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EXPERT OPINION NECESSARY IN PENNSYLVANIA TO ASSERT NEGLIGENCE ACTION AGAINST A DESIGN PROFESSIONAL

Pennsylvania is one of a few select states which allow contractors and subcontractors to bring direct claims against design professionals for design errors, even where the contractor does not have a direct contract with the design professional. In the relatively recent case of *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, the Pennsylvania Supreme Court permitted a contractor to assert an action in professional negligence against an architect for purely economic losses sustained as a result of alleged design errors, despite the fact that the contractor had no contract with the architect. Such actions have become common place in Pennsylvania courts and arbitration tribunals. However a recent case points out a potential pitfall in bringing such an action.

Under Pennsylvania law, an action for professional negligence against a licensed professional must be accompanied by a written “**certificate of merit**,” filed within 60 days after the Complaint and signed by counsel for the party asserting the action, stating that a licensed professional has supplied a written statement that a reasonable probability exists that the defendant has deviated from acceptable professional standards.

In *Zokaites Contracting, Inc. v. Trant Corporation*, the contractor/developer plaintiff filed a complaint in court alleging that an engineering firm had breached its contract with the plaintiff, and had committed several design errors in their grading, finished elevation, catch basin, and sanitary sewer design, among others. A certificate of merit was not filed within the required 60 days. Shortly before the scheduled trial, and years after the complaint was filed, the engineer defendant secured an order from the trial court dismissing the professional negligence action because no certificate of merit had been filed.

The Superior Court ruled that the 60 day certificate of merit requirement was mandatory. The decision noted that there had been no official request to extend the time to file the certificate. Further, the Court refused to consider the exchange of an expert report prior to trial as “substantial compliance” with the rule requiring the certificate of merit to be filed within 60 days of the complaint. In short, the Court enforced the strict terms of the applicable rule of procedure and barred the negligence action.

Because the plaintiff had included a cause of action for breach of the design services agreement, a contract claim, the entire claim was not dismissed. However, the action for negligence (which carries with it a broader scope of potential damages than the contract action) was completely dismissed. The Superior Court’s decision was appealed to the Pennsylvania Supreme Court, which, in 2010, declined to accept the appeal.

The *Zokaites Contracting* decision underscores the importance of preparing an action for professional negligence. Such claims must be fully investigated in advance, and a party must consult with a licensed professional to determine to secure an opinion that the applicable standard of care has been breached so that an appropriate certificate of merit can be filed. The failure to stringently follow this procedure is likely to result in the dismissal of what may be an otherwise legitimate claim.