Pennsylvania Superior Court Widens the Net for Negligent Misrepresentation Claims Against Professionals

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A recent ruling by Pennsylvania’s intermediate appellate court has expanded the scope of liability for negligent misrepresentation to include a class of potential defendants far beyond those expressly exposed under a prior ruling of the Commonwealth’s highest court. The September 27, 2017, decision by the Pennsylvania Superior Court in *Fulton Bank, N.A. v. Sandquist*, Pa. Superior Court No. 2306 EDA 2016, emphatically rejects the notion that the liability recognized by the Pennsylvania Supreme Court in *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, 581 Pa. 454, 866 A. 2d 266 (Pa. 2005), is limited to the facts of that case.

In *Bilt-Rite*, a school district’s architect had submitted a design plan containing a number of features that, it represented, could be built using “normal” construction means. After securing the contract as the lowest responsible bidder, *Bilt-Rite* discovered that the features required them to use non-standard techniques at a significantly higher cost. *Bilt-Rite* then brought an action against the architect, with whom it did not have a contract, seeking recovery of the increased costs. After the trial court granted and the Superior Court sustained a dismissal of the claim, the Pennsylvania Supreme Court agreed to hear:

[T]he first impression question of whether a building contractor may maintain a negligent misrepresentation claim against an architect for misrepresentations in the architect’s plans … where there was no privity of contract between the architect and the contractor, but the contractor reasonably relied upon the misrepresentations in submitting its winning bid and consequently suffered purely economic damages as a result of that reliance. *Bilt-Rite*, 866 A. 2d at 272.

The court decided the questions posed in the affirmative:

[W]e hereby adopt Section 552 [of the Restatement (Second) of Torts] as the law of Pennsylvania in cases where information is negligently supplied by one in the business of supplying information such as an architect or design professional, and where it is foreseeable that the information will be used and relied upon by third persons, even if the third parties have no direct relationship with the supplier of the information. *Id.* at 287.

With limited exceptions, courts interpreting *Bilt-Rite* had rejected attempts to extend its applicability beyond the design professional–contractor relationship. In *Fulton Bank*, however, the plaintiff argued that an accounting firm, similar to the design professional in *Bilt-Rite*, should be liable for negligent misrepresentation to its client. The accounting firm prepared tax returns and financial statements for a company to which the bank had extended credit in reliance on the accuracy of the financial information provided, and argued that the accounting firm was liable for losses sustained by the bank when the borrower defaulted on the loans due to circumstances that were at odds with the information contained in the financial statements.

The trial court in *Fulton Bank* held that *Bilt-Rite* applied only to architects and design professionals in their interactions with contractors, and dismissed the bank’s claim. However, the Superior Court disagreed. Determining that the “such as an architect or design professional” language in the *Bilt-Rite* decision was intended to be illustrative rather than restrictive, the court concluded that “*Bilt-Rite* can be applied to other factual
scenarios where a party is providing professional information that is designed to be relied upon by a third party,” *Fulton Bank*, 2306 EDA 2016 at p. 7.

If the *Fulton Bank* decision is left to stand or sustained on appeal, it presents a disturbing spectre of nebulous potential exposure to any person or entity in the business of supplying information. Where a design professional provides project specifications, it seems self-evident that those building the project will rely on those specifications to bid and build the project, and liability cannot be said to be unforeseeable. However, given that much of the accountants’ work in *Fulton Bank* was performed years before the bank’s client ever sought financing, the decision extends potential liability to parties whose identities and involvement may be completely unknown or unknowable at the time the information is initially provided. As such, it seems evident that it will be the nature of the information rather than from or for whom it is being obtained that will serve as a marker for future liability.

*NOTE: Patrick McKnight (Law Clerk) assisted in researching and drafting this article.*

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