misc. 2d 689, 690-691 (N.Y. Sup. Ct. 1994) (professional liability for a landscaper).

Elements of a Claim

New York generally articulates the elements of a claim for professional negligence as follows:

1) Negligence of the professional — departure from the applicable standard of care

2) Causation

3) Actual damages

See, e.g., Health Acquisition Corp. v. Program Risk Mgmt., Inc., 964 N.Y.S.2d 554 (N.Y. App. Div. 2013); Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 865 N.Y.S.2d 14 (N.Y. App. Div. 2008).

Expert Testimony

Expert testimony is required to prove malpractice unless the alleged act can be evaluated by laypersons. See 530 E. 89 Corp. v. Unger, 43 N.Y.2d 776, 777 (1977) (architectural malpractice). "[T]o prove negligence or malpractice in the design of a structure, the plaintiff must put forth expert testimony that the engineer or architect deviated from accepted industry standards." Columbus v. Smith & Mahoney P.C., 259 A.D.2d 857, 858 (N.Y. App. Div. 1999); see also Michael v. He Gin Lee Architect Planner, PLLC, 153 A.D.3d 704, 705 (N.Y. App. Div. 2017) (architectural malpractice).

Relevant Statutes and Regulations

- N.Y. Bus. Corp. § 1505(a):

> Each shareholder, employee or agent of a professional service corporation and a design professional service corporation shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation.

Economic Loss Doctrine

In New York, the economic loss doctrine has been found to preclude the recovery of purely economic loss under tort theories, including negligence claims against an architect or engineer. See, e.g., Key Int'l Mfg., Inc. v. Morse/Diesel, Inc., 536 N.Y.S.2d 792 (N.Y. App. Div. 1988) ("[T]he owner of a construction project may not recover compensation for economic damages caused by the negligence of an architect or engineer with whom it is not in privity of contract.").

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Three years, for actions to recover damages for an injury to person or property. C.P.L.R. § 214.
  - Six years, for an action based upon a contractual obligation or liability, express or implied. C.P.L.R. § 213.
  - "[A] contractor's claim accrues when its damages are ascertainable," which is generally when "the work is substantially completed or a detailed invoice of the work performed is submitted." C.S.A. Contr. Corp. v. N.Y. City Sch. Constr. Auth., 5 N.Y.3d 189, 192 (2005).
- Statue of Repose:
  - New York does not have a statute of repose. However, any claim for personal injury, wrongful death, or property damage asserted against a licensed architect, engineer, land surveyor, or landscape architect (or against a company performing these services) that arises out of the services provided by these professionals that were performed more than 10 years prior to the claim is subject to C.P.L.R. § 214-d. This statute requires plaintiff to serve a pre-suit notice of claim to the design professional 90 days prior to the commencement of any action, and the design professional may seek dismissal of the lawsuit through summary judgment.

Additional Issues

- Professionals "may be held in malpractice for the negligent performance of their professional services but in this state no cause of action is known to the law against an architect for a breach of implied warranty." Queensbury Union Free Sch. Dist. v. Jim Walter Corp., 398 N.Y.S.2d 832 (N.Y. Sup. Ct. 1977).
- "As a general rule, parties are free to enter into contracts that absolve a party from its own negligence or that limit liability to a nominal sum. As a matter of public policy, however, exculpatory or limitation of liability clauses are not enforceable in the face of grossly negligent conduct. This applies equally to contract clauses purporting to exonerate a party from liability and clauses limiting damages to a nominal sum." Soja v. Keystone Trozze, LLC, 964 N.Y.S.2d 731 (N.Y. App. Div. 2013) (internal citations omitted).
- "No action lies for breach of implied warranty on behalf of an owner against an architect with whom he or she has a contract. Absent a guarantee of specific results, an architect is only held to the standard generally followed by the profession and does not impliedly warrant that the item to be constructed will be of good and merchantable quality." 76 N.Y. Jur. 2d Malpractice § 21.

- "[A] viable cause of action alleging professional negligence or malpractice requires that the underlying relationship between the parties be one of privity of contract, or that the bond between them be so close as to be the functional equivalent of privity." Perfetto v. CEA Eng'rs, P.C., 980 N.Y.S.2d 788 (N.Y. App. Div. 2014). To establish the functional equivalent of privity, a plaintiff must show: (1) defendant was aware that his professional services would be used for a particular purpose, (2) plaintiff relied upon the professional, and (3) some conduct by defendant linking the defendant to the plaintiff and evincing the defendant's understanding of plaintiff's reliance. See, e.g. Ossining Union Free Sch. Dist. v. Anderson LaRocca Anderson, 539 N.E.2d 91, 425, (N.Y. 1989) (consulting engineer); Melnick v. Parlato, 745 N.Y.S.2d 68 (N.Y. App. Div. 2002) (claim of architectural malpractice).

Pattern Jury Instructions

New York has a specific pattern jury instruction for the standard of care for architects, which is as follows:

> An architect who prepares plans and specifications for a building impliedly represents that he or she has the reasonable degree of skill usually possessed by a member of the architectural profession and is familiar with the construction materials and practices in ordinary use in the construction of such a building and with the various building code provisions governing construction of such a building. An architect is not required to have that degree of skill that belongs only to a few persons of extraordinary skill but must keep informed of currently approved methods in general use in the profession and in the construction industry. An architect is liable to a client for defects in the building resulting from the architect's failure in the preparation of plans and specifications to use that degree of skill usually possessed by architects and for failure to be familiar with the various code provisions and current materials and practices in general use in the construction industry.
>
> An architect who undertakes to supervise the construction of a building is under a duty to use reasonable care to see that the work complies with the various code provisions and the plans and specifications and is done in a good and workmanlike manner. By reasonable care is meant that degree of care that a reasonably prudent architect would use under the same circumstances. An architect is not required to remain constantly at the job site but must make such inspections at the site and be present to oversee such portions of the construction as a reasonably prudent architect would do.
>
> Caveat: Failure to use due care in design or supervision allows recovery of both tort and contract damages, except those damages may be precluded by the running of the applicable statute of limitations[.]

N.Y. Pattern Jury Instr.—Civil 2:153 Malpractice—Architect.

Although New York does not have a specific pattern jury instruction for the standard of care for engineers or design professionals, New York Pattern Jury Instruction 2:15 instructs juries on the duty of care and reads as follows:

> A person who has special training and experience in a (engineering or design), when acting in the trade or profession on behalf of others who are relying on (his, her) special skills, has the duty to use the same degree of skill and care that others in the same profession in the community would reasonably use in the same situation. (AB), the defendant in this case, has (or claimed to have) special skills in [engineering or design]. If you decide that defendant did use the same degree of skill and care that other [engineers or design professionals] in the community would reasonably use in the same situation, then you must find that defendant was not negligent, no matter what resulted from defendant's conduct. On the other hand, if you decide that defendant did not use the same degree of skill and care, then you must find that defendant was negligent.

N.Y. Pattern Jury Instr.—Civil 2:15 Common Law Standard of Care—Defendant Having Special Knowledge.

NORTH CAROLINA

STANDARD OF CARE

In North Carolina, "one who engages in a business, occupation or profession represents to those who deal with him in that capacity that he possesses the knowledge, skill, and ability, with reference to matters relating to such calling which others engaged therein ordinarily possess. He also represents that he will exercise reasonable care in the use of his skill and the application of his knowledge and will exercise his best judgment in the performance of work for which his services are engaged, within the limits of such calling." Firemen's Mut. Ins. Co. v. High Point Sprinkler Co., 266 N.C. 134, 140 (1966). Engineers, surveyors, and architects must exercise that degree of care that engineers, surveyors, and architects of ordinary skill and prudence would exercise under similar circumstances. In re New Bern Riverfront Dev., LLC, No. 09-10340-8-JRL, 2011 WL 5902621, at *2 (Bankr. E.D.N.C. May 24, 2011) (citing *Davidson & Jones, Inc. v. New Hanover City*, 255 S.E.2d 580, 584 (N.C. Ct. App. 1979)); Lamb v. Styles, 824 S.E.2d 170 (N.C. Ct. App. 2019); Associated Indus. Contractors, Inc. v. Fleming Eng'g, Inc., 590 S.E.2d 866 (N.C. Ct. App. 2004), aff'd, 608 S.E.2d 757 (N.C. 2005)).

RESTATEMENT

North Carolina has not explicitly adopted the Restatement (Second) of Torts § 299A, but courts have used it as a standard of care. See, e.g., Wall v. Stout, 311 S.E.2d 571 (1984); Apperson v. Intracoastal Realty Corp., 2018 N.C. App. LEXIS 929 (N.C. Ct. App. 2018); Reich v. Price, 429 S.E.2d 372 (N.C. Ct. App. 1993).

ELEMENTS OF A CLAIM

To establish a prima facie case of professional negligence in North Carolina, the plaintiff must show:

1) The nature of the defendant's profession

2) The defendant's duty to conform to a certain standard of conduct

3) A breach of the duty proximately causing injury to the plaintiff

See, e.g., Rainey v. St. Lawrence Homes, Inc., 621 S.E.2d 217 (N.C. Ct. App. 2005); Beck Elec., LLC v. Neighboring Concepts, PLLC, 753 S.E.2d 743 (N.C. Ct. App. 2013).

EXPERT TESTIMONY

North Carolina does not require expert testimony to establish the standard of care, failure to comply with the standard of care, or proximate cause, where the trier of fact may make those determinations based on common knowledge. Associated Indus. Contractors, Inc. v. Fleming Eng'g, Inc., 590 S.E.2d 866 (N.C. Ct. App. 2004), aff'd, 608 S.E.2d 757 (N.C. 2005); see also Ohio Square D. Co. v. C.J. Kern Contractors, Inc., 318 S.E.2d 527, 530 (N.C. Ct. App. 1984), aff'd sub nom. Square D Co. v. C.J. Kern Contractors, Inc., 334 S.E.2d 63 (N.C. 1985) (holding six-

year statute of repose codified in N.C. GEN. STAT. § 1-50 (a)(5) barred a plaintiff's claims against architects).

RELEVANT STATUTES AND REGULATIONS

- N/A

ECONOMIC LOSS DOCTRINE

In North Carolina, "[a]n engineer may be held liable in tort for breach of professional duty, even if its work is pursuant to a contract with the injured party and the injury suffered is to property which is the subject matter of the contract." In re New Bern Riverfront Dev., LLC, 2011 WL 5902665 at *2 (N.C. E.D. Bankr. Ct. August 11, 2011)).

STATUTE OF LIMITATIONS AND STATUTE OF REPOSE

- Statute of Limitations:
  - Three years, for claims of professional negligence N.C. GEN. STAT. § 1-52(5).
- Statue of Repose:
  - Six years, for actions based upon defective or unsafe conditions of an improvement to real property, as well as for actions to recover damages for negligent construction or repair of an improvement to real property, personal injury, death, property damages, and more. Id. § 1-50(a)(5).

ADDITIONAL ISSUES

- Under North Carolina law, an expert's proffered opinion of an engineer's standard of care may not be based only on an engineer society's code of ethics. Michael v. Huffman Oil Co., 661 S.E.2d 1, 8 (N.C. Ct. App. 2008).
- The North Carolina Building Code "specifically set[s] the standard of care in respect to the installing of the electrical system of a building and the electric wiring of buildings for lighting or for other purposes," Drum v. Bisaner, 113 S.E.2d 560, 563 (N.C. 1960), and a defendant can be found to have owed and breached a duty to provide electrical fixture plans conforming to the North Carolina Building Code. Beck Elec., LLC v. Neighboring Concepts, PLLC, 753 S.E.2d 743, at *3 (N.C. Ct. App. 2013).
- An architect, even in the absence of privity of contract, "may be sued by a general contractor or the subcontractors working on a construction project for economic loss foreseeably resulting from breach of the architect's common law duty of due care in the performance of his contract with the owner." Davidson & Jones Inc. v. New Hanover County, 41 N.C.App. 661, 667 (Ct. App. N.C. 1979).

PATTERN JURY INSTRUCTIONS

North Carolina does not have a pattern jury instruction pertaining specifically to cases involving professional negligence of architects, engineers, or other design professionals.

North Carolina's pattern jury instruction defining negligence provides:

> Negligence refers to a person's failure to follow a duty of conduct imposed by law. Every person is under a duty to use ordinary care to protect himself and others from [injury] [damage]. Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect himself and others from [injury] [damage]. A person's failure to use ordinary care is negligence.

Further, the pattern jury instruction regarding an architect's or project manager's negligence in scheduling provides, in relevant part:

> In this case, the [architect] [project expediter] [(name other appropriate term)] entered into a contract with [(name owner)], the owner of the [(name project)], to provide services including the scheduling of work on the project by contractors and subcontractors. An [architect] [project expediter] [(name other appropriate term)] is required to exercise that degree of ability, skill and care customarily used by [architect] [project expediter] [(name other appropriate term)] upon such projects under the same or similar circumstances. A failure to exercise such ability, skill and care is negligence.

NORTH DAKOTA

STANDARD OF CARE

In North Dakota, "one who undertakes to design and construct a structure has a duty to exercise ordinary care and skill to protect any who foreseeably, or with reasonable anticipation, may be injured by the failure to do so," a duty that "arises independent of any contractual obligations." Sime v. Tvenge Assocs. Architects & Planners, P.C., 488 N.W. 2d 606, 609 (N.D. 1992); see also Dinger ex. Rel Dinger v. Strata Corp., 607 N.W. 2d 886, 891 (N.D. 2000).

"Generally, the duty of care in negligence actions is to exercise reasonable care under the circumstances." Tom Beuchler Const., Inc. v. City of Williston, 392 N.W.2d 403, 405 (N.D. 1986). "Reasonable care under the circumstances necessarily includes any specialized knowledge, facts, or skill on the part of the one charged with a duty." Id. (citing Van Ornum v. Otter Tail Power Co., 210 N.W.2d 188 (N.D.1973)). For an architect, the standard of care is "set by the learning, skill, and care ordinarily possessed and practiced by others of the same profession." Van Ornum, 210 N.W.2d at 201. "The custom or practice is not necessarily the standard of care to be employed in a negligence action, but may be evidence of whether conduct meets the standard of reasonable care under the circumstances." Tom Buechler Constr., Inc., 392 N.W.2d at 405.

Further, "[i]n preparing plans and specifications for a project, a professional does not guaranty a perfect plan or satisfactory results; rather, the professional's duty is to exercise that degree of skill and care applied under all the circumstances in the community by the average, prudent, reputable member of the profession." Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C., 419 N.W.2d 920, 921-22 (N.D. 1988). In Wold Eng'g, for instance, plaintiffs sued defendant, an engineering firm, after a water system designed by defendant froze, resulting in significant damage to plaintiff's property. Id. at 921. Affirming the trial court's decision following a bench trial, the appellate court concluded that because defendants had the water system reviewed by a number of engineers before installing it on plaintiff's property, and because there was evidence that vandalism committed after installation may have been the proximate cause of the malfunction, defendant did not breach its duty of care to plaintiffs. Id. at 922.

ELEMENTS OF A CLAIM

In North Dakota, the elements of a malpractice or professional negligence action:

1) The existence of a duty or standard of care on the part of the professional to protect another from injury.

2) The failure to discharge that duty.

3) A resulting injury proximately caused by the breach of duty.

Id.

Expert Testimony

North Dakota law does not expressly require expert testimony in order to sustain an action for malpractice or professional negligence against a design professional.

Relevant Statutes and Regulations

- N.D. Admin. Code 8-07-01-0:

> In engaging in the practice of architecture or landscape architecture, a registered architect or landscape architect shall act with reasonable care and competence and shall apply the technical knowledge and skill which are ordinarily applied by registered architects or landscape architects of good standing practicing in the same locality.

Economic Loss Doctrine

It is not clear whether North Dakota courts will apply the economic loss doctrine to claims against design professionals. As a general matter, "under the economic loss doctrine in North Dakota, 'economic loss resulting from damage to a defective product, as distinguished from damage to other property or persons, may be recovered in a cause of action for breach of warranty or contract, but not in a tort action.'" Leno v. K & L Homes, Inc., 803 N.W.2d 543, 550 (N.D. 2011) (quoting Steiner v. Ford Motor Co., 606 N.W.2d 881 (N.D. 2000)).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - The statute of limitations for professional negligence claims against architects and engineers is two years from the date of discovery or reasonable discovery. Sime, 488 N.W. 2d at 609; see also NDCC § 28-01-18.
- Statute of Repose:
  - – subject to a caveat for certain cases involving wrongful death, the statute of repose in North Dakota for claims involving a "deficiency in the design, planning, supervision, or observation of construction or construction of an improvement to real property"; an "injury to property, real or personal, arising out of any such deficiency"; or an "injury to the person or for wrongful death arising out of any such deficiency" is ten years after "substantial completion of the improvement." NDCC § 28-01-44 (emphasis added).

Additional Issues

- In North Dakota, claims for ordinary negligence and claims for professional negligence are distinct, each having their own statute of limitations, 6 years and 2 years, respectively. "'[I]t is the actual 'nature of the action' or the actual 'nature of the subject matter' which is determinative" of whether the action is based upon professional negligence or ordinary negligence, for purposes of determining applicable limitations period. Krein v. DBA Corp.,

327 F.3d 723, 727 (8th Cir. 2003) (action alleging that corporation that provided engineering and design services for installation of conveyor belt system at facility negligently performed such services was construed as professional negligence, rather than for ordinary negligence, regardless of fact that non-degree employees were involved in providing on-site supervision and training at facility, and the engineering work was subcontracted out); see Sime, 488 N.W. 2d 606, 609 (N.D. 1992) (action alleging that architect and engineer negligently designed and located ventilation system was construed as action for "malpractice," subject to two-year statute of limitations, rather than action in negligence)

PATTERN JURY INSTRUCTIONS

North Dakota courts do not appear to use a standard jury instruction specifically pertaining to the negligence of engineers or architects. Because the standard of care for architects and engineers is referenced in administrative statute (NDAC 8-07-01-01), that may be a helpful starting point in crafting a jury instruction. Otherwise, the ordinary negligence pattern jury instruction states as follows:

C - 2.05. North Dakota Civil Jury Instructions

"Negligence" is the lack of ordinary care and diligence required by the circumstances. Ordinary care or diligence means such care as a person of ordinary prudence usually exercises about one's own affairs of ordinary importance.

Negligence involves a lack of such concern for the probable consequences of an act or failure to act as a person of ordinary prudence would have had in conducting one's own affairs. It is the lack of such care as persons of common sense and ordinary prudence usually exercise under the same or similar circumstances. Negligence is a relative term. Whether a certain act or failure to act is negligence depends upon the facts and circumstances of each particular case.

The duty to use care is based upon knowledge of danger. The care that a person must exercise in a particular situation is in proportion to the degree of danger of injury to oneself or to others in the act to be performed. The care necessary to constitute the ordinary care required by a person upon any particular occasion is measured by reference to the circumstances of danger known to one at the time or which the person should reasonably have foreseen. The greater the danger, the greater is the care required.

A person is presumed to have performed one's duty and to have exercised ordinary care, unless the contrary is shown by the greater weight of the evidence. The mere fact that a mishap occurred, considered alone, is not in itself evidence of negligence on the part of any of the people involved. You have no right to assume that the mishap was caused by negligence or other fault of anyone.

[If the standard of care required in any given situation is prescribed by the laws of this state, a failure to observe that standard is evidence of negligence.]

OHIO

STANDARD OF CARE

In Ohio, one who contracts in a specialized professional capacity, such as architecture or engineering, to provide the design for a structure may be held to respond in damages to the foreseeable consequences of a failure to exercise reasonable care in preparing the design. See Cincinnati Riverfront Coliseum, Inc. v. McNulty Co., 28 Ohio St. 3d 333, 337 (1986); Simon v. Drake Constr. Co., 621 N.E.2d 837 (Oh. Ct. App., 8th Dist. 1993); see also Kacsmarik v. Lakefront Linea Area, 2011 WL 2112740, *6 (Oh. Ct. App., 8th Dist. 2011). In the context of negligence, reasonable care is that which an ordinarily prudent person would use under similar circumstances. Gribben v. Miller Overhead Doors, Inc., No. CA 12, 1999 WL 112814, *2 (Oh. Ct. App., 5th Dist. 1999). With respect to an architect in particular, reasonable care in the preparation of a design depends upon the standard of care that architects must follow. Simon, 621 N.E.2d at 839.

The exercise of reasonable care, however, does not guarantee a perfect plan. First Nat. Bank of Akron v. Cann, 503 F. Supp. 419, 439 (E.D. Ohio 1980); see also 11 Ohio Jur.3d Business and Occupations § 104 (1980). In First Nat. Bank of Akron v. Cann, for instance, the U.S. District Court for the Eastern District of Ohio (applying Ohio law) determined that an architect did not breach the duty to exercise reasonable care in failing to frequently visit a bank construction site and in not using a bond breaker to caulk one of the walls at the project. Cann, 503 F. Supp. at 439. In addition to noting that the plaintiff did not present evidence establishing damages resulting from the architect's failure to supervise the project, the court concluded that the caulk work was one of a number of conditions that rendered the work to the wall defective. Id. Given the scope of the project and the amount of work performed on the wall, the plaintiff therefore could not establish that the architect's caulk work was the proximate cause of any defective condition. Id.

RESTATEMENT

Ohio has adopted the Restatement (Second) of Torts § 299A for "engineers and other professionals." Perry v. Allis-Chalmers Prod. Liab. Trust, 2007 Ohio Misc. LEXIS 851 (Cuyahoga Ct. C.P 2007).

ELEMENTS OF A CLAIM

1) The existence of a duty that the defendant owed to the plaintiff

2) The breach of that duty

3) The direct and proximate causation between breach and injuries

4) Damages

See, e.g., Nicholson v. Turner/Cargile, 669 N.E.2d 529, 532 (Ohio Ct. App., 10th Dist. 1995)

Expert Testimony

"Expert testimony is required to establish the standard of care, unless the lack of skill or care of the professional is so apparent as to be within the comprehension of a layperson and requires only common knowledge and experience to understand it." Simon, 621 N.E.2d at 839. "Once [a defendant] presented expert testimony, [the plaintiff] was forced to present expert testimony that [the defendant] failed to meet the standard of care, or present evidence of a lack of skill or care so apparent as to be within the comprehension of a layperson." Id.

Relevant Statutes and Regulations

- N/A

Economic Loss Doctrine

The well-established rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner that is legally cognizable or compensable. Corporex Dev. & Constr. Mgmt., Inc. v. Shook, Inc., 106 Ohio St. 3d 412, 414 (2005). Rather, "[r]ecovery for economic loss is strictly a subject for contract negotiation and assignment. Consequently, in the absence of privity of contract no cause of action exists in tort to recover economic damages against design professionals involved in drafting plans and specifications." Floor Craft Floor Covering, Inc. v. Parma Cmty. Gen. Hosp. Ass'n, 560 N.E.2d 206, 212 (Ohio 1990). Where contractual privity exists, the parties to the contract are limited to obtaining damages which were within the contemplation of the parties in framing their agreement. Id. at 211.

There are limited exceptions in Ohio to the privity rule stated above. For example, one exists where there is a sufficient "nexus" between the design professional and contractor to impose a duty of care, where that nexus forms a substitute for privity. For example, "a design professional's significant participation in a contractor's work may create a nexus that substitutes for contractual privity." Nicholson, 669 N.E. 2d at 535 (citing Clevecon, Inc. v. Northeast Ohio Regional Server Dist., 628 N.E.2d 143, 146 (Ohio Ct. App.. 8th Dist. 1993)).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Four years, for claims of professional negligence of engineers and architects. See Ohio Rev. Code § 2305.09(D).
  - This limitations period may be tolled until the plaintiff discovers or reasonably should discover the complained-of injury. Stacey v. Winters, No. 09 CO 12, 2010 WL 2354154, *5 (Oh. Ct. App., 7th Dist. 2010). For statute-of-limitations purposes, Ohio courts do *not* treat professional negligence of engineers and architects as akin to doctors and lawyers, to which a shorter one-year statute of limitations typically applies. See B & B Contrs. & Developers, Inc. v. Olsavsky Jaminet Architects, Inc., 984 N.E.2d 419, 429 (Oh. Ct. App., 7th Dist. 2012).

- Statute of Repose:
  - 10 years. Ohio Rev. Code Ann. § 2305.131 states that:

    [N]o cause of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property and no cause of action for contribution or indemnity for damages sustained as a result of bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property shall accrue against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of substantial completion of such improvement.

PATTERN JURY INSTRUCTIONS

CV 421.03 Standard of Care

1. INTRODUCTION. This is a negligence claim brought by the plaintiff against the defendant (attorney) (accountant) (architect) (designer) (engineer) _____(*describe other professional*) to recover compensation for damages claimed to have been caused by the defendant's negligence. The plaintiff must prove by the greater weight of the evidence that the defendant was negligent and that the defendant's negligence was a proximate cause of (injury) (damage) to the plaintiff. A(n) (attorney) (accountant) (architect) (designer) (engineer) _____ (*describe other professional*) is negligent if he/she fails to meet the required standard of care.

2. STANDARD OF CARE. The existence of a(n) (attorney) (accountant) (architect) (designer) (engineer) _____ (*describe other professional*)-client relationship places on the (attorney) (accountant) (architect) (designer) (engineer) _____(*describe other professional*) the duty to act with the degree of skill, knowledge, care, and diligence normally applied by members of that profession under like or similar circumstances. This is known as the standard of care. If you find by the greater weight of the evidence that the defendant failed to meet this standard of care, then you shall find that he/she was negligent.

OKLAHOMA

STANDARD OF CARE

Under Oklahoma law, "[a] supervising architect, in the performance of its contract with the owner, is required to exercise the ability, skill and care customarily exercised by architects in similar circumstances." Boren v. Thompson & Assocs., 999 P.2d 438, 446 (Okla. 2000) ("Architects are required to exercise ordinary professional skill and diligence in rendering their professional services."); Wills v. Black & W., Architects, 344 P.2d 581, 584 (Ok. 1959).

In Wills, an architecture firm designed a building for the plaintiff, but the roof of the building began to leak less than a year after its construction. 344 P.2d at 583. The plaintiffs filed suit against the architects, alleging that the roof had not been designed or constructed in a proper manner. Id. In determining whether the defendant could avail itself of a statute-of-limitations defense, the court first had to assess the origination of the architects' duty.

> In the case at bar, the contract between the plaintiff and defendants specifically recited 'the architect will endeavor to guard . . . but does not guarantee the performance.' We therefore conclude defendants did not warrant or guarantee a perfect plan or satisfactory results and would only be liable to exercise reasonable care and professional skill in performing their services.

Id. at 584 (alteration in original). Thus, the court held that the plaintiff's cause of action arose when the building was completed.

In Tulsa Zoo Mgmt., Inc. v. Peckham Guyton Albers & Viets, Inc., the Tulsa Zoo sued its architects after the foundation for a new exhibit was poured below the proper elevation. No. 17-CV-644-GKF-FHM, 2019 WL 1029544, at *1 (N.D. Okla. Mar. 4, 2019). Although the court applied a Missouri choice-of-law provision in the parties' contract, it noted that Oklahoma law requires architects "to exercise ordinary professional skill and diligence in rendering their professional services." Id. at *17 (quoting Boren v. Thompson & Assocs., 999 P.2d 438, 446 (Okla. 2000)); see also Waggoner v. W & W Steel Co., 1982 OK 141, 657 (Okla. 1982) ("Because an architect's undertaking does not imply a guarantee of perfect plans or results, he is liable only for failure to exercise reasonable care and professional skill in preparation and execution of plans according to their contract.").

RESTATEMENT

No Oklahoma state courts have cited to Restatement (Second) of Torts § 299A, but at least one district court applying Oklahoma law has. See Great N. Ins. Co. v. John Watson Landscape Illumination, Inc., No. 12-CV-25-JED-FHM, 2015 WL 1222161, at *2 (N.D. Okla. Mar. 17, 2015) ("'Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade'; but where a person represents 'that he has superior skill or knowledge, beyond that common to his profession or trade[,] . . . he incurs an obligation to the person to whom he makes such a representation, to have, and to exercise, the

skill and knowledge which he represents himself to have.'" (alterations and emphasis in original) (quoting Restatement (Second) of Torts § 299A).

Elements of a Claim

The elements for professional negligence are as follows:

1) A duty owed by the defendant to protect the plaintiff from injury

2) A failure to perform that duty

3) Injuries to the plaintiff that are proximately caused by the defendant's failure to exercise the duty of care

Smith v. Hines, 261 P.3d 1129, 1133 (Okla. 2011) (discussing professional medical malpractice).

Expert Testimony

Although expert testimony is "ordinarily necessary to establish causation in professional negligence cases," expert testimony is not necessary where the element of damage lies within the common knowledge of laypersons. Ellison v. Campbell, 2014 OK 15, ¶15 (Okla. 2014). Accordingly, expert testimony is not necessary to establish the cause of an objective injury where there is competent evidence, without such testimony, to establish the cause with reasonable certainty. Tulsa Zoo Mgmt., Inc., 2019 WL 1029544 at *21; Boxberger v. Martin, 552 P.2d 370, 373 (Okla. 1976)).

Relevant Statutes and Regulations

- N/A

Economic Loss Doctrine

The economic loss doctrine, which the Oklahoma Supreme Court adopted in Waggoner v. Town & Country Mobile Homes, Inc., 808 P.2d 649, 653 (Okla. 1990), bars recovery under tort theories for "injury only to the product itself resulting in purely economic loss." Agape Flights, Inc. v. Covington Aircraft Engines, Inc., No. CIV-09-492-FHS, 2012 WL 2792452, at *3 (July 9, 2012); see Oklahoma Gas & Electric Co. v. McGraw–Edison Co., 834 P.2d 980 (Okla. 1992) (personal injury or damage to property claims fall outside the ambit of the doctrine). The Oklahoma Supreme Court has also recognized, however, that damages to "other property" apart from the product itself are recoverable in tort actions. Agape Flights, 2012 WL 2792452 at *3. Oklahoma courts have not applied the economic loss doctrine to design professionals.

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Two years, for professional negligence cases. Okla. Stat. Ann. tit. 12, § 95 (West). The limitations period "begins to run from the date the negligent act occurred or from the

date the plaintiff should have known of the act complained of." Marshall v. Fenton, Fenton, Smith, Reneau & Moon, P.C., 899 P.2d 621, 623 (Okla. 1995). It should be noted that the discovery rule applies to malpractice actions involving engineers and architects subject to Section 109 below. Samuel Roberts Noble Found., Inc. v. Vick, 840 P.2d 619, 625 (Okla. 1992).

- Statute of Repose:
  - A statute of repose applicable to such actions provides:

    No action in tort to recover damages

    (i) for any deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property,

    (ii) for injury to property, real or personal, arising out of any such deficiency, or

    (iii) for injury to the person or for wrongful death arising out of any such deficiency,

    shall be brought against any person owning, leasing, or in possession of such an improvement or performing or furnishing the design, planning, supervision or observation of construction or construction of such an improvement more than ten (10) years after substantial completion of such an improvement.

OKLA. STAT. ANN. tit. 12, § 109.

ADDITIONAL ISSUES

- N/A

PATTERN JURY INSTRUCTIONS

Oklahoma's pattern jury instructions applicable to professional negligence claims are as follows:

Since this lawsuit is based on the theory of negligence, you must understand what the terms "negligence" and "ordinary care" mean in the law with reference to this case.

"Negligence" is the failure to exercise ordinary care to avoid injury to another's person or property. "Ordinary care" is the care which a reasonably careful person would use under the same or similar circumstances. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide. Thus, under the facts in evidence in this case, if a party failed to do something which a reasonably careful person would do, or did something which a reasonably careful person would not do, such party would be negligent.

. . .

> In a professional malpractice case, the trial court should substitute the appropriate professional designation (e.g., physician, nurse, attorney, etc.) in place of "person" in the definition of ordinary care.

Vernon's Okla. Forms 2d, OUJI-CIV 9.2, (2d ed.); Id. Cmt. to 9.

> An architect must possess that degree of knowledge and ability ordinarily possessed by other members of that profession, and further, must exercise ordinary care, diligence, and judgment in the performance of any service undertaken as an architect.

Id. 14.16.

A comment to the Oklahoma Uniform Jury Instruction on the statute of limitations affirmative defense provides that, "[i]n cases of fraud or professional malpractice, the date of accrual is subject to the discovery rule, under which the date of accrual is when the plaintiff knew or should have known of the injury." Id. 1.20 (citing Samuel Roberts Noble Found., Inc. v. Vick, 840 P.2d 619, 624 (Ok. 1992) ("The discovery rule provides that the limitations period does not begin to run until the date the plaintiff knew or should have known of the injury.")).

OREGON

STANDARD OF CARE

An architect "must act with reasonable diligence in the performance of his duties." White v. Pallay, 247 P. 316, 317 (Or. 1926). The Supreme Court of Oregon has further explained that "[t]his skill and ability which he is bound to exercise are such as are ordinarily required of architects, which is a higher degree than that required of unskilled persons." Scott v. Potomac Ins. Co. of D.C., 341 P.2d 1083, 1086-87 (Or. 1959) (citations omitted). However, design professionals are not held to the standard of perfection:

> An architect is no more a mere overseer or foreman or watchman than he is a guarantor of a flawless building, and the only question that can arise in a case where general performance of duty is shown is whether, considering all the circumstances and peculiar facts involved, he has or has not been guilty of negligence. This is a question of fact, and not of law.

Id.

In White, an architect prepared drawings, plans, and specifications for the erection of a building and, upon completion of the building, brought suit against the defendant for his unpaid fees. 247 P. at 317. The defendant argued that the architect's plans were flawed, resulting in extra costs to repair the foundation of the building, which negated its duty to pay. Id. The court ruled in favor of the architect. Id. On appeal, the defendant argued that the architect had warranted that his plans would produce a certain result, and because they failed, he was entitled to damages. Id. However, the court held that the architect's only duty was to act with reasonable diligence in the performance of his duties. Id. Because there was sufficient evidence for the trier of fact to conclude that the architect had met this duty, the court affirmed the judgment in the architect's favor. Id.

RESTATEMENT

The only Oregon decision citing Restatement (Second) of Torts § 299A, was issued by the Supreme Court of Oregon, in a decision about home construction defects. The court explained:

> Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

Beri, Inc. v. Salishan Props., Inc., 580 P.2d 173, 176 n.2 (Or. 1978) (quoting Restatement (Second) of Torts § 299A (Am. Law Inst. 1965)).

ELEMENTS OF A CLAIM

In a professional negligence claim, a plaintiff must allege and prove the following:

1) A duty that runs from the defendant to the plaintiff

2) A breach of that duty

3) A resulting harm to the plaintiff measurable in damages

4) Causation, *i.e.*, a causal link between the breach of duty and the harm

Ultimately, the plaintiff must prove causation by a reasonable probability.

Smith v. Providence Health & Servs.-Oregon, 393 P.3d 1106, 1108 (Or. 2017) (internal citations omitted) (quoting Zehr v. Haugen, 871 P.2d 1006 (Or. 1994)) (citing Sims v. Dixon, 355 P.2d 478 (Or. 1960)).

In Fazzolari v. Portland School District No. 1J, 734 P.2d 1326 (Or. 1987), the Supreme Court introduced a general "foreseeability" principle to replace traditional concepts of duty, breach, and causation in negligence cases.

> Under that principle, the question of liability turns on whether the defendant's conduct "unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff." . . . "A person is negligent if the person fails to exercise reasonable care, a standard that 'is measured by what a reasonable person of ordinary prudence would, or would not, do in the same or similar circumstances.'" The foreseeability principle applies unless the parties "invoke a status, a relationship, or a particular standard of conduct that creates, defines, or limits the defendant's duty."

Cowan v. Nordyke, 222 P.3d 1093, 1094-95 (Or. App. 2009) (internal citations omitted) (quoting first Fazzolari, 734 P. 2d at 1326 and then Bjorndal v. Weitman, 184 P.3d 1115 (Or. 2008)).

EXPERT TESTIMONY

In most charges of negligence against professionals, expert testimony is required to establish the reasonable practice in the community, as the conduct of the defendant professional is adjudged by this standard. Getchell v. Mansfield, 260 Or. 174, 179 (Or. 1971) (discussing medical malpractice). Without such expert testimony, a plaintiff cannot prove negligence. Id. "The reason for this rule is that what is reasonable conduct for a professional is ordinarily not within the knowledge of the usual jury." Id. However, if the jury can decide what is reasonable conduct without assistance from an expert witness, no expert testimony is necessary to establish the standard of care. Id. at 179–80; see also Yundt v. D & D Bowl, Inc., 259 Or. 247, 255 (Or. 1971) ("[a qualified expert may express an opinion on an ultimate fact If the ultimate fact cannot be equally well decided by the jury from the same evidence…This is a departure from the earlier cases that stated the expert testimony must be 'required' before it was received. . .").

RELEVANT STATUTES AND REGULATIONS

- Or. Rev. Stat. Ann. § 654.305:

> Generally, all owners, contractors or subcontractors and other persons having charge of, or responsibility for, any work involving a risk or danger to the employees or the public shall use every device, care and precaution that is

> practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

ECONOMIC LOSS DOCTRINE

In Oregon:

> [O]ne ordinarily is not liable for negligently causing a stranger's purely economic loss without injuring his person or property." For a plaintiff to recover in those circumstances, the plaintiff would have to show "[s]ome source of duty outside the common law of negligence," such as a special relationship or status that imposed a duty on the defendant beyond the common-law negligence standard.

Harris v. Suniga, 180 P.3d 12, 15-16 (Or. 2008) (citations omitted) (quoting Hale v. Groce, 744 P.2d 1289, 1290 (Or. 1987)); Id. at 17 ("Plaintiffs here seek recovery for physical damage to their real property, and this court's cases generally permit a property owner to recover in negligence for damages of that kind."). The doctrine bars parties from bringing negligence actions against parties for causing purely economic loss unless there is some special relationship between them.

Oregon "precedents establish that a negligence claim for the recovery of economic losses caused by another must be predicated on some duty of the negligent actor to the injured party beyond the common law duty to exercise reasonable care to prevent foreseeable harm." Onita Pac. Corp. v. Trustees of Bronson, 843 P.2d 890, 896 (Or. 1992). Certain professional or contractual relationships may also give rise to a tort duty to exercise reasonable care on behalf of another's interests. For example, "[e]ngineers and architects are among those who may be subject to liability to those who employ (or are the intended beneficiaries of) their services and who suffer losses caused by professional negligence." Id. (citing first Ashley v. Fletcher, 550 P.2d 1385 (Or. 1976) (architect); and then Bales for Food v. Poole, 424 P.2d 892 (Or. 1967) (engineer)).

STATUTE OF LIMITATIONS AND STATUTE OF REPOSE

- Statute of Limitations:
  - Two years. Sternberg v. Lechman-Su, 350 P.3d 593, 598 (Or. Ct. App. 2015) (citing OR. REV. STAT. ANN. § 12.110 (West)).
- Statute of Repose:
  - 10 years. OR. REV. STAT. ANN. § 12.115 (West).

Additional Issues

- "Engineers and architects are among those who may be subject to liability to those who employ (or are the intended beneficiaries of) their services and who suffer losses caused by professional negligence." Onita Pac. Corp. v. Trustees of Bronson, 843 P.2d 890, 897 (Or. 1992) (citing Ashley v. Fletcher, 550 P.2d 1385 (Or. 1976) (architect)).

- "In addition, if a contract between a professional and a client incorporates a general standard of skill or care to which the professional would be bound, independent of the contract, the professional may be liable in tort," and "[b]oth engineers and architects may owe a duty of care in that situation." Conway v. Pac. Univ., 924 P.2d 818, 823 (Or. 1996).

- Architects have a nondelegable duty to meet the minimum safety standards of the building code after being paid for assuming the overall responsibility for designing a building. Johnson v. Salem Title Co., 425 P.2d 519, 522 (Or. 1967).

Pattern Jury Instructions

Under Oregon law, unless the parties invoke a status, a relationship, or a particular standard of conduct that creates, defines, or limits the defendant's duty, the issue of liability for harm actually resulting from the defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff. Piazza ex rel. Piazza v. Kellim, 271 Or. App. 490, 500 (Ct. App. Or. 2015).

PENNSYLVANIA

STANDARD OF CARE

In Pennsylvania, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities, unless the professional represents that they have greater or less skill or knowledge. Robert Wooler Co. v. Fid. Bank, 479 A.2d 1027, 1031 (Pa. Super. Ct. 1984) (citing Restatement (Second) of Torts § 299A)). Accordingly, the Pennsylvania Supreme Court has stated:

> An architect is bound to perform with reasonable care the duties for which he contracts. His client has the right to regard him as skilled in the science of the construction of buildings, and to expect that he will use reasonable and ordinary care and diligence in the application of his professional knowledge to accomplish the purpose for which he is retained. While he does not guarantee a perfect plan or a satisfactory result, he does by his contract imply that he enjoys ordinary skill and ability in his profession and that he will exercise these attributes without neglect and with a certain exactness of performance to effectuate work properly done. While an architect is not an absolute insurer of perfect plans, he is called upon to prepare plans and specifications which will give the structure so designed reasonable fitness for its intended purpose, and he impliedly warrants their sufficiency for that purpose.

Bloomsburg Mills, Inc. v. Sordoni Constr. Co., 164 A.2d 201, 203 (Pa. 1960) (internal citations omitted). There are two questions involved in determining whether a claim alleges ordinary negligence as opposed to professional negligence: "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of professional judgment beyond the realm of common knowledge and experience." Sabella v. Estate of Milides, 992 A.2d 180, 187 (Pa. Super. Ct. 2010).

RESTATEMENT

While the Pennsylvania Supreme Court has not officially adopted the Restatement (Second) of Torts § 299A, the Pennsylvania Superior Court has relied upon this provision to articulate the standard of care applicable in professional negligence actions. See Pressley v. Travelers Prop. Cas. Corp., 817 A.2d 1131, 1138 (Pa. Super. Ct. 2003); see also Robert Wooler Co., 479 A.2d at 1031 (citing § 299A and explaining that it "has been followed uniformly by the courts of this Commonwealth in determining claims predicated upon alleged negligence on the part of other professional persons.").

ELEMENTS OF A CLAIM

In Pennsylvania, for a party to prevail in a professional negligence action, the elements are identical to an ordinary negligence claim:

1) The plaintiff must establish the defendant owed a duty of care to the plaintiff

2) That duty was breached

3) The breach resulted in the plaintiff's injury

4) The plaintiff suffered an actual loss or damages

Merlini ex rel. Merlini v. Gallitzin Water Auth., 980 A.2d 502, 506 (Pa. 2009).

EXPERT TESTIMONY

"[T]he most distinguishing feature of professional malpractice is the need for expert testimony to clarify complex issues for a jury of laypersons." Water Auth., 980 A.2d 502, 506 (Pa. 2009) (citing Martin v. Evans, 711 A.2d 458, 461 (Pa. 1998)). "In a professional malpractice action, the determination of whether there was a breach of duty requires the plaintiff to additionally show that the defendant's conduct fell below the relevant standard of care applicable to the rendition of the professional services at issue." Merlini ex rel. Merlini v. Gallitzin Water Auth., 934 A.2d 100, 104 (Pa. Super. Ct. 2007), aff'd, 980 A.2d 502 (Pa. 2009). "In most cases, such a determination requires expert testimony because the negligence of a professional encompasses matters not within the ordinary knowledge and experience of laypersons." Id.; see also Guy M. Cooper, Inc. v. E. Penn Sch. Dist., 903 A.2d 608, 617 (Pa. Commw. Ct. 2006) ("[I]n a suit against an architect for negligent design . . . expert testimony is necessary to establish professional negligence.") (quoting Cipriani v. Sun Pipe Line Co., 574 A.2d 706 (Pa. Super. Ct. 1990)). An expert is not required if the negligence is obvious or within a layperson's understanding. See Plaza v. Herbert, Rowland & Grubic, Inc., No. 344 C.D. 2016, 2017 WL 519827, at *6 (Pa. Commw. Ct. Jan. 30, 2017). See also New Prime, Inc. v. Brandon Balchune Constr., Inc., No. 3:14-CR-2410, 2017 WL 6411574, at *7 (M.D. Pa. Dec. 15, 2017) (holding that summary judgment was premature due, in part, to conflicting expert opinions).

RELEVANT STATUTES AND REGULATIONS

- Pa. R.C.P. No. 1042.1-1042.12:

  Sets forth requirements governing Professional Liability Actions, including the requirement under Rule 1042.3 that a plaintiff file a Certificate of Merit with a complaint based on professional negligence.

- 49 PA. CODE § 15.63:

  Outlines misconduct in the practice of landscape architecture.

- 49 PA. CODE § 9.151:

  Standards of professional conduct for architect.

- 49 PA. CODE § 37.81:

  Outlines potential misconduct violations for professional engineers, land surveyors, or geologists who are found guilty by the Board of gross negligence,

incompetency, or misconduct in the practice of engineering, land surveying, or geology or of a violation of the Code of Ethics of the profession of engineering or land surveying.

Economic Loss Doctrine

In Pennsylvania, the economic loss doctrine does not bar professional negligence claims based on purely economic losses. See Lebanon Cty. Earned Income Tax Bureau v. Bank of Lebanon Cty., No. 2007-01270, 2011 WL 12847599, at *22 (Pa. Com. Pl. Ct. Jan. 10, 2011) ("Most notably, professional negligence claims have been exempt from the limitations of [the economic loss doctrine]."); Id. (collecting cases); see also Bilt-Rite Contractors, Inc. v. The Architectural Studio, 866 A.2d 270, 288 (Pa. 2005) (noting that "Pennsylvania has long recognized that purely economic losses are recoverable in a variety of tort actions including . . . professional malpractice actions" and holding that economic losses resulting from negligent misrepresentation are an exception to the economic loss doctrine.).

Similarly, the gist of the action doctrine does not bar professional negligence claims. Rather, "[u]nder settled Pennsylvania case law, a client may bring both a contract action and a tort action against a professional based on allegations that he or she failed to provide the client with professional services consistent with those expected of the profession." Rapidigm, Inc. v. ATM Mgmt. Servs., LLC, 63 Pa. D. & C.4th 234, 240 (Pa. Com. Pl. Ct. 2003) (first citing Gorski v. Smith, 812 A.2d 683, 693-94 (Pa. Super. Ct. 2002); and then citing Koken v. Steinberg, 825 A.2d 723 (Pa. Commw. Ct. 2003)).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Two years, for negligence claims against design professionals, 42 Pa. Cons. Stat. § 5524, which generally accrues when the injury occurs. However, Pennsylvania has adopted the discovery rule, which allows a plaintiff to file a claim outside the two-year window if the plaintiff did not discover the injury prior. See Simon v. Wyeth Pharm., Inc., 989 A.2d 356, 365 (Pa. Super. Ct. 2009) ("If the injured party could not ascertain he was injured and by what cause within the limitations period, 'despite the exercise of reasonable diligence,' then the discovery rule is appropriate.").
- Statute of Repose:
  - 12 years. 42 Pa. Cons. Stat. § 5536. ("Except as provided in subsection (b), a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property must be commenced within 12 years after completion of construction of such improvement to recover damages . . . .").

Additional Issues

- Guy M. Cooper, Inc. v. E. Penn Sch. Dist., 903 A.2d 608, 617 (Pa. Commw. Ct. 2006) (finding that an expert report was inadequate where it did not describe an architectural standard of care, did not describe a breach of an architectural standard of care, and did not identify drawings alleged to be defective or ambiguous).

- Pa. R.C.P 1042.3(a) provides: "In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party that either

  (1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or

  (2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or

  (3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim."

Pattern Jury Instructions

Pennsylvania has pattern jury instructions for non-medical professional negligence, which are found in Chapter 15. The Subcommittee Note to the Introduction provides that, these instructions "are specifically framed in terms of the legal profession because the preponderance of Pennsylvania cases that discuss non-medical negligence have involved lawyers." However, the introduction makes clear that the standard of care "seems generally applicable to all professions," and gives the specific example that "the standard by which the performance of an architect will be judged is the standard of ordinary care used by a reasonable person possessing the skills used by a person in that profession." (first citing Follansbee Bros. Co. V. Garrett-Cromwell Eng'g Co., 48 Pa. Super. 183 (Pa. Super. Ct. 1911); and then citing Robert M. Schoenhaus, Annotation, *Necessity of Expert Testimony to Show Malpractice of Architect*, 3 A.L.R. 4th 1023 (2002)).

15.00 [Architect, Engineer, or Design Professional] NEGLIGENCE—INTRODUCTION, Pa. SSJI (CIV), 15.00:

PROFESSIONAL NEGLIGENCE IS THE NEGLIGENT, CARELESS, OR UNSKILLED PERFORMANCE BY [A] [AN] [architect, engineer, or design professional] OF THE DUTIES IMPOSED ON HIM OR HER BY HIS OR HER PROFESSIONAL RELATIONSHIP WITH A CLIENT. NEGLIGENCE IS THE

FAILURE TO USE THE ORDINARY CARE AND SKILL OF A PERSON IN THAT PROFESSION.

A PROFESSIONAL MUST HAVE THE SAME KNOWLEDGE AND SKILL AND USE THE SAME CARE NORMALLY USED IN THE PROFESSION. A PROFESSIONAL WHOSE CONDUCT FALLS BELOW THIS STANDARD OF CARE IS NEGLIGENT.

[USE THE FOLLOWING WHERE THE DEFENDANT-PROFESSIONAL IS A SPECIALIST:] [A PROFESSIONAL WHO PROFESSES TO BE A SPECIALIST IN A PARTICULAR FIELD MUST HAVE THE SAME KNOWLEDGE AND SKILL AND USE THE SAME CARE AS OTHERS IN THAT SAME SPECIALTY. A SPECIALIST WHOSE CONDUCT DOES NOT MEET THIS PROFESSIONAL STANDARD OF CARE IS NEGLIGENT.]

[UNDER THIS STANDARD OF CARE, A] [A] PROFESSIONAL MUST ALSO KEEP INFORMED OF THE CONTEMPORARY DEVELOPMENTS IN THE PROFESSION [OR HIS OR HER SPECIALTY] AND MUST USE CURRENT SKILLS AND KNOWLEDGE. IN OTHER WORDS, A PROFESSIONAL MUST HAVE UP-TO-DATE SKILLS AND KNOWLEDGE, AND IF HE OR SHE FAILS TO KEEP CURRENT OR FAILS TO USE CURRENT KNOWLEDGE IN HIS OR HER PROFESSION, THE PROFESSIONAL IS NEGLIGENT.

[USE ONLY WHERE EXPERT TESTIMONY NOT REQUIRED:] [A PROFESSIONAL MUST ALSO USE THE SAME DEGREE OF CARE AS A REASONABLE PERSON WOULD UNDER THE CIRCUMSTANCES, AND IF THE [architect, engineer, or design professional] FAILS TO DO SO, HE OR SHE IS NEGLIGENT.]

YOU MUST DECIDE WHETHER THE DEFENDANT WAS NEGLIGENT. IF YOU DECIDE THAT THE DEFENDANT WAS NEGLIGENT, THEN YOU MUST DECIDE WHETHER THE DEFENDANT'S NEGLIGENCE WAS A FACTUAL CAUSE OF THE PLAINTIFF'S INJURIES. IF YOU SO DECIDE, YOU MUST DECIDE THE AMOUNT OF [DAMAGES] [HARM] THE PLAINTIFF SUSTAINED.

RHODE ISLAND

STANDARD OF CARE

A supervising architect, in the performance of its contract with the owner, is required to exercise the ability, skill, and care customarily exercised by architects in similar circumstances. Forte Bros. v. Nat'l Amusement, Inc., 525 A.2d 1301, 1303 (R.I. 1987). This duty of care extends to contractors who share an economic relationship and community of interest with the architect on a construction project. Id. The duty is based on circumstances establishing a direct and reasonable reliance by the contractor on the contractual performance of the architect when the architect knows, or should have known, of the reliance. Id. In Forte Bros., the plaintiff contracted to perform excavation and grading work on a construction project, for which the plaintiff would be paid $15 per cubic yard of mass rock and boulders. Id. at 1302. The project owner retained a supervising architect/site engineer, who was responsible for measuring any removed rock, reporting the totals to the owner, and approving any payments to the plaintiff for the excavation. Id. The plaintiff filed suit against the project owner and the architect/site manager, alleging that the architect/site manager negligently failed in its duties and, as a result, the project owner refused to pay its agreed-upon fee. Id. The appellate court held that the plaintiff properly stated a claim for negligence.

RESTATEMENT

Only one Rhode Island state court decision cites to Restatement (Second) of Torts § 299A. Quest Diagnostics, LLC v. Pinnacle Consortium of Higher Educ., 93 A.3d 949, 953 (R.I. 2014) ("[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing . . . ." (quoting Restatement (Second) of Torts § 299A (Am. Law Inst. 1965)) (alterations in original)).

ELEMENTS OF A CLAIM

"An action in negligence can be maintained when a plaintiff shows that a defendant:

1) Breached a duty of care owed to the plaintiff, and

2) The breach proximately caused an injury to the plaintiff resulting in actual damages."

Lutz Eng'g Co. v. Indus. Louvers, Inc., 585 A.2d 631, 635 (R.I. 1991).

EXPERT TESTIMONY

Expert testimony is required to establish any matter that is not obvious to a layperson and thus lies beyond common knowledge. Rhode Island Res. Recovery Corp. v. Restivo Monacelli LLP, 189 A.3d 539, 547 (R.I. 2018). In cases dealing with professional malpractice, Rhode Island courts have frequently determined that one or more of the issues of standard of care, breach of the

standard of care, and proximate causation were beyond the common knowledge of a layperson and required expert testimony. Id. (holding that the plaintiff's allegations of accounting malpractice required expert testimony).

Relevant Statutes and Regulations

- NA

Economic Loss Doctrine

The economic loss doctrine provides that a plaintiff is precluded from recovering purely economic losses in a negligence cause of action. Boston Investment Prop. # 1 State v. E.W. Burman, Inc., 658 A.2d 515, 517 (R.I. 1995). Under this doctrine, a plaintiff may not recover damages under a negligence claim when the plaintiff has suffered no personal injury or property damage. Id.; see also Franklin Grove Corp. v. Drexel, 936 A.2d 1272, 1275 (R.I. 2007) (alterations in original). Rhode Island courts, however, recognize an exception to the economic loss doctrine where the loss at issue was highly foreseeable:

> [E]ven when the dispute involves sophisticated commercial entities, the Rhode Island Supreme Court has refused to apply the economic loss doctrine in circumstances where the parties shared an economic relationship such that the "foreseeability of harm to [the plaintiff] was high if [the defendant] failed to perform its job." This exception is a narrow one, however, predicated on the existence of a high level of foreseeability. Thus, when a party has acted entirely independently from the other, it cannot then be held accountable for unforeseeable economic damages, and a negligence claim will be barred as a matter of law.

Triton Realty Ltd. P'ship v. Almeida, No. PC 04-2335, 2006 WL 828733, at *3 (R.I. Super. Mar. 29, 2006) (internal citations omitted) (quoting Boston Investment Prop. # 1 State, 658 A.2d at 517) (alterations in original). In Boston Investment Prop. # 1 State, the court applied the economic loss doctrine to bar recovery of a purely economic damages by a subsequent purchaser of a commercial office building that alleged the losses were proximately caused by the negligence of the general contractor. 658 A.2d.

Likewise, the economic loss doctrine does not apply to consumer transactions. Rousseau v. K.N. Const., Inc., 727 A.2d 190 (R.I. 1999) (Economic loss doctrine did not apply where purchasers of real property brought a negligence action against engineer, who was hired by vendors to perform percolation tests, seeking economic damages only).

In the absence of privity of contract between a general contractor and subsequent purchaser of a building in Rhode Island, a plaintiff was not entitled to recover *economic* damages proximately caused by the general contractor's negligence. Boston Investment Prop. # 1, 658 A.2d at 517.

Statute of Limitations and Statute of Repose

- Statute of Limitations:

- Three years. McNulty v. Chip, 116 A.3d 173, 181 n.7 (R.I. 2015) (citing 9 R.I. GEN. LAWS ANN. § 9-1-14 ("limitation of actions for words spoken or personal injuries)).

- Statute of Repose:

  - 10 years, which commences upon "substantial completion" of a construction project:

    > No action (including arbitration proceedings) in tort to recover damages shall be brought against any architect or professional engineer who designed, planned, or supervised to any extent the construction of improvements to real property, or against any contractor or subcontractor who constructed the improvements to real property, or material suppliers who furnished materials for the construction of the improvements, on account of any deficiency in the design, planning, supervision, or observation of construction or construction of any such improvements or in the materials furnished for the improvements:
    >
    > (1) For injury to property, real or personal, arising out of any such deficiency;
    >
    > (2) For injury to the person or for wrongful death arising out of any such deficiency; or
    >
    > (3) For contribution or indemnity for damages sustained on account of any injury mentioned in subdivisions (1) and (2) hereof more than ten (10) years after substantial completion of such an improvement; provided, however, that this shall not be construed to extend the time in which actions may otherwise be brought under §§ 9-1-13 and 9-1-14.
    >
    > 9 R.I GEN. LAWS ANN. § 9-1-29.

ADDITIONAL ISSUES

- N/A

PATTERN JURY INSTRUCTIONS

- N/A

SOUTH CAROLINA

STANDARD OF CARE

"In a professional negligence cause of action, the plaintiff must prove the professional failed to conform to generally recognized and accepted practices in the profession." City of York v. Turner-Murphy Co., 452 S.E.2d 615, 616-17 (S.C. Ct. App. 1994). As it pertains to architects, designers, and other building professionals:

> It seems to be well settled that where a person holds himself out as specially qualified to perform work of a particular character, there is an implied warranty that the work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use, and, if a party furnishes specifications and plans for a contractor to follow in a construction job, he thereby impliedly warrants their sufficiency for the purpose in view.

Hill v. Polar Pantries, 64 S.E.2d 885, 888 (S.C. 1951).

In Hill, the defendant, which operated a frozen-food locker plant, contracted to design a similar plant for the plaintiff and to install the necessary equipment. Id. at 886. However, upon completion of the building, significant cracks developed in the plant's floors and walls. Id. The plaintiff filed suit, alleging that the defendant furnished faulty plans and specifications and improperly supervised the work. Id. At the close of the evidence, the defendant moved for a directed verdict, which the court denied. Id. at 887. The appellate court agreed, noting that the defendant's president held himself out as possessing the requisite skill to design a frozen-food locker plant and to supervise its construction. Id. at 888. Accordingly, the court ruled that he could be held to the implied warranties of proper workmanship and reasonable fitness. Id.

In Gilliland v. Elmwood Properties, the court noted that an architect may be held to a standard of care, but even when evidence of such a standard is absent, an architect may be liable for negligent misrepresentation where the misrepresented fact or facts induced the plaintiff to enter a contract or business transaction. 301 S.C. 295, 301 (S. C. 1990).

RESTATEMENT

South Carolina has not adopted the Restatement (Second) of Torts § 299A.

ELEMENTS OF A CLAIM

An action for negligence requires:

1) A duty of care owed by the defendant

2) A breach of that duty by negligent act or omission

3) Damage proximately caused by the breach

Doe ex rel. Doe v. Batson, 548 S.E.2d 854, 857 (S.C. 2001).

"In a professional negligence cause of action, the plaintiff must prove the professional failed to conform to generally recognized and accepted practices in the profession. If the plaintiff cannot meet this burden, then the professional cannot be found liable as a matter of law." Turner-Murphy Co., 452 at 616-17.

Expert Testimony

In a decision concerning claims of architect malpractice, the South Carolina Supreme Court reiterated the well-known rule that generally, in a malpractice case, "there can be no finding of negligence in the absence of expert testimony to support it." Gilliland v. Elmwood Props., 391 S.E.2d 577, 580 (S.C. 1990) (quoting D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Torts, 188 (5th ed. 1984)); see, e.g., Walker v. The Bluffs Apartments, 477 S.E.2d 472, 474 (S.C. Ct. App. 1996) (citing cases for proposition that a plaintiff must establish the standard of care required by an architect and the deviation from that standard of care).

"Where professional negligence is alleged, expert testimony is usually necessary to establish both the standard of care and the professional's deviation from that standard, unless the subject matter is within the area of common knowledge and experience of the layman so that no special learning is needed to evaluate the professional's conduct." City of York v. Turner-Murphy Co., 452 S.E.2d 615, 617 (S.C. Ct. App. 1994) (citing Hoeffner v. The Citadel, 429 S.E.2d 190, 192 (S.C. 1993)).

Relevant Statutes and Regulations

- S.C. Code Ann. § 15-36-100(B), which states that a plaintiff in an action for professional negligence against a professional licensed or registered with the state must specify at least one negligent act or omission claimed and the factual basis underlying each claim based on the available evidence.

- S.C. Code Ann. § 15-36-100(G)(1), which states that plaintiffs in professional negligence suits against architects, land surveyors, and engineers must include a contemporaneous expert witness affidavit.

Economic Loss Doctrine

The question of whether a plaintiff may maintain an action in tort for purely economic loss turns on the determination of the source of the duty the plaintiff claims the defendant owed. Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 463 S.E.2d 85, 88 (S.C. 1995). "A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie." Id. "A breach of a duty arising independently of any contract duties between the parties, however, may support a tort action." Id. Thus, in most instances, a negligence action will not lie when the parties are in privity of contract; however, when there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action. Id. In Griffin, the court explained that:

> We see no logical reason to insulate design professionals from liability when the relationship between the design professional and the plaintiff is such that the design professional owes a professional duty to the plaintiff arising separate and distinct from any contractual duties between the parties or with third parties.
>
> . . .
>
> In the case *sub judice,* Engineer designed the project specifically for the County of Charleston. Engineer supervised the construction. Engineer had the right, among other rights, to inspect the construction and to halt construction. Under these facts, Engineer owed a duty to the contractor not to negligently design or negligently supervise the project. Accordingly, the trial judge erred in finding the doctrine of "economic loss" prohibited the plaintiff from maintaining a suit in tort for purely economic losses.

Id. at 89; see also Kennedy v. Columbia Lumber & Mfg. Co., 384 S.E.2d 730, 737 (S.C. 1989); Koontz v. Thomas, 511 S.E.2d 407, 412 (S.C. Ct. App. 1999).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Three years, for "upon a contract, obligation, or liability, express or implied," "trespass upon or damage to real property," and "any injury to the person or rights of another, not arising on contract and not enumerated by law," S.C. Code Ann. § 15-3-530.
  - 10 years, for an "action for relief not provided for in" the chapter. Id. § 15-3-600.
- Statute of Repose:
  - Eight years. "No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement." S.C. Code Ann. § 15-3-640.

Additional Issues

- "[A]rchitects may be held liable to homebuyers for negligence in connection with home construction projects and breach of implied warranty where no contractual privity exists between the architect and the homebuyer." Beachwalk Villas Condo. Ass'n, Inc. v. Martin, 406 S.E.2d 372, 374 (S.C. 1991).
- "[I]f a party furnishes plans and specifications for a contractor to follow in a construction job, he thereby impliedly warrants their sufficiency for the purpose in view." Hill v. Polar Pantries, 64 S.E.2d 885, 888 (S.C. 1951).
- The South Carolina Court of Appeals recognized in Kincaid v. Landing Dev. Corp., 344 S.E.2d 869 (S.C. Ct. App. 1986) "that a violation of a building code violates a legal duty for which a builder can be held liable in tort for proximately caused losses." Kennedy v. Columbia Lumber & Mfg. Co., 384 S.E.2d 730, 737 (S.C. 1989). "Where a building code

or industry standard does not apply, public policy further demands the imposition of a legal duty on a builder to refrain from constructing housing that he knows or should know will pose serious risks of physical harm." Id. Such a duty extends to foreseeable parties. Id.

- Architects may be held liable to homebuyers for negligence in connection with home construction projects and breach of implied warranty where no contractual privity exists between the architect and the homebuyer. Beachwalk Villas Condo. Ass'n, Inc. v. Martin, 406 S.E.2d 372, 374 (S.C. 1991).

- An architect does not have a duty to assure payment to subcontractors; however, special conditions in contract documents may give rise to a special relationship with subcontractors, and therefore a duty of care. Cullum Mech. Const., Inc. v. South Carolina Baptist Hosp., 544 S.E.2d 838, 842 (S.C. 2001).

- There are limited cases from South Carolina commenting on the geographical limitations applicable in determining the standard of care for architectural or engineering professional negligence claims. See Vista del Mar Condominiums, LLC v. Nichols Brosch Wurst Wolfe & Assocs., Inc., No. 4:09-CV-02869-JMC, 2013 WL 625455, at *3 (D.S.C. Feb. 20, 2013).

PATTERN JURY INSTRUCTIONS

- There is a legal duty imposed on builders to undertake construction that is commensurate with existing industry standards. § 11-3 Builder Negligence–Duty on Builder to Undertake Construction Commensurate with Industry Standards, Anderson, S.C. Requests to Charge – Civil, 11-3.

- Although a person may have no obligation or duty to another, once a person undertakes to perform a certain task, such as the construction of a house, they are charged with the duty of properly planning, coordinating and supervising the work. If they fail in performing this duty, they may be held liable for any damages or injuries to persons that proximately result from such failure. § 11-5 Builder Negligence – Duty of Planning, Coordinating, and Supervising Work, Anderson, S.C. Requests to Charge – Civil, 11-5.

SOUTH DAKOTA

STANDARD OF CARE

In South Dakota, the standard of care applicable to design professionals has been articulated as follows:

> As a general rule, it may be said that where a person holds himself out as especially qualified to perform work of a particular character there is an implied warranty that the work shall be done in a reasonably good and workmanlike manner and that the completed product or structure shall be reasonably fit for its intended purpose.

Waggoner v. Midwestern Dev., Inc., 154 N.W.2d 803, 807 (S.D. 1967). "The nature of the professional's duty, the standard of care imposed, varies in different circumstances. . . . In our view the extent of appellee's duty may best be defined by reference to the foreseeability [sic] of injury consequent upon breach of that duty." Mid-W. Elec., Inc. v. DeWild Grant Reckert & Assocs. Co., 500 N.W.2d 250, 254 (S.D. 1993) (quoting A. R. Moyer, Inc. v. Graham, 285 So. 2d 397, 400 (Fla. 1973)) (alteration in original). "We instruct trial courts to use the legal concept of foreseeability to determine whether a duty exists." Id. Moreover, while the obligation to provide an appropriate design and proper construction may arise out of a contract, a duty exists to provide such services using "such skill and care ordinarily exercised by others in the same profession." Hayward Baker, Inc. v. Shirttail Gulch Rd. Dist., Inc., 2012 WL 3929211, at *5 (D.S.D. Sept. 10, 2012).

In Domson, Inc. v. Kadrmas Lee & Jackson, Inc., the South Dakota Supreme Court recognized that project designs are generally imperfect. 2018 S.D. 67. The defendants were hired to design a road construction project. Id. at ¶2. The project contractor did not finish the project in time and, after being assessed penalties for the untimely delivery, brought suit against the defendants for negligently designing, interpreting, and applying the plans and specifications. Id. at ¶4. At trial, the contractor presented an expert witness who acknowledged that "[n]o set of project documents are perfect, nor are field conditions exactly as described in those documents." Id. at ¶31. The court granted summary judgment for the defendants. On appeal, with respect to the negligent design claim, the South Dakota Supreme Court held that, while errors existed in the project and bid documents, the contractor failed to demonstrate a genuine, material issue for trial concerning whether the existence of errors in a project's bid documents constituted a breach of the applicable standard of care for the duty to reasonably draft project specifications. Id. at ¶33.

> In fact, although [the expert] identified errors in the project documents, he never suggested that design problems violated any standard of care, let alone the standard of care for architects and engineers. Moreover, he unequivocally indicated that problems in the design phase were normal and should have been worked out during the contract administration.

Id.

Finally, the U.S. Court of Appeals for the Eighth Circuit (applying South Dakota law) as recognized that "[d]eviation from 'customary practice' does not, however, necessarily prove

negligence if there is evidence that the deviation was reasonable." Bartak v. Bell-Galyardt & Wells, Inc., 629 F.2d 523, 529 (8th Cir. 1980) (affirming summary judgment for defendants.)

RESTATEMENT

Two South Dakota Supreme Court cases cite to the Restatement (Second) of Torts § 299A. Neither discusses the section in detail, but one includes the following statement:

> Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

Saiz v. Horn, 668 N.W.2d 332, 337 n.5 (S.D. 2003) (discussing the duty of care applied to real estate agents).

ELEMENTS OF A CLAIM

To recover in a professional negligence claim, the plaintiff must prove:

1) Duty
2) Breach of duty
3) Factual causation
4) Proximate causation
5) Damages

Lien v. McGladrey & Pullen, 509 N.W.2d 421, 423 (S.D. 1993).

EXPERT TESTIMONY

In the majority of cases involving an architect's liability for harm, there can be no finding of negligence unless there is expert testimony to support it, because laymen would be unable to understand highly technical architectural requirements without hearing other architects testify as to those requirements. Bartak, 629 F.2d at, 530. There is, however, a "common knowledge" exception to the requirement of expert testimony; the jury is competent to pass on issues of negligence that do not require a knowledge of professional skills. Id.

RELEVANT STATUTES AND REGULATIONS

- N/A

Economic Loss Doctrine

"The general rule is that economic losses are not recoverable under tort theories. . . ." City of Lennox v. Mitek Indus., Inc., 519 N.W.2d 330, 333 (S.D. 1994). However, "[e]conomic losses are [] recoverable in professional negligence actions"; "[i]n all other negligence actions, the economic loss rule applies." Taco John's of Huron, Inc. v. Bix Produce Co., No. CIV. 07-4134-KES, 2008 WL 11450655, at *4 (D.S.D. Sept. 18, 2008) (citing Mid-Western Elec., Inc., 500 N.W.2d at 254).

In Mid-Western, the South Dakota Supreme Court permitted recovery of economic damages in professional negligence cases where the defendant, an engineering firm that prepared specifications for installation of a fire detection and suppression system, was sued by plaintiff, an electrical subcontractor that installed the system as advised by the defendant. 500 N.W.2d at 251. The fire system was rejected by the builder because it failed to conform to specifications, so the subcontractor sued the engineering firm on the theory of professional negligence. Id. The court granted recovery of economic damages because the plaintiff was foreseeably harmed by the professional's negligence, thus carving out an exception based on foreseeability to the traditional bar on recovery absent privity of contract. Id. at 251, 254.

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Three years, for personal injury claims. S.D. Codified Laws § 15-2-14.
  - Six years, for actions upon a contract, obligation, or liability, express or implied. S.D. Codified Laws § 15 2 13.
- Statute of Repose:
  - 10 years. S.D. Codified Laws § 15-2A-3:

    > No action to recover damages for any injury to real or personal property, for personal injury or death arising out of any deficiency in the design, planning, supervision, inspection, and observation of construction, or construction, of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury or death, may be brought against any person performing or furnishing the design, planning, supervision, inspection, and observation of construction, or construction, of such an improvement more than ten years after substantial completion of such construction. The date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or his representative can occupy or use the improvement for the use it was intended.

Additional Issues

- An architect–employer relationship is a fiduciary one in South Dakota, particularly where an architect agrees to guard the plaintiff against defects and deficiencies in the work of a contractor through general supervision of the construction work. Canton Lutheran Church v. Sovik, Mathre, Sathrum & Quanbeck, 507 F. Supp. 873, 878 (D.S.D. 1981).

- "[W]here in the sale of a new house the vendor is also a builder of houses for sale there is an implied warranty of reasonable workmanship and habitability surviving the delivery of deed. The builder is not required to construct a perfect house and in determining whether a house is defective the test is reasonableness and not perfection. The duration of liability is likewise determined by the standard of reasonableness."

  Waggoner v. Midwestern Dev., Inc., 154 N.W.2d 803, 809 (S.D. 1967) (citations omitted).

- The Supreme Court of South Dakota discussed a rule appearing in Nebraska law "where architects have assumed supervisory duties for safety precautions via contract they may be held liable for injury stemming from a breach of that duty." Duncan v. Pennington Cty. Hous. Auth., 283 N.W.2d 546, 548 (S.D. 1979) (citing 59 A.L.R.3d 869 (1974)).

- "[A] cause of action exists for economic damage for professional negligence beyond the strictures of privity of contract." Mid-W. Elec., Inc. v. DeWild Grant Reckert & Assocs. Co., 500 N.W.2d 250, 254 (S.D. 1993).

Pattern Jury Instructions

- N/A

TENNESSEE

STANDARD OF CARE

Tennessee does not have a particularized standard of care for architects, engineers, and design professionals. Rather, the same general standard of care applies to all professionals. Delmar Vineyard v. Timmons, 486 S.W.2d 914, 920 (Tenn. Ct. App. 1972) ("The standard of care applicable to the conduct of audits by public accountants is the same as that applied to doctors, lawyers, architects, engineers and others furnishing skilled services for compensation."). This standard of care is the "knowledge and care" exercised by "other reputable professionals practicing in the same or a similar community and under similar circumstances." Tenn. Pattern Jury Instru. – Civil, No. 6.01 (Professional Fault).

A design professional's work does not have to be perfect or error-free. Martin v. Sizemore, 78 S.W.3d 249, 279-80 (Tenn. Ct. App. 2001). In Martin v. Sizemore, the state of Tennessee filed charges with the Tennessee Board of Examiners for Architects and Engineers, alleging that a licensed architect's professional certificate should be suspended or revoked because, among other reasons, he failed to submit acceptable electrical design drawings for a proposed two-story, 38-room motel to the state fire marshal in a timely manner and that he permitted his client to substantially complete the project, even though the plans contained numerous deficiencies. Id. at 279-80. Specifically, the state submitted 54 comments to the architect concerning corrections to his drawings, which were not incorporated into the final project. The board suspended the architect's license for three years, but the Court of Appeals of Tennessee reversed, holding that "architects are generally not expected to produce perfect plans or drawings." The court further concluded that "evidence concerning the number of comments in a set of plans or drawings is not, by itself, sufficient to support a conclusion that an architect was not competent to prepare the plans," which is "especially true in this case in light of [expert] testimony that architectural plans are rarely error-free." Id. at 281.

RESTATEMENT

Tennessee follows the Restatement (Second) of Torts § 299A. See Morrison v. Allen, 338 S.W.3d 417, 450 (Tenn. 2011) (quoting Restatement § 299A); Dooley v. Everett, 805 S.W.2d 380, 385 (Tenn. Ct. App. 1990) (same).

ELEMENTS OF A CLAIM

In Tennessee, to recover on a professional negligence claim, a plaintiff must establish:

1) A duty of care owed by the defendant to the plaintiff

2) Conduct by the defendant falling below the applicable standard of care amounting to a breach of that duty

3) An injury or loss

4) Causation in fact

5) Proximate or legal cause

See, e.g., Hall v. Gaylord Entm't Co., No. M201402221COAR3CV, 2015 WL 7281784, at *5 (Tenn. Ct. App. Nov. 17, 2015) (citing Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 355 (Tenn. 2008)).

EXPERT TESTIMONY

Expert testimony is generally necessary to establish "not only the applicable standard of care but also whether the conduct at issue fell below that standard." Martin v. Sizemore, 78 S.W.3d 249, 272 (Tenn. Ct. App. 2001).

RELEVANT STATUTES AND REGULATIONS

- Tenn. Code Ann. § 62-6-123:

> A covenant promise, agreement or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, the promisee's agents or employees or indemnitee, is against public policy and is void and unenforceable.

ECONOMIC LOSS DOCTRINE

In Tennessee, the economic loss doctrine provides that, "absent privity of contract, one may not recover in negligence where there is no injury to person or property." Acuity v. McGhee Eng'g, Inc., 297 S.W.3d 718, 734 (Tenn. Ct. App. 2008). There is an exception, however: A plaintiff may maintain an action for purely economic loss arising out of negligent supervision or negligent misrepresentation despite a lack of privity. Id. (applying the doctrine to a negligent misrepresentation claim filed against an engineer); John Martin Co. v. Morse/Diesel, Inc., 819 S.W.2d 428, 435 (Tenn. 1991).

STATUTE OF LIMITATIONS AND STATUTE OF REPOSE

- Statute of Limitations:
  - One year, for negligence claims to a person. TENN. CODE ANN. § 28-3-104(a)(1)(A).
  - For a negligence claim based on an injury to a person, the limitations period starts to run when an individual suffers the injury or the injury is or should have been discovered with reasonable diligence. TENN. CODE ANN. § 28-3-104; Owens v. Truckstops of Am., 915 S.W. 2d 420, 426 (Tenn. 1996); Strine v. Walton, 323 S.W.3d 480, 491-492 (Tenn. Ct. App. 2010).

- Three years, for negligence claims based on injuries to a person's property. TENN. CODE ANN. § 28-3-105.

- For a negligence claim based on injury to property, the limitations period starts to run when the injury occurs or is or should have been discovered with reasonable care and diligence. Willis v. Smith, 683 S.W.2d 682, 688 (Tenn. Ct. App. 1984); Prescott v. Adams, 627 S.W. 2d 134, 138 (Tenn. Ct. App. 1981).

☐ Statute of Repose:

- Four years. TENN. CODE ANN. § 28-3-202 states:

> All actions to recover damages for any deficiency in the design, planning, supervision, observation of construction, or construction of an improvement to real property, for injury to property, real or personal, arising out of any such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, observation of construction, or construction of such an improvement within four (4) years after substantial completion of such an improvement.

ADDITIONAL ISSUES

☐ Tennessee courts have rejected a strict locality rule in favor of the "same or similar community" rule for establishing a professional's standard of care. Martin v. Barge, Waggoner, Sumner & Cannon, 894 S.W.2d 750, 751 (Tenn. Ct. App. 1994).

☐ As to construction accidents, engineers and architects can generally avoid liability "by contracting that they will play no significant role in supervising the construction work." Johnson v. EMPE, Inc., 837 S.W.2d 62, 65 (Tenn. Ct. App. 1992).

PATTERN JURY INSTRUCTIONS

Although Tennessee does not employ a jury instruction addressing the standard of care applicable to design professionals specifically, Tennessee Pattern Instruction 6.01 addresses the standard of care for professionals generally:

> A person who undertakes to perform professional services for another must use reasonable care to avoid causing injury to that person. The knowledge and care required of the professional is the same as other reputable professionals practicing in the same or a similar community and under similar circumstances.

> A professional not only must have that degree of learning and skill ordinarily possessed by other reputable professionals but also must use the care and skill ordinarily used in like cases. In applying that skill and learning, a professional is required to use reasonable diligence and best judgment in an effort to accomplish the purpose of the employment.

A failure to have and use such knowledge and skill is negligence.

Tenn. Pattern Jury Instru. – Civil, No. 6.01 (Professional Fault).

TEXAS

STANDARD OF CARE

Texas does not have a particularized standard of care for architects, engineers, and design professionals. Rather, the same general standard of care applies to all professionals. See, e.g., Collective Asset Partners LLC v. Schaumburg, 432 S.W.3d 435, 440 (Tex. App. 2014) (citing cases applying the same professional negligence elements to other professions). This standard of care is the degree of care that another member of the profession would use under the same or similar circumstances. See Tex. Pattern Jury Charge 60.1 (Nonmedical Professional's Degree of Care; Proximate Cause). As to architects, the Texas Court of Appeals has further articulated the following:

> The architect, by his contract, implies his possession of ordinary good taste, skill and ability, and a promise to exercise them reasonably, without neglect, and with a certain exactness of performance, in seeing that the work is properly done. The degree of skill required is such as would produce, if followed, a building of the kind called for, without marked defects in character, strength or appearance.
>
> In the absence of special agreement, an architect is not liable for faults in construction resulting from defects in the plans, as his undertaking does not imply or guarantee a perfect plan or a satisfactory result, it being considered enough that the architect himself is not the cause of any failure, and there is no implied promise that miscalculations may not occur. Thus, an architect is only liable for a failure to exercise reasonable care and skill.

Ryan v. Morgan Spear Assocs., Inc., 546 S.W.2d 678, 681 (Tex. Civ. App. 1977) (quoting 6 C.J.S. Architects § 27).

A design professional's work does not have to be perfect or error-free. Ryan v. Morgan Spear Assocs., Inc., 546 S.W.2d 678 (Tex. Civ. App. 1977), *writ refused NRE* (June 1, 1977). In Ryan v. Morgan Spear Associates, a veterinarian brought an action to recover damages against an architectural firm on the theory that deterioration to the foundation of an animal hospital building was due to the architect's faulty design. Id. The Ryan court explained:

> In the absence of special agreement, an architect is not liable for faults in construction resulting from defects in the plans, as his undertaking does not imply or guarantee a perfect plan or a satisfactory result, it being considered enough that the architect himself is not the cause of any failure, and there is no implied promise that miscalculations may not occur. Thus, an architect is only liable for a failure to exercise reasonable care and skill.

Id. Texas courts have consistently applied this rule. See Capitol Hotel Co. v. Rittenberry, 41 S.W.2d 697 (Tex.Civ .App. 1931); American Surety Co. of New York v. San Antonio Loan & Trust Co., 98 S.W. 387 (Tex.Civ.App.1906) *modified in part by* Lonergan v. San Antonio Loan & Tr. Co., 104 S.W. 1061, 1069 (1907).

RESTATEMENT

Texas does not follow the Restatement (Second) of Torts § 299A.

ELEMENTS OF A CLAIM

To prevail in an action for professional negligence, a party must establish that:

1) The professional owed a duty to the claimant

2) The professional breached that duty

3) Such breach proximately caused injury to the claimant

4) Compensable damages occurred

Collective Asset Partners LLC v. Schaumburg, 432 S.W.3d 435, 440 (Tex. App. 2014).

EXPERT TESTIMONY

To establish a design professional's standard of care, expert testimony is generally necessary. See 3D/I + Perspectiva v. Castner Palms, Ltd., 310 S.W.3d 27, 29 (Tex. App. 2010) ("In determining whether expert testimony is necessary to establish negligence, we consider whether the conduct at issue involved the use of specialized equipment and techniques unfamiliar to the ordinary person.").

RELEVANT STATUTES AND REGULATIONS

- Tex. Loc. Gov't Code Ann. § 271.904:

  > (d) A contract for engineering or architectural services to which a governmental agency is a party must require a licensed engineer or registered architect to perform services:
  >
  > (1) with the professional skill and care ordinarily provided by competent engineers or architects practicing under the same or similar circumstances and professional license; and
  >
  > (2) as expeditiously as is prudent considering the ordinary professional skill and care of a competent engineer or architect.

- Tex. Transp. Code Ann. § 473.004:

  > A governmental entity may not require that engineering or architectural services be performed to a level of professional skill and care beyond the level that would be provided by an ordinarily prudent engineer or architect with the same professional license and under the same or similar circumstances in a contract:

(1) for engineering or architectural services; or

(2) that contains engineering or architectural services as a component part.

- Tex. Civ. Prac. & Rem. Code Ann. § 150.002:

  (a) In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, a claimant shall be required to file with the complaint an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who:

  1) is competent to testify;

  2) holds the same professional license or registration as the defendant; and

  3) practices in the area of practice of the defendant and offers testimony based on the person's:

  A) knowledge;

  B) skill;

  C) experience;

  D) education;

  E) training; and

  F) practice.

  (b) The affidavit shall set forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion, or a similar professional skill claimed to exist and the factual basis for each such claim. The third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor shall be licensed or registered in this state and actively engaged in the practice of architecture, engineering, or surveying.

Economic Loss Doctrine

Although Texas generally applies the economic loss rule to preclude the recovery of purely economic damages in a negligence action, the Texas Supreme Court has noted that the economic loss rule may not apply to an action for professional negligence. See LAN/STV v. Martin K. Eby Const. Co., 435 S.W.3d 234, 243-44, 244 n.42 (Tex. 2014) (stating that the doctrine does not apply to a professional malpractice action against a lawyer and noting that certain factors "also support

negligence actions against other professionals," including possibly design professionals). Courts, however, have thus far been reluctant to apply such a "professional relationship" exception to the economic loss rule. See, e.g., ALS 88 Design Build LLC v. MOAB Constr. Co., No. 04-15-00096-CV, 2016 WL 2753915, at *2 (Tex. App. May 11, 2016) (finding that the economic loss rule precluded the plaintiff from recovering purely economic damages in a professional negligence action against the defendant design firm); A & H Properties P'ship v. GPM Eng'g, No. 03-13-00850-CV, 2015 WL 9435974, at *3 (Tex. App. Dec. 23, 2015) (same).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Two years, for negligence claims. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a).
  - The limitations period starts to run when the tortious act causes the injury. Childs v. Haussecker, 974 S.W.2d 31, 36 (Tex. 1998).
- Statute of Repose:
  - 10 years. Tex. Civ. Prac. & Rem. Code Ann. § 16.009 states:

> (a) A claimant must bring suit for damages for a claim listed in Subsection (b) against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement..

Additional Issues

- The certificate-of-merit requirement set forth in Tex. Civ. Prac. & Rem. Code Ann. § 150.002 applies only to a plaintiff who initiates an action for damages arising out of the provision of professional services by a licensed professional. It does not apply to a defendant or third-party defendant who asserts such claims. Jaster v. Comet II Const., Inc., 438 S.W.3d 556, 571 (Tex. 2014).
- Where (1) the contract specifically stated that nothing in the contract created a cause of action in favor of a third party, and (2) the architects did not have a right to control the construction worked performed on site, the architects owed no duty to a third party (the homeowners' guests). As a result, the homeowners' guests could not maintain a negligence action against the architects. Black ± Vernooy Architects v. Smith, 346 S.W.3d 877, 884-93 (Tex. App. 2011).
- The professional code of ethics is not considered when determining an architect's duty of care. Dukes v. Philip Johnson/Alan Ritchie Architects, *P.C.*, 252 S.W.3d 586, 593-94 (Tex. App. 2008).

Pattern Jury Instructions

Although Texas does not employ a pattern instruction addressing the standard of care applicable to design professionals specifically, Texas Pattern Jury Charge 60.1 addresses the standard of care for nonmedical professionals generally:

> "Negligence," when used with respect to the conduct of [the defendant], means failure to use ordinary care, that is, failing to do that which [the type of professional involved] of ordinary prudence would have done under the same or similar circumstances or doing that which [the type of professional involved] would not have done under the same or similar circumstances.
>
> "Ordinary care," when used with respect to the conduct of [the defendant], means that degree of care that [the type of professional involved] would use under the same or similar circumstances.

Tex. Pattern Jury Charge 60.1 (Nonmedical Professional's Degree of Care; Proximate Cause).

UTAH

STANDARD OF CARE

Utah does not have a particularized standard of care for architects, engineers, and design professionals. Rather, the same general standard of care applies to all professionals. See Nauman v. Harold K. Beecher & Assocs., 467 P.2d 610, 615 (Utah 1970) ("The responsibility of an architect does not differ from that of a lawyer or physician.") (quoting Bayne v. Everham, 163 N.W. 1002, 1008 (Mich. 1917)). The applicable standard of care is the "the care, skill, and diligence normally exercised" by other members of the profession in good standing, which "must be determined by testimony of witnesses in the same trade or profession." See Wessel v. Erickson Landscaping Co., 711 P.2d 250, 253 (Utah 1985). The proper measurement is against other professionals in the locality, rather than nationally. Nauman, 467 P.2d at 615.

RESTATEMENT

Utah follows the Restatement (Second) of Torts § 299A. Franco v. The Church of Jesus Christ of Latter-day Saints, 21 P.3d 198, 206 (Utah 2001).

ELEMENTS OF A CLAIM

To prevail on a claim for professional negligence against a design professional, a plaintiff must establish:

1) That the design professional breached the applicable standard of care

2) That injury resulted

3) That the breach was the proximate cause of the injury

See Wessel, 711 P.2d at 253.

EXPERT TESTIMONY

Utah courts have held that expert testimony is required "[w]here the average person has little understanding of the duties owed by particular trades or professions," as in cases involving medical doctors, architects, and engineers." Preston & Chambers, P.C. v. Koller, 943 P.2d 260, 263 (Utah Ct. App. 1997) (quoting Wycalis v. Guardian Title, 780 P.2d 821, 826 n. 8 (Utah. Ct. App. 1989)).

RELEVANT STATUTES AND REGULATIONS

- UTAH CODE ANN. § 13-8-7:

> (3)(a) A design professional shall perform design professional services under a design professional services contract consistent with the professional skill and care ordinarily provided by other design professionals:
>
> (i) with the same or similar professional license; and

(ii) providing the same or similar design professional service:

(A) in the same or similar locality;

(B) at the same or similar time; and

(C) under the same or similar circumstances. . . .

(4) The provisions of this section apply to a design professional services contract executed on or after May 8, 2018.

- UTAH CODE ANN. § 78B-4-513:

(1) Except as provided in Subsection (2), an action for defective design or construction is limited to breach of the contract, whether written or otherwise, including both express and implied warranties.

(2) An action for defective design or construction may include damage to other property or physical personal injury if the damage or injury is caused by the defective design or construction.

(3) For purposes of Subsection (2), property damage does not include:

(a) the failure of construction to function as designed; or

(b) diminution of the value of the constructed property because of the defective design or construction.

(4) Except as provided in Subsections (2) and (6), an action for defective design or construction may be brought only by a person in privity of contract with the original contractor, architect, engineer, or the real estate developer.

(5) If a person in privity of contract sues for defective design or construction under this section, nothing in this section precludes the person from bringing, in the same suit, another cause of action to which the person is entitled based on an intentional or willful breach of a duty existing in law.

(6) Nothing in this section precludes a person from assigning a right under a contract to another person, including to a subsequent owner or a homeowners association.

ECONOMIC LOSS DOCTRINE

A Utah statute specifically provides that "an action for defective design or construction is limited to breach of the contract[.]" See UTAH CODE ANN. § 78B-4-513(1). There is an exception to this statutory economic loss rule, however, for claims seeking redress for "damage to other property or physical personal injury if the damage is caused by the defective design or construction." Id. at § 78B-4-513(2). The statute does not provide a complete definition of the

phrase "other property," but does provide guidance as to the term's reach, stating that the "other property" exception does not apply to "the failure of construction to function as designed," or to the "diminution of the value of the constructed property because of the defective design or construction." Id. at § 78B-4-513(3).

Utah's common law version of the economic loss rule applies to situations beyond the scope of the statute. Hayes v. Intermountain GeoEnvironmental Servs. Inc., 446 P.3d 594, 598, (Utah Ct. App. 2019), cert. granted, 455 P.3d 1061 (Utah 2019). The common law rule "prevents recovery of economic damages under a theory of nonintentional tort when a contract covers the subject matter of the dispute." Reighard v. Yates, 285 P.3d 1168, 1176 (Utah 2012). To determine whether "a contract covers the subject matter of the dispute," courts look to whether "a duty exists independent of any contractual obligations between the parties." Id. Factors relevant to determining whether an independent duty exists include "'whether the defendant's allegedly tortious conduct consists of an affirmative act or merely an omission,' 'the legal relationship of the parties,' 'the foreseeability or likelihood of injury,' and policy considerations including 'which party can best bear the loss occasioned by the injury.'" Id. at 1179 (quoting B.R. ex rel. Jeffs v. West, 275 P.3d 228, 230 (Utah 2012)).

STATUTE OF LIMITATIONS AND STATUTE OF REPOSE

- Statute of Limitations:
  - Three years, for damage to real property, from the discovery by the aggrieved part of the facts of the injury. UTAH CODE ANN. § 78B-2-305(1).
  - Two years, if the cause of action is discovered or discoverable before completion or abandonment of the project, which begins to run upon completion or abandonment. UTAH CODE ANN. § 78B-2-225(4)(a), (b). However, the two-year statute of limitations does not apply if there has been fraudulent concealment. UTAH CODE ANN. § 78B-2-225(5)(a).
- Statute of Repose:
  - Six years, for claims based in contract or warranty, which begins to run upon completion or abandonment of the project unless a contract or warranty expressly fixes a different time period. UTAH CODE ANN. § 78B-2-225(3)(a).
  - Nine years, for claims against design professionals for damages to real property that are not based on contract or warranty, which begins to run upon completion or abandonment of the project, except that claimants whose actions are discovered or discoverable in the eighth or ninth year of the nine-year period have an additional two years from the date of discovery to commence an action. UTAH CODE ANN. § 78B-2-225(4)(c), (d).

Additional Issues

- A house is not separate and apart from the land such that it constitutes "other property" for purposes of the exception to the economic loss rule. Hayes, 446 P.3d at 602.

- Engineers and other designers have a duty under negligence principles to "eliminate any unreasonable risk of foreseeable injury." Hunt v. ESI Eng'g, Inc., 808 P.2d 1137, 1139 (Utah Ct. App. 1991).

Pattern Jury Instructions

Model Utah Jury Instruction CV501 addresses the standard of care for design professionals:

> A[n] [architect] [landscape architect] [engineer] [land surveyor] is required to use the same degree of learning, care, and skill ordinarily used by other [architects] [landscape architects] [engineers] [land surveyors] under like circumstances. This is known as the "standard of care." The law does not require perfect [plans/drawings/services] or satisfactory results but rather requires compliance with the standard of care.
>
> [The "applicable standard of care" is the standard of care existing at the time of [name of defendant]'s services and in the same or similar locality as where [name of defendant]'s services were performed.]
>
> The failure to follow the standard of care is a form of fault known as "professional malpractice." [Name of defendant] is a[n] [architect] [landscape architect] [engineer] [land surveyor]. To establish professional malpractice by [name of defendant], [name of plaintiff] has the burden of proving three things:
>
> 1) what the standard of care is;
>
> 2) that [name of defendant] failed to follow this standard of care; and
>
> 3) that this failure to follow the standard of care was the cause of [name of plaintiff]'s harm.
>
> In this case, [name of plaintiff] alleges that [name of defendant] failed to follow the standard of care in the following respects:
>
> If you decide that [name of defendant] failed to follow the standard of care in any of these respects, then you must determine whether that failure was the cause of [name of plaintiff]'s harm and, if so, the amount of the harm.

Model Utah Jury Instru., 2d Ed., at CV501 (Standard of Care for Design Professionals).

VERMONT

STANDARD OF CARE

In Vermont, the standard of care for architects, engineers, and design professionals is as follows:

> The undertaking of an architect implies that he possesses skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply, in the given case, his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result' . . . [an] architect 'must use ... skill, care and diligence to provide sufficient and adequate plans,' but '**work can be inaccurate or imperfect without being an actionable deviation from ... standards of care**' . . . [an] 'architect [is] required to exercise "ordinary professional skill and diligence**" not to "guarantee perfect plans or satisfactory results.**

Howard v. Usiak, 775 A.2d 909, 915–16 (Vt. 2001) (internal citation omitted) (emphasis added). In Howard, a veterinarian brought a negligence action against an architect he hired to design and execute his plan to open an animal emergency clinic in Vermont. See Id. at 911. The veterinarian alleged that the architect breached his duty of care by failing to install an elevator in the animal clinic. See Id. at 916. However, the court held that the architect was not negligent in failing to install the elevator. See Id. at 917. In reaching this conclusion, the court emphasized that the architect's work "can be inaccurate or imperfect" without being an actionable negligence claim and that an architect need not "guarantee perfect plans or satisfactory results." Id. at 916. In this case, the architect conducted due diligence and called the correct Vermont agency responsible for state building codes and sought all applicable codes. See Id. The court did not find the architect liable for the "mistake" of not including the elevator because the architect was not required to be "perfect" and seek out unwritten regulatory requirements through conversations with government regulators. Id.

Further, irrespective of the contractual language between any architect and a client, "courts have held that the architect's duty includes a requirement that a building designed will comply with all federal, state and local building codes in effect at the time." Id. at 916.

RESTATEMENT

Vermont follows the Restatement (Second) of Torts § 299A in the context of professional negligence actions. See, e.g., Brown v. Kelly, 437 A.2d 1103, 1104 (Vt. 1981). It is important to note, however, that Vermont courts have not specifically cited § 299A in the context of design professionals.

ELEMENTS OF A CLAIM

To prove professional malpractice in Vermont, a plaintiff must show:

1) That the professional negligently breached a duty to the plaintiff

2) That, as a proximate result of the breach, the plaintiff suffered injury

See, e.g., Howard v. Usiak, 775 A.2d 909, 915 (Vt. 2001).

Expert Testimony

"[N]egligence by professionals is demonstrated using expert testimony to: (1) describe the proper standard of skill and care for that profession, (2) show that the defendant's conduct departed from that standard of care, and (3) show that this conduct was the proximate cause of plaintiff's harm." Estate of Fleming v. Nicholson, 724 A.2d 1026, 1028 (Vt. 1998).

"If the alleged negligent conduct is a matter of judgment unique to that profession, the above elements must be established by expert testimony to assist the trier of fact in determining negligence." Id.; see also Tetreault v. Greenwood, 682 A.2d 949, 950 (Vt. 1996) (expert testimony was required to show that a defendant failed to adhere to the standard of care commonly exercised by Vermont attorneys when conducting a title search).

"There are situations, however, where expert testimony is not needed. Where a professional's lack of care is so apparent that only common knowledge and experience are needed to comprehend it, expert testimony is not required to assist the trier of fact in finding the elements of negligence." See Estate of Fleming, 724 A.2d at 1028.

Relevant Statutes and Regulations

- N/A

Economic Loss Doctrine

In Vermont, the economic loss doctrine has been found to preclude the recovery of purely economic loss under tort theories. Specifically, in Vermont, "'[n]egligence law does not generally recognize a duty to exercise reasonable care to avoid intangible economic loss to another unless one's conduct has inflicted some accompanying physical harm,' which does not include economic loss." Gus' Catering, Inc. v. Menusoft Sys., 762 A.2d 804, 807 (Vt. 2000) (quoting O'Connell v. Killington, Ltd., 665 A.2d 39, 42 (Vt. 1995)).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Six years. See, e.g., Abajian v. TruexCullins, Inc., 176 A.3d 524, 527, 530 (Vt. 2017). In Vermont, a civil action must "be commenced within six years after the cause of action accrues." Id. (quoting Vt. Stat. Ann. tit. 12 § 511). "A cause of action accrues upon 'discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery.' At that point, the limitation period begins to run, 'and the plaintiff is ultimately chargeable with notice of all the facts that could have been obtained by the exercise of reasonable diligence in prosecuting the inquiry.'" Id. (internal citation omitted).

- Statute of Repose:
  - 20 years. Title 12 V.S.A. § 518(a) provides that a plaintiff may not commence a cause of action "more than twenty years from the date of the last occurrence to which the injury is attributed." This establishes the maximum length of time within which a plaintiff must commence a suit for injury even if the cause of action is not barred by any applicable statute of limitations. See Cavanaugh v. Abbott Labs, 496 A.2d 154, 162 (Vt. 1985) (abrogated on other grounds).
  - "The undertaking of an architect implies that he possesses skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply, in the given case, his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result." Howard, 775 A.2d at 909 (citing Coombs v. Beede, 89 Me. 187 (1896)).

Additional Issues

- N/A

Pattern Jury Instructions

Although Vermont does not have a specific pattern instruction for the standard of care for design professionals, Vermont Civil Jury Instruction Section 3.0 Negligence—Standard of Care/Reasonable Person instructs juries on the duty of care for professional negligence and reads as follows:

> [Name of Plaintiff] claims that [Name of Defendant] was negligent [describe case, *e.g.*, driving auto; maintaining sidewalk; controlling his/her dog; performing legal services etc.]. [Name of Defendant] was negligent if [he/she] was not reasonably careful [summarize activity: driving the car, etc.]. That does not mean that [Defendant] had to use the greatest possible care, like an unusually cautious person. Rather, [he/she] had to exercise the same care a reasonable person [or, if professional liability case, reasonable lawyer, accountant etc.] would have done in [his/her] same circumstances, taking into account the foreseeable risk of injury caused by [his/her] actions. Not every injury is caused by negligence; sometimes accidents happen even when people act reasonably. [For a professional liability case: not every harm is caused by negligence; sometimes mistakes happen even when people act reasonably.]
>
> If you find that [Name of Defendant] was negligent when [he/she] [describe action – drove the car, etc.], you must then decide whether that negligence caused [Name of Plaintiff]'s [accident/injury/harm—describe]. [Causation instruction to follow.]

VIRGINIA

STANDARD OF CARE

In Virginia, the standard of care for design professionals is "the care of those ordinarily skilled in the business." Nelson v. Commonwealth, 368 S.E.2d 239, 243 (Va. 1988) (citing Surf Realty Corp. v. Standing, 78 S.E.2d 901, 907 (Va. 1953)). The Virginia Supreme Court has articulated this standard as follows:

> An architect, in the preparation of plans and drawings, owes to his employer the duty to exercise his skill and ability, his judgment and taste reasonably and without neglect . . . In his contract of employment he implies that he possesses the necessary competency and ability, to enable him to furnish plans and specifications prepared with a reasonable degree of technical skill. He must possess and exercise the care of those ordinarily skilled in the business and, in the absence of a special agreement, he is not liable for fault in construction resulting from defects in the plans because he does not imply or guarantee a perfect plan or a satisfactory result.

Surf Realty Corp., 78 S.E.2d at 907 (internal citations omitted).

RESTATEMENT

Virginia does not follow the Restatement (Second) of Torts § 299A.

ELEMENTS OF A CLAIM

To prevail in an action for professional malpractice, a plaintiff must:

1) Establish the standard of care

2) Demonstrate that the defendant's actions breached the standard of care

3) Prove that the defendant's breach was the proximate cause of the plaintiff's injuries

See William H. Gordon Assocs., Inc. v. Heritage Fellowship, United Church of Christ, 784 S.E.2d 265, 274 (Va. 2016).

EXPERT TESTIMONY

"A majority of jurisdictions that have considered the issue have applied, and we now adopt, the general rule that the practice of architecture is sufficiently technical to require expert testimony to establish the standard of care and any departure therefrom." Nelson v. Commonwealth, 368 S.E.2d 239, 244 (Va. 1988). "Engineering, like architecture, medicine, and automotive transmission design, is in most instances sufficiently technical to require expert testimony to establish the standard of care and whether there has been any departure from that standard." William H. Gordon Assocs., Inc. v. Heritage Fellowship, United Church of Christ, 784 S.E.2d 265, 274 (2016).

Relevant Statutes and Regulations

- 18 Va. Admin. Code 10-20-730(A):

  > The professional shall undertake to perform professional assignments only when qualified by education or experience, or both, and licensed or certified in the profession involved . . . The professional may accept an assignment requiring education or experience outside of the field of the professional's competence, but only to the extent that services are restricted to those phases of the project in which the professional is qualified.

- 18 Va. Admin. Code 10-20-730(C):

  > The professional shall adhere to the minimum standards and requirements pertaining to the practice of his own profession, as well as other professions if incidental work is performed.

Economic Loss Doctrine

In Virginia, the economic loss doctrine precludes a party from recovering purely economic loss via a tort claim against a party with whom it has not contracted. See Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 374 S.E.2d 55, 58 (Va. 1988) (holding that homeowners could not recover their economic losses in a negligence action against an architect and subcontractor with whom they had no direct contractual relationship).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - In Virginia, the statute of limitations for negligence claims depends on the nature of the injuries claimed. The limitations period begins to run on the date the injury is sustained. Va. Code Ann. § 8.01-230. The statutes of limitations are:
    1. Two years, for personal injury claims. Va. Code Ann. § 8.01-243(A).
    2. Five years, for injury to property. Va. Code Ann. § 8.01-243(B).
- Statute of Repose:
  - Five years. Va. Code Ann. § 8.01-250. "No action to recover for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement to real property more than five years after the performance or furnishing of such services and construction. Id.

Additional Issues

- An action for professional negligence, "while sounding in tort, is an action for breach of contract and is thus government by the statute of limitations applicable to contracts." Comptroller of Va. ex rel. Va. Military Inst. v. King, 232 S.E.2d 895, 899-900 (Va. 1977).

- Engineering and architecture are "in most instances sufficiently technical to require expert testimony to establish the standard of care and whether there has been any departure from that standard." William H. Gordon Assocs., Inc., 784 S.E.2d at 274.

Pattern Jury Instructions

Although Virginia does not have a specific pattern instruction addressing the standard of care for design professionals generally, Virginia Model Jury Instruction 35.200 instructs juries on the duty of care for architects and can likely be applied to other design professionals: "An architect has a duty to use reasonable care in [preparing plans for designing; supervising the construction of] a building. Reasonable care is the care that an ordinarily skilled architect would use. If an architect fails to perform this duty, then he is negligent." Va. Model Civ. Jury Instr. 35.200 (Duty of Architects).

WASHINGTON

STANDARD OF CARE

Washington does not have a particularized standard of care for architects, engineers, and design professionals. Rather, under Washington law, the following summarizes the duty owed:

> Generally, the foundation of any liability analysis for . . . design professional[s] rests in contract. However, design professionals also owe duties to their clients and the public to act with reasonable care, which can sometimes give rise to a tort duty independent of the contract . . . To act in accordance with the duty, engineers [and other design professionals] must exercise the degree of care, skill, and learning expected of a reasonably prudent engineer in the state of Washington acting in the same or similar circumstances.

Pointe at Westport Harbor Homeowners' Ass'n v. Engineers Nw., Inc., *P.S.*, 376 P.3d 1158, 1162 (Wash. App. 2016) (internal quotations omitted).

Stated more generally, the Supreme Court of Washington has held that "engineers who undertake engineering services in this state are under a duty of reasonable care," which consists of a "duty to exercise reasonable engineering skill and judgment." Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 243 P.3d 521, 528-29 (Wash. 2010). The court in Affiliated FM Ins. Co. detailed what the scope of this duty entails and what it does not:

> A duty of care is necessarily limited to the level of care that is reasonable in the particular circumstances. In these circumstances—an engineer providing professional services—the usual measure of care, ordinary care, is not sensitive enough to the technical aspects of an engineer's professional responsibilities. What is reasonable care should be measured against what a reasonably prudent engineer would do. A higher degree of care, such as utmost care, would make engineers insurers and expose them to an intolerably high risk of liability. As Professor DeWolf and Mr. Allen note, "an engineer does not and cannot insure or in any sense guarantee a satisfactory result." 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 15.51, at 505 (3d ed. 2006). Requiring utmost care would be unduly burdensome. We therefore hold the measure of reasonable care for an engineer undertaking engineering services is the degree of care, skill, and learning expected of a reasonably prudent engineer in the state of Washington acting in the same or similar circumstances.

Id.

Finally, the Supreme Court of Washington has recognized that an engineer does not guarantee a satisfactory result and that the mere fact that damages occurred is not in itself evidence that an engineer has failed to exercise his skill with reasonable care. See Seattle W. Indus., Inc. v. David A. Mowat Co., 110 Wash. 2d 1, 8, 750 P.2d 245, 250 (1988).

RESTATEMENT

Washington follows the Restatement (Second) of Torts § 299A. See, e.g., Seattle W. Indus., Inc. v. David A. Mowat Co., 750 P.2d 245, 251 (Wash. 1988).

ELEMENTS OF A CLAIM

Washington generally articulates the elements of a claim for professional negligence as follows:

1) The standard of care

2) A breach of that standard of care

3) Damages that proximately resulted from that breach

Baechler v. Beaunaux, 272 P.3d 277, 280 (Wash App. 2012).

EXPERT TESTIMONY

Washington's Court of Appeals has suggested, but not explicitly ruled, that expert testimony is generally required to establish the architect's negligence for a design defect. See Hull v. Enger Const. Co., 15 Wash. App. 511, 515 (1976).

RELEVANT STATUTES AND REGULATIONS

- ☐ N/A

ECONOMIC LOSS DOCTRINE

In Washington, "the independent duty doctrine, previously known as the economic loss rule, bars recovery in tort for economic losses suffered by parties to a contract unless the breaching party owed a duty in tort independent of the contract." Pointe at Westport Harbor Homeowners' Ass'n v. Engineers Nw., Inc., *P.S.*, 376 P.3d 1158, 1162 (Wash. App. 2016). In certain circumstances, Washington courts have held that design professionals owed a duty of care independent of the contract. See, e.g., Id. (holding that an engineering firm owed an independent duty to a developer and members of an homeowners association "to take reasonable care to design a building that did not present safety risks to its residents or their property."); Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 243 P.3d 521, 529 (2010) (holding that an engineering firm working on the Seattle Monorail owed an independent duty to the Seattle Monorail System because "an engineer's duty of care extends to safety risks of physical damage to the property on which the engineer works.").

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Three years, for claims against design professionals. Seattle W. Indus., Inc. v. David A. Mowat Co., 750 P.2d 245, 252 (Wash. 1988).
  - The limitations period begins to run when all elements necessary to the claim exist and the plaintiff has a right to seek relief from the courts. Murphy v. Grass, 164 Wash. App. 584 (Wash. App. Ct. 2011).
- Statute of Repose:
  - Six years, from the substantial completion of construction or the termination of services. WASH. REV. CODE ANN. § 4.16.310.

Additional Issues

- "Where a person holds himself out as qualified to furnish, and does furnish, specifications and plans for a construction project, he thereby impliedly warrants their sufficiency for the purpose in view." Prier v. Refrigeration Eng'g Co., 442 P.2d 621, 624 (Wash. 1968).

Pattern Jury Instructions

Although Washington does not have a specific pattern instruction for the standard of care for design professionals, the following is an example of a jury instruction upheld by the Washington Supreme Court as correctly stating the law: "an engineer is required to exercise the skill possessed by others in 'the' community." Seattle W. Indus., Inc. v. David A. Mowat Co., 750 P.2d 245, 251 (Wash. 1988).

WEST VIRGINIA

STANDARD OF CARE

The particularized standard of care for architects, engineers, and design professionals in West Virginia is as follows: "In discharging this duty [to protect the public's health, safety, and welfare], a registered architect shall act with reasonable care and competence, and shall apply the technical knowledge and skill which are ordinarily applied by registered architects of good standing, practicing in the same locality." W. VA. CODE R. 2-1-9.

The duty to "render professional services with ordinary skill, care and diligence commensurate with that rendered by members of his or her profession in the same or similar circumstances" is not limited to just architects, but applies with the same force to engineers and other design professionals, as well. See E. Steel Constructors, Inc. v. City of Salem, 549 S.E.2d 266, 275 (W. Va. 2001).

Specifically, all design professionals have a duty to use "ordinary skill, care, and diligence in rendering their professional services . . . commensurate with the requirements of his profession, and [are] only liable for a failure to exercise reasonable care and skill commensurate with those requirements." See Id. at 275-76. (internal citations omitted).

RESTATEMENT

West Virginia follows the Restatement (Second) of Torts § 299A. See, e.g., Capper v. Gates, 454 S.E.2d 54, 60 (W. Va. 1994) (adopting the Restatement and holding the defendant to the standard of care demanded of professionals in his area of purported expertise); Yost v. Fuscaldo, 408 S.E.2d 72, 77 (W. Va. 1991) (same).

ELEMENTS OF A CLAIM

In West Virginia, in general, an action in professional negligence may be maintained upon the plaintiff's showing that the defendant:

1) Owed a duty

2) Breached that duty by some act or omission

3) Such act or omission caused the injury complained of

Stantec Consulting Servs., Inc. v. Thrasher Envtl., Inc., No. 12-1400, 2013 WL 5676826, at *4 (W. Va. Oct. 18, 2013).

EXPERT TESTIMONY

In West Virginia, it is the general rule that professional skills can only be proved by expert witnesses in professional negligence cases. Roberts v. Gale, 139 S.E.2d 272, 276 (W. Va. 1964). However, "[t]his rule has been qualified to permit negligence to be established by law witnesses

in cases where negligence or want of professional skill is so obvious as to dispense with the need for expert testimony." Id.

Relevant Statutes and Regulations

- W. Va. Code § 2-1-9:

> 9.1.1. In engaging in the practice of architecture, a registered architect's primary duty is to protect the public's health, safety, and welfare. In discharging this duty, a registered architect shall act with reasonable care and competence, and shall apply the technical knowledge and skill which are ordinarily applied by registered architects of good standing, practicing in the same locality.

Economic Loss Doctrine

Under West Virginia law:

> An individual who sustains economic loss from an interruption in commerce caused by another's negligence may not recover damages in the absence of physical harm to that individual's person or property, a contractual relationship with the alleged tortfeasor, or some other special relationship between the alleged tortfeasor and the individual who sustains purely economic damages sufficient to compel the conclusion that the tortfeasor had a duty to the particular plaintiff and that the injury complained of was clearly foreseeable to the tortfeasor.

Glascock v. City Nat. Bank of W. Virginia, 576 S.E.2d 540, 545 (W. Va. 2002) (quoting Aikens v. Debow, 541 S.W.2d 576, 590 (W. Va. 2000). Courts have repeatedly applied the economic loss doctrine to cases involving engineers and other design professionals. See, e.g., E. Steel Constructors, Inc., 549 S.E.2d at 274 (finding a "special relationship" between a contractor and a design professional who were both hired by the same owner and holding that the contractor could recover purely economic damages in an action alleging professional negligence on the part of the design professional); Affholder, Inc. v. N. Am. Drillers, Inc., No. 2:04-0952, 2006 WL 3192537, at *16 (S.D.W. Va. Nov. 1, 2006).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Two years. See Trafalgar House Const., Inc. v. ZMM, Inc., 567 S.E.2d 294, 299 (W. Va. 2002).

> "Under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury." Id.

- Statute of Repose:
  - N/A

Additional Issues

- In West Virginia, "[a] design professional, such as an architect or engineer, 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 that exists between the two, and consequently, the contractor may, upon proper proof, recover purely economic damages in an action alleging professional negligence on the part of the design professional." E. Steel Constructors, Inc., 549 S.E.2d at 271.

Pattern Jury Instructions

Although West Virginia does not have a specific pattern instruction for the standard of care for design professionals, case law suggests that courts instruct juries consistent with the Restatement (Second) of Torts § 299A. See Capper v. Gates, 454 S.E.2d 54, 60-61 (W. Va. 1994).

WISCONSIN

STANDARD OF CARE

In Wisconsin, "an architect has the duty of using the standard of care ordinarily exercised by the members of that profession." A.E. Invest. Corp. v. Link Bldrs., Inc., 214 N.W.2d 764, 769 (Wisc. 1974). This same standard of care also applies to engineers. See Milwaukee Partners v. Collins Engineers, Inc., 485 N.W.2d 274, 277 (Wis. Ct. App. 1992).

In determining the standard of care for architects, engineers, and design professionals, courts look at what "is ordinary and customary" in that specific profession. See Transportation Ins. Co. v. Hunzinger Const. Co., 507 N.W.2d 136, 138 (Wis. Ct. App. 1993). Expert testimony is typically required to establish the applicable standard of care for an engineer or architect for the *specific* project at hand. Thusius v. E.G. Hintz & Sons, Inc., 297 Wis. 2d 584, ¶ 12 (Wis. Ct. App. 2006). As the Wisconsin appellate court explained in Thusius, "[i]t is unlikely . . , that a jury or trial court would be familiar with a professional engineer's ordinary standard of care." Id. The court granted summary judgment in favor of the defendant because the plaintiff's expert did not set forth the specific standard of care for the design of expansion joints. Id.

An engineer's or architect's work does not need to be perfect. As one Wisconsin federal court recently explained, the standard of care "does not mean that an engineer's drawings must be perfect and free from mistakes or defects." Novum Structures, LLC v. C. Larson Engineering, Inc., 2019 U.S. Dist. LEXIS 72187, at *5 (E.D. Wis. Apr. 30, 2019). The Novum court relied on the Wisconsin Supreme Court's 1877 decision in Shipman v. State, where the court likewise explained that an architect is not "responsible for a perfect plan or for perfect superintendence of every detail of such a [] building." 43 Wis. 381, 391 (Wis. 1877).

RESTATEMENT

Wisconsin courts have also referred to the Restatement (Second) of Torts § 299A in analyzing the standard of care for professionals. See, e.g., Basom v. Nasi Const. Co., 371 N.W.2d 429 (Wisc. Ct. App. 1985) (citing Restatement § 299A and stating that "[o]ne practicing a profession or trade must exercise the skill and knowledge normally possessed by the members of that profession or trade"); Lammers v. Steffan, 93 N.W.2d 183 (Wis. Ct. App. 1980). Section 299A and the cases interpreting it make clear that the standard of care for a professional is determined by looking to the standard skills of the profession, not the skills possessed by the most talented professionals or even the average skills for the profession. Restatement (Second) of Torts § 299A cmt. e ("It is not that the of the most highly skilled, nor is it that of the average member of the profession or trade, since those who have less than median or average skill may still be competent and qualified."). Likewise, the specific expertise of the professional at issue is not relevant to determining the standard of care. Lammers v. Steffan, 96 Wis. 2d 735 (Wis. Ct. App. 1980).

ELEMENTS OF A CLAIM

Wisconsin generally articulates the elements of a claim for professional negligence, as all claims for negligence, as follows:

1) A breach of

2) A duty owed

3) That results in

4) An injury or injuries, or damages.

See, e.g., Paul v. Skemp, 625 N.W.2d 860, 865 (Wis. 2001).

Expert Testimony

- ☐ N/A

Relevant Statutes

- ☐ N/A

Economic Loss Doctrine

In Wisconsin, the economic loss doctrine only applies to goods and products. Baker v. Matousek, 2019 U.S. Dist. LEXIS 56333, at *6 (W.D. Wis. Apr. 2, 20190. It does not apply to the provision of services. Id. Accordingly, the doctrine is likely not available as a defense to architects and engineers in Wisconsin.

Statute of Limitations and Statute of Repose

- ☐ Statute of Limitations:
  - Although there is no specific statute of limitations for engineering and architectural malpractice, courts have applied a six-year statute of limitations that begins to run upon discovery of the alleged defect. Milwaukee Partners v. Collins Engineers, Inc., 485 N.W.2d 274, 278 (Wis. Ct. App. 1992).
- ☐ Statute of Repose:
  - Seven years, for claims against architects and engineers, which begins to run upon substantial completion of the project at issue. Wis. Stat. § 893.89.

Additional Issues

- ☐ Contributory negligence is recognized as a defense in Wisconsin cases involving professional liability. See, e.g., Brown v. Dibbell, 595 N.W.2d 358, 365 (Wis. 1999).
- ☐ "Under Wisconsin negligence law, architects may be liable to third parties with whom they are not in privity of contract. The lack of privity does not constitute a policy reason for not imposing liability where negligence is shown to be a substantial factor in occasioning the harm." A. E. Inv. Corp. v. Link Builders, Inc., 214 N.W.2d 764, 769 (Wis. 1974).

PATTERN JURY INSTRUCTIONS

Although Wisconsin does not have a specific pattern instruction for the standard of care for design professionals, the following is an example jury instruction regarding the standard of care utilized in Wisconsin:

> A building [design professional] ha[s] a duty to exercise ordinary care in the [design] of a building. This duty requires such [professional] to perform work with the same degree of care and skill and to provide such suitable materials as are used and provided by [professionals] of reasonable prudence, skill, and judgment in similar [design].

Beaton v. Zander Insulation, Inc., 568 N.W.2d 652 (Wis. Ct. App. 1997).

WYOMING

STANDARD OF CARE

In Wyoming, "an engineer's duty is to exercise such care, skill, and diligence as people engaged in the engineering profession ordinarily exercise under like circumstances." Kemper Architects, P.C. v. McFall, Konkel & Kimball Consulting Engineers, Inc., 843 P.2d 1178, 1185 (Wyo. 1992) (also stating that "an engineer is guilty of negligence if he fails to apply the skill and learning which is required of similarly situated engineers").

Similarly, the Supreme Court of Wyoming held that "a like standard should apply to architects." Garaman, Inc. v. Williams, 912 P.2d 1121, 1123 (Wyo. 1996). Specifically, the court stated that "we stated in Kemper Architects, P.C. that an engineer must exercise such care, skill, and diligence as others who are engaged in the engineering profession would ordinarily exercise under similar circumstances. We believe that a like standard should apply to architects." Id. (internal citation omitted).

Additionally, design professionals are not required to deliver perfect results. The Supreme Court of Wyoming has stated that, with respect to architects, engineers, doctors, attorneys, and others that deal in somewhat inexact sciences, "[b]ecause of the inescapable possibility of error which inheres in these services, the law has traditionally required, ***not perfect results***, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals." Kemper Architects, P.C., 843 P.2d at 1186 (emphasis added). In Kemper Architects, P.C., an engineer sued an architect for negligence after the architect designed an air volume system that failed to meet specifications and caused the engineer additional costs. See Id. at 1181. In determining the correct formulation of a professional's standard of care, the court emphasized that the standard cannot be "outcome-oriented" such that the design professional guarantees any certain outcome from his project. See Id. at 1186. Specifically, the court stated that "[t]he sound policy reason to avoid an outcome-oriented standard . . . is that the 'likely understanding between the client and the professional designer is not that a successful outcome will be achieved when professional services are purchased but that the professional will perform as would other professionals.'" Id.

RESTATEMENT

Case law suggests that Wyoming follows the Restatement (Second) of Torts § 299A. In Banner v. Town of Dayton, the court upheld the trial court's assessment of the standard of care for an engineer, which "substantially adopted a standard of conduct similar to that suggested by 2 ALI Restatement (Second), Torts 2d § 299A and [was found by the court as] appropriate for determining the negligence of a Wyoming consulting engineer." 474 P.2d 300, 305-06 (Wyo. 1970). Notably, the court held that, with respect to comment (g) of the Restatement requiring that "[a]llowance must be made also for the *type of community* in which the actor carries on his practice," the trial court did not err when it instructed that the "community" consisted of the state of "Wyoming" as a whole, as opposed to a smaller locality. Id. (emphasis added). In analyzing the applicability of the economic loss rule, "the salient question is not whether the tort claim is based in negligence, but whether a tort duty exists independent of any duties established in a contract."

Rogers v. Wright, 366 P.3d 1264, 1275-77 (Wyo. 2016) (finding that, because "home builders and developers have an independent duty of care when building new homes," the economic loss doctrine did not bar a purchaser of a new home from bringing a negligence action against the builder).

Elements of a Claim

In Wyoming, when the cause of action for professional negligence sounds in tort, the elements are as follows:

1) The duty of the professional to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise

2) A breach of that duty

3) A proximate causal connection between the negligent conduct and the resulting injury

4) Actual loss or damage resulting from the professional's negligence

Rino v. Mead, 55 P.3d 13, 20 (Wyo. 2002).

Expert Testimony

Wyoming courts require the plaintiff to "present expert witness testimony which reveals the standard of care applicable to the profession and the defendant's compliance with or breach of that standard." Garamani, 912 P.2d at 1123-24 (holding that an architect defendant's testimony is insufficient to establish the standard of care and testimony from an expert architect (or engineer/design professional) is generally required to establish standard of care and breach thereof).

Relevant Statutes and Regulations

- N/A

Economic Loss Doctrine

In Wyoming, the economic loss doctrine has been found to preclude the recovery of purely economic loss under tort theories, including architectural and project engineer malpractice. See, e.g., Excel Const., Inc. v. HKM Eng'g, Inc., 228 P.3d 40, 44 (Wyo. 2010) (finding that the economic loss doctrine barred a negligence claim against a project engineer); Rissler & McMurry Co. v. Sheridan Area Water Supply Joint Powers Bd., 929 P.2d 1228, 1235 (Wyo. 1996) (same).

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Two years. Adelizzi v. Stratton, 243 P.3d 563, 566 (Wyo. 2010). This time period begins on the date when the "act, error or omission' occurs, rather than the date when the cause of action accrues." Id.

- Statute of Repose:
  - 10 years, where the triggering event to begin the repose period is "substantial completion of [an] improvement to real property," Including the design or construction of real property. Specifically, 10 years after that event no cause of action may accrue. See Worden v. Vill. Homes, 821 P.2d 1291, 1295 (Wyo. 1991) (WYO. STAT. ANN. § 1-3-111).

ADDITIONAL ISSUES

- While the standard of care in Wyoming for engineers, architects, and design professionals is "such care, skill, and diligence as people engaged in the [applicable] profession ordinarily exercise under like circumstances," courts recognize that "the contracting parties may agree to a standard of performance which is greater than the typical 'skill usually exercised by others of its profession' standard." Kemper Architects, P.C., 843 P.2d at 1185 (finding that, in the case at bar, no express contract terms existed that varied the standard of performance).

- An architect's failure to comply with code requirement does not establish negligence; much of architects' work involves application of their professional judgment, and professionals are not required to warrant perfect results, but only to exercise appropriate degree of care. Garaman, Inc., 912 P.2d at 1124.

PATTERN JURY INSTRUCTIONS

The following is an example of the jury instructions that instruct juries on the duty of care for professional negligence, which the Supreme Court of Wyoming stated "correctly defined a violation of that standard as occurring if the engineer was negligent":

> [A]n engineer has the duty to have that degree of learning and skill ordinarily possessed by reputable engineers.
>
> It is his further duty to use reasonable diligence and his best judgment in the exercise of his professional skill and in the application of his learning, in an effort to accomplish the purpose for which he was employed.
>
> A failure to perform any such duty is negligence.
>
> The degree of care, skill and judgment which is usually exercised by an engineer is not a matter within the common knowledge of jurors or lay persons. These standards are within the special knowledge of experts in the field of engineering and can only be established by their testimony. You may not speculate or guess what those standards of care, skill and judgment are but must attempt to determine[ ] this from the testimony of legal experts called for that purpose.

Kemper Architects, P.C., 843 P.2d at 1182.

DISTRICT OF COLUMBIA

STANDARD OF CARE

The District of Columbia does not have a particularized standard of care for architects, engineers, and design professionals. Rather, the same general standard of care applies to all professionals. See Morrison v. MacNamara, 407 A.2d 555, 560 (D.C. 1979) (noting that, across professions, "the duty of reasonable care requires that those with special training and experience adhere to a standard of conduct commensurate with such attributes."). The applicable standard of care is "the degree of care that a reasonably competent person follows under the same or similar circumstances." See D.C. Std. Jury Instr. 9-2 (General Standard of Care of Professionals). When measuring a design professional's degree of care, the relevant comparison is the degree of care exercised by other design professionals nationally, not regionally or locally. See Id.; Morrison, 407 A.2d at 564 ("Architects are not held to a standard of conduct exercised by other architects in the District or a similar locality.").

RESTATEMENT

D.C. does not follow the Restatement (Second) of Torts § 299A. See Haynesworth v. D.H. Stevens Co., 645 A.2d 1095, 1097 (D.C. 1994) (acknowledging that the District of Columbia has not formally adopted the Restatement).

ELEMENTS OF A CLAIM

To prevail in an action for professional negligence, a party must establish:

1) The applicable standard of care

2) That the standard has been violated

3) That the violation caused harm

Bell v. Jones, 523 A.2d 982, 987 (D.C. App. 1986).

EXPERT TESTIMONY

The District of Columbia requires expert testimony regarding the applicable standard of care unless the subject matter is "within the realm of common knowledge and everyday experience." D.C. v. Arnold & Porter, 756 A.2d 427, 433 (D.C. 2000). "A plaintiff must put on expert testimony to establish what the standard of care is if the subject in question is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson." Id. Applying this standard, the District of Columbia has routinely required expert testimony even in cases involving everyday experiences. See, e.g., Messina v. D.C., 663 A.2d 535, 537 (D.C. 1995) (in a case in which a child swung on monkey bars in a playground and fell and injured herself, the court required expert testimony as to the appropriate standard of care on whether the ground was appropriately cushioned); D.C. v. Freeman, 477 A.2d 713, 719 (D.C. 1984) (after a vehicle struck

a pedestrian at an intersection, the plaintiff filed suit against the District, alleging lack of pedestrian safety measures, and the court required expert testimony on the appropriate standard of care).

Relevant Statutes and Regulations

- N/A

Economic Loss Doctrine

In the District of Columbia, the economic loss doctrine "bars recovery of purely economic losses in negligence, subject to only one limited exception where a special relationship exists." Aguilar v. RP MRP Washington Harbour, LLC, 98 A.3d 979, 985-86 (D.C. App. 2014). In determining whether a special relationship exists triggering the exception to the economic loss doctrine, courts ask whether the "defendants had an 'obligation . . . to care for [the plaintiffs'] economic well-being' or an 'obligation' that 'implicate[d] [the plaintiffs'] economic expectancies.'" Whitt v. Am. Prop. Constr., P.C., 157 A.3d 196, 205 (D.C. App. 2017) (quoting Aguilar, 98 A.3d at 985).

While the District of Columbia has not explicitly applied this rule in the professional negligence context, it has cited to cases in other jurisdictions for guidance that shed light on the scope of this exception. Id. (citing to L & P Converters, Inc. v. Alling & Cory Co., 642 A.2d 264, 267 (Md. Ct. Spec. App. 1994). In L&P Converters, for instance, the court held that contractual privity or its equivalent constitutes a "special relationship" in this context. Id. Courts have held that a construction company has a special relationship with the plaintiff-business where: (1) the construction permit contained express terms "specifically protecting [the business] from the effects" of the project, and (2) the extensive nature of the project meant the harm was not "isolated and unexpected." Whitt, 157 A.3d at 205-206.

Statute of Limitations and Statute of Repose

- Statute of Limitations:
  - Three years. D.C. Code § 12-301(8). The limitations period starts to run when the injury occurs. When the relationship between the injury and wrongful conduct is obscure, however, the limitations period begins to run when the plaintiff has knowledge, or with reasonable diligence should have knowledge, of: (1) the existence of the injury; (2) its cause in fact; (3) some evidence of wrongdoing. Bussineau v. President & Dirs. of Georgetown Coll., 518 A.2d 423, 425-26 (D.C. 1986).
- Statute of Repose:
  - Ten years, to recover damages for injury to real property "resulting from the defective or unsafe condition of an improvement to real property," unless the alleged injury "occurs within the ten-year period beginning on the date the improvement was substantially completed[.]" D.C. Code § 12-310(a)(1). This statute "differs from an ordinary statute of limitations in that the specified time period begins to run not from the date on which a right of action accrues, but from . . . the date the improvement to

real property was completed." B. Frank Joy, L.L.C. v. D.C. Sewer & Water Auth., 213 A.3d 90, 93 (D.C. 2019) (citation omitted).

Additional Issues

- The trial court's confinement of the standard of care to the District of Columbia was, at most, harmless error where (1) there was no evidence that the standard of care in the District differed from the national standard of care, and (2) "all of the pertinent events in this case occurred in the District of Columbia" such that "neither party could have been prejudiced" by the application of a District of Columbia standard of care. Bell, 523 A.2d at 988.

Pattern Jury Instructions

Although D.C. does not employ a jury instruction addressing the standard of care applicable to design professionals specifically, D.C. Standard Jury Instruction 9-2 addresses the standard of care for professionals generally:

> [Plaintiff] must prove the professional standard of care. A professional has a duty to use the degree of care that a reasonably competent person follows under the same or similar circumstances. A [professional] is not liable if [he/she] meets the standard of care in the field.
>
> [[Plaintiff] must prove a standard of care that applies nationwide, not just regionally or locally.]
>
> [A reasonable professional under the standard of care changes his or her conduct according to the danger he or she knows, or should know, exists. Therefore, as the danger increases, a reasonable professional under the standard of care acts in accordance with those circumstances.]

See D.C. Std. Jury Instr. 9-2 (General Standard of Care of Professionals).

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