1987

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LIABILITY AND LOSS ALLOCATION FOR ECONOMIC LOSSES IN CONSTRUCTION LITIGATION INVOLVING DESIGN PROFESSIONALS

LARRY D. ESPELT

The construction industry has, in recent years, become the source of increased litigation. The sophisticated nature of the services provided by architects and engineers has tempted practitioners and courts to apply tort principles when resolving commercial loss disputes involving design professionals. In his Article, Mr. Espel examines the conflict between tort and contract principles in this arena and recommends that the courts resist the temptation to use tort theories when resolving disputes of this kind.

INTRODUCTION .............................................. 82
I. CONTRACTS IN CONSTRUCTION PROJECTS .............. 84
II. CONTRACT VS. TORT ................................ 88
   A. The Law in 'Design Professional' Cases .......... 88
   B. The Law in Analogous Commercial Loss Cases .. 98
   C. Policy Reasons for Contract Theory ............... 102
      1. Variety of Roles .................................. 102
      2. Availability of Third-Party Beneficiary Theory . 103
      3. Misrepresentation Still Available ............... 107
      4. Resolution of Confusion Re: Statute of
         Limitations .................................. 111
III. APPLICATION OF COMPARATIVE FAULT ............... 113
    A. Generally ....................................... 113
    B. Settlements and Releases .......................... 121
IV. APPELLATE COURT APPLICATION OF TORT THEORY IN
    COMMERCIAL LOSS CASES ......................... 123
CONCLUSION ........................................... 134

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INTRODUCTION

In an era in which expanding tort theories seem to dominate litigation, the Minnesota Supreme Court has preferred the more circumscribed principles of contract theory for commercial loss cases. The court has ruled that contract law governs lawsuits to recoup purely economic damages. The court has been unwilling to recognize claims of negligence and strict liability for economic losses.

Cases which test the boundaries between contract and tort present difficulties. The difficulties are nowhere more evident than in cases involving the duties and liabilities of design professionals in construction disputes. This subject presents a perplexing blend of contract and tort theories.

Generally, the duties of a design professional are defined by contractual relationships. Basically, the design professional contracts to render services. The test for unsatisfactory services is generally expressed in terms of negligence. Indeed, the Minnesota Supreme Court has said that the measure of liability is the same whether a claim sounds in contract or in tort.

Because of this, the court has never squarely decided whether claims for economic loss involving design professionals or other construction project parties sound in contract or tort. The extent to which contract law provides the exclusive liability theory for economic losses has an important bearing, however, on many questions. These include:

1. See, e.g., A. CORBIN, CORBIN ON CONTRACTS (1952). Corbin states:
   A study of its common usage will show that the term "contract" has been made to denote three different kinds of things in various combinations: (1) the series of operative acts of the parties expressing their assent, or some part of these acts; (2) a physical document executed by the parties as an operative fact in itself and as lasting evidence of their having performed other necessary acts expressing their intentions; (3) the legal relations resulting from the operative acts of the parties, always including the relation of right in one party and duty in the other.
   Id. at 4.
3. One can find publications which acknowledge the importance of the issue without any satisfactory examinaton of the relevant policies or analysis. In ACRET, ARCHITECTS & ENGINEERS (2d ed. 1984), for example, one finds references to the importance of determining whether liability sounds in contract or tort without any explanation of how the determination is to be made. Id. § 1.15. The author seems to assume that cases which measure services by a test of negligence are determined by tort rules. In Minnesota, at least, this does not necessarily follow.

The annotation, Tort Liability of Project Architect for Economic Damages Suffered by Contractor, 65 A.L.R. 3d 249 (1975 & Supp. 1986), collects some of the cases which bear
1. Are the duties of a design professional to be defined by contract interpretation or by other rules?
2. What role do the concepts of privity and third party beneficiary play in economic loss cases?
3. Does the statute of limitations for contract apply to claims against design professionals for economic loss?
4. What is the place of comparative fault in the loss allocation rules for economic loss cases?

The supreme court has not yet answered these questions completely. The court has been disinclined to permit the vagaries of negligence theory to supersede rules of contract law in commercial loss cases, deferring instead to the bargained-for expectations of the parties. Some uncertainty remains on the availability of negligence claims for economic loss, however, in commercial cases that do not involve the Uniform Commercial Code. Privity and statute of limitation issues are yet unresolved. The court has provided some general principles for loss allocation. Opinions have not addressed certain common questions, however, and further elaboration will be helpful.

This Article is intended to summarize the cases, both to highlight the governing law and to identify the many areas of doubt. Discussion of the following topics will be presented:

- Contracts in Construction Projects
- Contract vs. Negligence in Claims Against Design Professionals
- Commercial Loss Opinions That Did Not Directly Involve Claims Against Design Professionals
- Separate Standards for Various Roles
- Privity and Third-Party Beneficiary Theory
- Misrepresentation Theory
- Statute of Limitations Issues That Depend Upon Choice of Theory
- Allocation of Responsibility
- A Critique of the Application of Tort Law for Commercial Cases
- Settlements and Releases

on this general subject. It appears that the cases are evenly divided on the question of whether liability in tort exists.

The point of this article is to explore those issues where it seems to matter which theory applies.
I. CONTRACTS IN CONSTRUCTION PROJECTS

Participants in a construction project generally document their undertakings, duties, and liabilities in written contracts. Organizations of architects, engineers, and contractors have sponsored standard form contracts which dominate construction transactions. The American Institute of Architects (AIA), a national professional association, provides model agreements for dealings between owners and architects, architects and consultants, owners and contractors, and other situations. 4 The Engineers' Joint Contract Documents Committee

4. The AIA publishes copyrighted forms of agreement, many of which have been approved and endorsed by the Associated General Contractors of America. Examples include:

(EJCDC)\textsuperscript{5} and the Associated General Contractors of America\textsuperscript{6} are two other organizations which sponsor supplementary or competing forms of agreement. The AIA and the EJCDC both


5. The Engineers' Joint Contract Documents Committee makes available for sale the following copyrighted forms of agreement:

- g. Engineers' Joint Contract Documents Committee, Standard Form of Agreement Between Engineer and Associate Engineer for Professional Services, EJCDC Doc. No. 1910-13 (1985).

In addition, the Engineers' Joint Contract Documents Committee publishes and sells various commentaries, guides, and cross-references which can be used to coordinate the relationships between parties.

6. The AGC publishes Associated General Contractors of America, Subcontract for Building Construction, AGC Doc. No. 600 (1984), and other standard forms for typical construction project contracts. Other forms can be found. The Federal Acquisition Regulation was adopted in 1984. See generally Smith, Developments in Standard Form Contracts, 85.4 Construction Briefings (1985).
also sponsor model general conditions which set forth in some detail the nature of contractual obligations of the owners, professionals, and contractors.

It is important to recognize the specificity of the undertakings contained in these various types of contracts and documents. Design professionals may be employed in a variety of modes, some more demanding than others. Frequently, the contract documents reflect undertakings or limitations which the parties carefully negotiate. Even if the parties do not engage in detailed negotiations, they may select their form documents with care and with a recognition of the industry usage which those standard forms imply. Usually, the parties are on relatively equal bargaining levels. Depending upon the size and complexity of the project, the parties frequently consult with lawyers, at least in connection with some aspects of the contractual terms.

The extent to which design professionals are obligated to inspect or supervise construction provides a fruitful example of the variability of contractual roles. In the modern world of construction, this is an economic, negotiated issue. Architects generally offer limited, periodic site visits. Such observations will give information as to the general nature of the progress but not as to many of the details of the construction. Owners occasionally desire a more intensive role on the part of architects and they find that such requests lead to demands for greater compensation.

In many projects, owners contract separately with construction managers for the observation or supervision of construction. In such cases, the design professionals perform fewer periodic visits and may only inspect the site after substantial completion, when most of the construction details are covered. Other variations are common. For example, in design-build projects, the general contractor, not the owner, has the contractual relationship with the design professional. In such cases, owners often contract with independent architects, engineers, or contractors to perform periodic observations. In addition, lenders regularly retain architects to provide construction progress reports.

One occasionally finds courts and parties who expect that architects have responsibility, not only to provide limited observations of a contractor's work, but also to supervise the con-
tractor in the details of the work. Most project manuals include a general condition that disclaims any such responsibility on the part of the design professional. The contractor is generally the party who accepts responsibility for determining the means and methods of performing the construction and for warranting compliance with the design as set forth in the drawings and specifications. The word "supervise" is rarely accepted by designers. If the parties have not negotiated and agreed that the design professionals have a "supervisory" responsibility, imposition of such a duty by the courts would dramatically upset the bargained-for allocation of responsibilities.

The various agreements of construction project participants are normally well documented. Architects and contractors are accustomed to the forms and the procedures that lead to contract execution. However, oral and handshake agreements still exist. Parties occasionally perform work before they sign contract documents. Frequently, architects content themselves with abbreviated letter agreements with owners but then recommend general conditions with elaborate detail for the owners to incorporate into the contract documents with the contractors. Awkward questions of contract interpretation can present themselves when architects rely upon the terms of the

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7. Such a perception may or may not have been true in the past. One can find commentaries which conclude that the architect normally has extensive control of the construction project. See, e.g., Lehman, The Roles of Architect and Contractor in Construction Management, 6 U. of Mich. J.L. Ref. 447, 452 (1973). "The theory that the legal responsibility of the architect should be commensurate with his control of the construction project has resulted in expansion of liability to third parties." Id.

It has been correctly pointed out, however, that contemporary construction projects often do not include the degree of architectural control that has been cited to justify expansion of liability. See, e.g., Note, Architectural Malpractice: A Contract-Based Approach, 92 Harv. L. Rev. 1075 (1979).


The architect shall not have control or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the work, for the acts or omissions of the Contractor, Subcontractors or any other persons performing any of the Work, or for the failure of any of them to carry out the Work in accordance with the Contract Documents.

Id.

general conditions that describe the role of the architects even though their letter agreement contained no similar provisions. Where the documentation is unsatisfactory, however, the law of contract interpretation can fill in most of the blanks even if the agreements have been verbal.

II. CONTRACT VS. TORT

A. The Law in 'Design Professional' Cases

Notwithstanding the voluntary contracts which bring construction parties together, plaintiffs have frequently persuaded trial courts to submit economic loss claims against architects, contractors, or other construction participants to a jury on theories of negligence as well as breach of contract. This has led to a long line of opinions in Minnesota that wrestle with the proper handling of commercial loss claims against design professionals.

An early example of these issues can be found in Kostohryz v. McGuire.\(^\text{10}\) In that case, the owners and the architect entered into a contract on a standard form used by architects for the design of a home.\(^\text{11}\) The owners exceeded their budget for the construction of the home and sued the architect to recover damages.\(^\text{12}\) The owners relied upon a negligence theory and a breach of contract theory.\(^\text{13}\) The jury found in favor of the owners on both counts.\(^\text{14}\) Those issues which were ostensibly based upon the negligence claim were settled prior to the appeal, so that the only issues before the supreme court dealt with interpretation of the contract between the parties.\(^\text{15}\) The supreme court affirmed the jury's verdict that the architect breached a condition of the contract.\(^\text{16}\) The supreme court commented on the duty and liability of an architect as follows:

The duty and liability of an architect, whether sounding in tort or arising out of a breach of a contract, is measured as stated in Gammel v. Ernst and Ernst, 245 Minn. 249, 254, 72 N.W.2d 364, 367 (1955). In that case, involving the liability of public accountants, this court said:

\(^{10}\) 298 Minn. 513, 212 N.W.2d 850 (1973).
\(^{11}\) Id. at 513, 212 N.W.2d at 851.
\(^{12}\) Id. at 514, 212 N.W.2d at 852.
\(^{13}\) Id.
\(^{14}\) Id.
\(^{15}\) Id.
\(^{16}\) Id. at 516, 212 N.W.2d at 854.
[T]hey would be required to perform the services for which they were engaged in good faith and with reasonable care and competence and would be liable for damages occasioned by any failure to do so.\textsuperscript{17}

The court did not comment explicitly on whether the claim in negligence was proper for the type of damages alleged. The court was careful to identify the procedural posture of the case, and the court referred to the claims of negligence as “two of the most litigated issues.”\textsuperscript{18}

The supreme court next talked about the underlying theory for construction claims in \textit{Northern Petrochemical Co. v. Thorsen \& Thorshov, Inc.}\textsuperscript{19} In \textit{Northern Petrochemical}, the owner of a building successfully sued both the architect and the contractor for damages caused by building settlement. The supreme court affirmed the findings of liability, describing the causes of action in terms of “negligent breaches of contractual obligations.”\textsuperscript{20} The court applied a rule of loss allocation derived from tort law. As written, the opinion drew no careful distinction between contract and tort doctrines.

The Minnesota Supreme Court continued to imply that construction claims might sound in negligence as well as contract in \textit{City of Eveleth v. Ruble}.\textsuperscript{21} The trial court had awarded damages to a city and public utilities corporation from the design engineers for alleged negligence and breach of contract in the design of a water treatment plant.\textsuperscript{22} The supreme court’s opinion dealt primarily with the necessity of expert opinion to support the findings of damages.

The supreme court recited “legal principles” which bore on the issues to be considered:

1. One who undertakes to render professional services is under a duty to the person for whom the service is to be performed to exercise such care, skill, and diligence as men in that profession ordinarily exercise under like circumstances.

2. The circumstances to be considered in determining the standard of care, skill, and diligence to be required

\textsuperscript{17} Id. at 517, 212 N.W.2d at 854.
\textsuperscript{18} Id. at 514, 212 N.W.2d at 852.
\textsuperscript{19} 297 Minn. 118, 211 N.W.2d 159 (1973).
\textsuperscript{20} Id. at 130, 211 N.W.2d at 168.
\textsuperscript{21} 302 Minn. 249, 225 N.W.2d 521 (1974).
\textsuperscript{22} Id. at 251, 225 N.W.2d at 523.
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.

(3) Ordinarily, a determination that the care, skill, and diligence exercised by a professional engaged in furnishing skilled services for compensation was less than that normally possessed and exercised by members of that profession in good standing and that the damage sustained resulted from the variance requires expert testimony to establish the prevailing standard and the consequences of departures from it in the case under consideration.

(4) There are some situations in which a trier of fact may, without the aid of expert testimony, find damages to have been caused by the failure of a professional to exercise reasonable care, skill, and diligence. If the solution proposed by the professional is one which the professional would not have proposed had he been fully informed as to the facts of the problem with which he was dealing, and if it is clear that the failure of the professional to ascertain the facts before recommending a solution to the problem was an omission inconsistent with the professional obligation assumed, a finding of negligence may be made without the benefit of precise scientific opinion testimony. If it is clear without resort to expert opinion that this error or omission on the part of the professional resulted in damage, and if the causation can be established, and if the damage can be measured by persons of ordinary learning and understanding, the opinions of experts are not needed.23

Points (3) and (4) represent the points actively considered by the supreme court. The court noted an “absence of the definitive expert testimony required by the general rule.”24 The court affirmed an award of one damage item notwithstanding the absence of expert testimony on the point.25 The court remanded an award of a second damaged item, however, because the point was not one which could be determined by

23. Id. at 253-56, 225 N.W.2d at 524-25 (footnotes omitted).
24. Id. at 256, 225 N.W.2d at 525.
25. Id.
reference to common knowledge.\textsuperscript{26} Thus, the holdings related to sufficiency of the evidence and the necessity for specific expert testimony.

The more pertinent principles for this article are points (1) and (2) of the “legal principles.” In ascertaining the duties of the designer, the court noted “the terms of the employment agreement” as the first, but not the exclusive reference. Further, in characterizing the issue concerning the second damage item, the court wrote:

The liability found by the trial court was not based on breach of contract. The design of the valves and the high service pumps was found to be negligent. This finding of damage caused by negligence on the part of the Engineer implies that the Engineer was under a duty to ascertain the pressure-bearing capacity of the distribution system and that his failure to do so made the design of the safety valves defective for failure to keep the pressure exerted by the high-service pumps within the pressure-bearing capacity of the lines. In our judgment, the opinions of experts qualified in the field are needed on the technical questions involved in this finding.\textsuperscript{27}

Superficially, one may read this language as an endorsement of a negligence theory for economic loss caused by the malpractice of design engineers. This author believes, however, that it stands for a more limited conclusion.

Notwithstanding that the trial court had determined to award damages against the engineer on the basis of its own assessment of negligence, the supreme court began its analysis by studying the contract between the city and the engineer.\textsuperscript{28} Further, the court remanded the case for reconsideration of whether expert testimony demonstrated that the duties of the engineer included an obligation to address the questions alleged.\textsuperscript{29} In other words, the supreme court ruled that liability

\textsuperscript{26} Id. at 264, 225 N.W.2d at 530.
\textsuperscript{27} Id. at 263, 225 N.W.2d at 529.
\textsuperscript{28} See id. at 252, 256, 225 N.W.2d at 523, 526.
\textsuperscript{29} Id. at 265, 225 N.W.2d at 530. In most cases, the question of whether a design professional has failed to meet the standards of other professionals turns on expert testimony. Id. at 263-65, 225 N.W.2d at 529-30. Where the alleged negligence does not involve questions outside the purview of the jury, expert testimony is not required. In Zontelli & Sons, Inc. v. City of Nashwauk, 353 N.W.2d 600 (Minn. Ct. App. 1984), rev’d, 373 N.W.2d 744 (Minn. 1985), for example, the trial court found negligence even though the city, which pressed the claim against the engineer, had offered no expert testimony in support of that finding. The court of appeals and,
could be sustained only if expert testimony demonstrated that the engineer's negligence violated a duty grounded in his contractual undertaking with the city.\footnote{city of eveleth, 302 minn. at 264, 225 n.w.2d at 530. support for the view that the minnesota common law analysis required proof of a breach of contract, rather than proof of the tort of negligence, can be found in cowles v. city of minneapolis, 128 minn. 452, 151 n.w. 184 (1915) (action against engineer discussed generally in contract terms with issues of negligence having to do with violations of contractual duty); city of east grand forks v. steele, 121 minn. 296, 298, 141 n.w. 181, 182 (1913) (claim against an accountant "is not an action in tort, but an action to recover damages for breach of contract").} Whether the engineer's liability to the city was to be expressed in contract or tort did not affect the outcome of the case, and, thus, any implication of the opinion about the theory is dicta. In any event, the court clearly implied that, even for claims which might be characterized as sounding in negligence, it would be improper to impute duties without due attention to the underlying contract.

Shortly after the \textit{City of Eveleth} opinion, the Minnesota Supreme Court issued a \textit{per curiam} opinion that explicitly treated the employment of a design professional as a matter of contract. In \textit{Moundsview Independent School District No. 621 v. Bueto\textregistered & Associates, Inc.},\footnote{id. at 837} the court was asked to review a summary judgment in favor of an architect based upon the architect's contract with the school district.\footnote{id. at 836 (minn. 1977) (per curiam).} The case arose after a windstorm ripped a portion of the roof off of a school, allegedly due to the failure of a contractor to adequately fasten the roof to the building.\footnote{id. at 837-38.} The architect's contract provided for general, periodic inspections and provided that the architect would have no responsibility for acts or omissions of the contractor or subcontractors.\footnote{id. at 837.} The supreme court affirmed the summary judgment in favor of the architect, explaining:

\begin{quote}
It is the general rule that the employment of an architect is a matter of contract, and consequently, he is responsible for all the duties enumerated within the contract of employment. An architect, as a professional, is required to per-
\end{quote}

\begin{quote}
in turn, the supreme court affirmed liability, both considering the engineer's negligence so obvious that expert testimony was unnecessary. \textit{see also} overland constructors, inc. v. millard school dist., 369 n.w.2d 69 (neb. 1985); annotation, \textit{necessity of expert testimony to show malpractice of architect}, 3 a.l.r.4th 1023 (1981).
\end{quote}
form his services with reasonable care and competence and will be liable in damages for any failure to do so.

* * *

Thus, the question of whether Buetow breached its duty to supervise the construction project is to be determined with reference to the general supervisory obligation enumerated in the contract.\textsuperscript{35}

Based upon the unambiguous language of the contract, the supreme court determined that the architect had no responsibility for the failure of the contractor to perform its work properly and, therefore, the court affirmed the summary judgment in favor of the architect.

The court's next decision is a well known leading opinion on the liability of architects and other design professionals. \textit{City of Mounds View v. Waliarvi}\textsuperscript{36} limits the liability of design professionals "to those situations in which the professional is negligent in the provision of his or her services."\textsuperscript{37} The court defined the scope of a design professional's duty by reference to contract principles. The supreme court admitted the possibility that design professionals might create express warranties, but the court adopted a strict construction approach to such express warranties and rejected altogether the appropriateness of implying warranties chargeable against design professionals. The rationale given for this position was that the strict liability that might flow from implied warranties would

\textsuperscript{35} Id. at 839 (citations omitted). A case which reached a similar result on different facts is Ferentchak v. Village of Frankfort, 105 Ill. 2d 474, 475 N.E.2d 822 (1985). In that case, the Illinois Supreme Court ruled that an engineer who developed a water drainage system for a subdivision devoted to custom-built homes was not contractually required to establish elevation for the foundations for the homes because his contract did not require it. A jury had found that the engineer was liable for negligent failure to set the elevation. The supreme court determined that the engineer could not be liable for failure to establish the foundation levels unless required by contract to do so. Id. at 825-26.

\textsuperscript{36} 263 N.W.2d 420 (Minn. 1978). \textit{See also} Gravely v. The Providence Partnership, 549 F.2d 958 (4th Cir. 1977) (applying Virginia law); Fretschel v. Burbank, 351 N.W.2d 403, 404 (Minn. Ct. App. 1984) (no implied warranty for non-builder).

\textsuperscript{37} 263 N.W.2d at 423. The \textit{Waliarvi} opinion quoted and relied upon \textit{City of Eveleth}, 302 Minn. at 253-54, 225 N.W.2d at 524 n.2 which stated a general duty for those rendering professional services:

One who undertakes to render professional services is under a duty to the person for whom the service is to be performed to exercise such care, skill and diligence as men in that profession ordinarily exercise under the circumstances.

\textit{Waliarvi}, 263 N.W.2d at 424.
unfairly expose professionals who work with inexact sciences. The \textit{Walijarvi} opinion explained:

The majority position limits the liability of architects and others rendering 'professional' services to those situations in which the professional is negligent in the provision of his or her services . . . .

. . .

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.\textsuperscript{38}

The court's holding unequivocally requires an assessment of negligence in determining the liability of design professionals. Nonetheless, the supreme court couched the liability analysis for design professionals in the context of contract law.

In \textit{Lesmeister v. Dilly},\textsuperscript{39} the supreme court expressly retracted any implication in the \textit{Northern Petrochemical} opinion that the liability theory for construction litigation sounded in negligence. The court explained: "We did not intend in \textit{Northern Petrochem} to recognize a new cause of action in negligence, \textit{i.e.}, negligent breach of a contractual duty. We only announced a rule of damage apportionment . . . ."\textsuperscript{40} \textit{Lesmeister} characterized claims against architects, designers, and other participants in a con-

\textsuperscript{38} 263 N.W.2d at 424.
\textsuperscript{39} 330 N.W.2d 95 (Minn. 1983).
\textsuperscript{40} \textit{Id.} at 102. One must use any reference to \textit{Lesmeister} with care. The court cautioned that a peculiar procedural posture required it to disclaim precedential significance. Yet, the same opinion announced rules of clarification. Moreover, both the court of appeals and the supreme court have cited \textit{Lesmeister} as authority. In this author's view, the opinion is at least provocative. It was not, however, an exhaustive treatment of relevant precedents. For example, \textit{Lesmeister} made no reference to \textit{City of Eveleth}.  

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struction context as claims which sound in contract, not in tort. The opinion explained:

The gravamen of this case in our view is contractual. Any duties between the parties arose out of contracts, about which there was opportunity to bargain and allocate risks and duties. This was not a situation in which parties were fortuitously brought together, as in an automobile accident. We conclude, therefore, that it was error to submit the theory of 'negligent breach' of contract to the jury, or to allow apportionment of fault either based on the pure contract or the 'negligent breach' cause of action.41

Thus, Lesmeister favors a general contract analysis for commercial loss cases. The court's emphasis on the bargaining position of the parties is a theme that finds echoes in other cases.

The importance of contract as the setting for commercial construction disputes has been reaffirmed recently in Zontelli & Sons, Inc. v. City of Nashwauk.42 In Zontelli, the contractor for a municipal storm sewer project sought extra compensation from the city and from the city's engineer on the basis of misleading plans and specifications.43 The city, in turn, pressed a claim against the engineer for contribution or indemnity.44 The jury found that the engineer had acted negligently in investigating subsurface conditions. The trial court had submitted the case to the jury upon the assumption that "the underlying nature of Zontelli's claims lay in tort and, therefore, applied comparative fault principles under MINN. STAT. § 604.01 (1982)."45 The court of appeals concluded that apportionment of fault was not proper. The court of appeals explained:

While we can understand why the trial court wanted to apportion fault in this case, apportionment was not proper. Regardless of the fact that some of Zontelli's claims sound in tort, the basis of each claim is rooted in a contract. The claim of breach of warranty is based on the estimates included in Zontelli's contract with the City. Zontelli's claim of negligence, a tort claim, requires proof of the existence of a duty of care flowing from Wallace to Zontelli. Such a

41. Id. at 102.
42. 373 N.W.2d 744 (Minn. 1985).
43. Id. at 747.
44. See id.
duty, if it exists at all, could only arise from the contract between Zontelli and the City or the contract between the City and Wallace. Zontelli's third-party beneficiary claim is dependent on the contract between the City and Wallace.\textsuperscript{46}

In so holding, the court of appeals quoted and relied on the analysis of \textit{Lesmeister}.\textsuperscript{47}

The supreme court accepted review and refined the liability analysis. As a starting point, the supreme court approved the contract analysis of the court of appeals. "As the court of appeals correctly determined, the city's liability to Zontelli is contractual because the city's duty to reimburse Zontelli for extra work arises out of the contract, a determination not contested on appeal to this court."\textsuperscript{48} In analyzing the city's liability to the contractor, the supreme court opinion worked entirely in the context of the contract between the city and the contractor.

Similarly, when the supreme court turned to the issue of the engineer's liability to the city, the court examined the question in terms of the engineer's breach of its contractual commitment to the city. The supreme court sustained the finding that the engineer's negligence established breach of contract.\textsuperscript{49} The supreme court awarded the city indemnity, based upon the breach of contract by the engineer.\textsuperscript{50} The supreme court expressly reversed the determinations of the trial court and the court of appeals that contribution, a theory based upon mutual negligence, was the appropriate remedy.\textsuperscript{51} Rather, the court

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} 373 N.W.2d at 751 (citation omitted).

\textsuperscript{49} See \textit{id.} at 755. The court cited, in passing, \textit{Kostohryz}, 298 Minn. at 517, 212 N.W.2d at 854, and \textit{City of Eveleth}, 302 Minn. at 253-55, 225 N.W.2d at 524-25. For additional cases on the subject, see Annotation, \textit{supra} note 29, at 1023.

\textsuperscript{50} Zontelli, 373 N.W.2d at 755. The court commented in footnote 6:

Although we have previously recognized indemnity to reimburse a party only for a liability arising from a tort, the principles underlying the rules are the same for a liability arising out of a contract.

\textit{id.} (citation omitted).

\textsuperscript{51} \textit{id.} at 756. In a footnote, the court explicitly reserved any comment on the question of whether the contractor had a claim against the engineer for negligent misrepresentation. The opinion states:

Zontelli sued both the city and Wallace; the city cross-claimed against Wallace. We are awarding Zontelli compensation from the city and granting the city indemnity from Wallace. We need not decide, therefore, whether Zontelli has a direct action against Wallace for negligent misrepresentation because the practical result would be the same in any event.

\textit{id.} at 756 n.9. The court's reference to negligent misrepresentation should not be confused with a reservation of the theory of negligence as such. As will be discussed...
held, the remedy was to be found in indemnity. From the overall perspective, the supreme court resolved the dispute on a contract by contract basis.⁵²

In the main, this series of cases reflects a preference for contractual theory for economic loss cases.⁵³ Except for Lesmeister, one cannot find an unambiguous statement that contract law provides the exclusive avenue of relief. Neither can one find an unambiguous holding to the contrary.

Given that the parties to a construction project come together by virtue of a series of mutual contractual undertakings, it seems logical that the definition of duties and obligations should be determined in the context of contract law. This point is particularly compelling when one speaks of economic losses involving primarily disappointed expectations of one or more of the parties. Even if the supreme court ultimately were to conclude that claims for economic loss against design professionals or other parties providing services are to sound in tort, the definition of a party’s duties should derive from the voluntary contracts negotiated by the parties.⁵⁴ In other

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⁵². The same type of reasoning can be found in D & A Dev. Co. v. Butler, 357 N.W.2d 156 (Minn. Ct. App. 1984). In that opinion, the court refused to permit recovery of economic damages in the absence of some contractual duty running from the architect to the plaintiff. The plaintiff had alleged no contractual duty owed to the plaintiff by the architect, either through direct privity or as a third-party beneficiary and, therefore, obtained no recovery. The court of appeals has since limited the holding of D & A Development. See Waldor Pump & Equip. Co. v. Orr-Schelen-Mayeron & Assoc., Inc., 386 N.W.2d 375, 377 (Minn. Ct. App. 1986). It is the view of this author that D & A Development was properly decided and that Waldor Pump strays from a proper interpretation of the supreme court rulings.

⁵³. For commentary with a similar, although not identical, perspective see Note, supra note 7, at 1075.

⁵⁴. PROSSER, LAW OF TORTS (4th ed. 1971) introduces the relation between tort and contract actions as follows:

The fundamental difference between tort and contract lies in the nature of the interests protected. Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties . . . . Contract actions are created to protect the interest in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract.

Id. at 613. Prosser described the distinction between nonfeasance, for which con-
words, the extent of the duties should be no greater, merely because claims are said to sound in tort, than they would if the claims sound in contract.\textsuperscript{55}

The fact that the measure of a design professional's performance asks whether the design professional has been negligent does not necessarily mean that the underlying theory of the case sounds in tort. For the most part, the mutual obligations and liabilities of the other parties are determined by contract analysis. Uniformity of analysis and result is enhanced if the doctrines applied to design professionals are compatible with the doctrines applied to the other parties.

\textbf{B. The Law in Analogous Commercial Law Cases}

In a parallel series of cases, the supreme court has ruled explicitly that claims for economic loss must be pursued in contract or warranty and not in negligence or tort. The supreme court introduced a landmark ruling that drew its vitality from the Uniform Commercial Code in \textit{Superwood Corp. v.}
Siempelkamp Corp. In that case, the purchaser of a product asserted claims for diminution of value of the product and for economic loss arising out of the internal failure of the product. The statute of limitations under the Uniform Commercial Code had expired, so the purchaser pursued claims founded in negligence and strict liability. The supreme court concluded that those theories were not available in the absence of personal injury or damage to other property. The principal rationale for the result derived from the court’s reluctance to permit tort theories to disrupt statutory and contractual expectations under the UCC. The language of the opinion seemed to extend beyond UCC cases, however, to cover all commercial loss cases.

Further support for such a reading can be obtained in Minneapolis Society of Fine Arts v. Parker-Klein Associates Architects, Inc. In that case, the plaintiff sued various parties involved in an improvement to a museum after the glazed brick masonry facade developed cracking and other problems. Prior to trial, various parties settled and the owner of the building went to trial against the brick manufacturer only. The jury concluded that the bricks themselves were not defective, but the jury also returned a finding that the manufacturer was negligent in failing to warn of special precautions necessary for the successful use of the glazed bricks. The supreme court reversed, holding that the negligence theory was not available for the recovery of economic loss. The opinion concluded:

[W]e hold that “economic losses” that arise out of commercial transactions, except those involving personal injury or loss to other property, are not recoverable under the tort theories of negligence or strict product liability... [D]amages were recoverable, if at all, under the “expectation-bargain” protection of contract law.

56. 311 N.W.2d 159 (Minn. 1981). The validity of the Superwood doctrine has been enhanced by the recent United States Supreme Court decision in East River Steamship Corp. v. Transamerica Delaval, Inc., 106 S. Ct. 2295 (1986). In that case, decided on admiralty law, the Supreme Court adopted what it viewed as the majority rule and rejected negligence and strict liability as theories for recovering economic loss damages. The Court examined the various policy arguments supporting the contrary rule and found them unpersuasive. Id. at .
57. Id. at 162.
58. Id.
59. 354 N.W.2d 816 (Minn. 1984).
60. Id. at 822.
While the facts and posture of the case might permit one to characterize *Fine Arts* as a UCC case, the language of the opinion does not suggest such a limited scope. Indeed, the *Fine Arts* litigation originally involved parties whose contracts were clearly outside the scope of the UCC, and the opinion included comments regarding the duties of some of those parties, including the architect.\(^6\) This holding affirmed the validity of contract analysis in Minnesota commercial cases.

The more recent case of *S.J. Groves & Sons Co. v. Aerospatiale Helicopter Corp.*\(^6\) provides a compelling policy justification for the exclusivity of the contract remedy. In *Groves*, the court ruled that negligence and strict liability claims were not available to the owner of a helicopter which had crashed, even though the pilot had been killed. The supreme court reasoned that the heirs of the pilot were permitted to proceed on tort theories because their claims came outside the realm of warranty. The owner of the helicopter, however, was a "commercial plaintiff with economic bargaining power substantially equivalent to that of the seller."\(^6\) The court perceived no policy reason to permit such a plaintiff to do better in tort theory than in contract theory. The *Groves* case refused to "emasculate" the Uniform Commercial Code, which the court recognized as an expression of legislative intent.\(^6\) The fundamental reason for refusing to recognize the tort recovery for the owner of the helicopter was that the owner was a "commercial entity possessing bargaining power substantially equal to that of the seller, clearly capable of negotiating a warranty against the damage the defective product caused to itself . . . ."\(^6\) This reference to bargaining power is the same theme that inspired the *Lesmeister* clarification of *Northern Petrochemical*.

61. *Id.* at 821-22. The fact that construction projects include many contracts which are governed by the UCC provides a strong reason to maintain similar principles of contract law for other contracts which must be reconciled with the UCC contracts.

62. 374 N.W.2d 431 (Minn. 1985).

63. *Id.* at 434.

64. *Id.* at 433.

65. *Id.* at 435. The court rejected an argument that the owner should be allowed to pursue the tort claims because the damage was "sudden and calamitous." *Id.* The court had avoided the issue in *Fine Arts* by concluding that the damage was not sudden or calamitous. 354 N.W.2d at 821. In *S.J. Groves*, the court noted doubt about the value of the distinction and decided that the owner's commercial power warranted the holding against tort recovery. 374 N.W.2d at 434-35.
While *Superwood*, *Fine Arts*, and *Groves* are all technically UCC cases, the language of each opinion applies to all commercial contexts. Moreover, the policies expressed by each opinion apply equally well to construction cases involving primarily a refusal to permit tort law to circumvent negotiated warranties and remedies.

Commercial loss claims in construction cases involve liabilities which should be determined on the basis of contract rather than negligence theories. Owners and developers are able to bargain for their warranties, remedies, and expectations. Designers are in a position to negotiate terms of their employment and to obtain extra compensation for extra services. Similarly, contractors and subcontractors compete in a marketplace which expects and permits them to submit their bid for the cost of meeting the owner’s expectations. Quotes for alternates are common and often come as a result of contractor suggestion. Designers and contractors are both in a position to subcontract for areas outside their expertise. Ultimately, there are few marketplaces that have more equality of bargaining power. The reasoning of the court in *Groves* applies almost by definition to the construction market.

The damage-to-other-property issue of *Fine Arts* also helps to identify necessary limitations on the scope of contract law in construction cases. To the extent that damage or injury occurs which lies outside the normal bounds of construction contracts, one might expect tort law to define the avenues of recovery. If a claim primarily involves disappointed expectations that are part of a voluntary contractual relationship, however, contract law should provide the justification, if any, for recovery.66

C. Policy Reasons For Contract Theory

1. Variety of Roles

To date, the Minnesota Supreme Court has had little occasion to discuss the possibility that the liabilities of design professionals depend upon their particular roles. To illustrate, architects not only design; architects also inspect, observe or, on occasion, supervise; architects adjudicate differences between owners and contractors; and architects act as agents for owners. Minnesota’s opinions in construction disputes involving architects and engineers have not differentiated between these roles in defining duties and liabilities.

Some cases from other jurisdictions have acknowledged the different roles and have set forth distinct theories and measures of liability for each. Many opinions recognize that architects act as independent contractors in the preparation of plans and specifications. Most theories which recognize this capacity compare with Minnesota’s theories. In observing, inspecting, or supervising the construction work, the architect acts as an agent of the owner. This role brings into play certain rules of agency and might obligate the architect differently than his role as designer. The architect will also often act as arbiter in resolving disputes between the owner and the contractor. Some courts consider the architect in this capacity to be a quasi-judicial officer with limited immunity.

In the current world of construction, the roles of architects...
are even more varied than those reflected in the existing case law. In design-build teams, architects and engineers are often employed by contractors, not owners. In some cases, architects work for owners, while engineers work for contractors or subcontractors. In fast-track construction projects, traditional roles have limited validity.

The variability of responsibilities of architects and engineers provides a very good reason to maintain the Minnesota rule that the duties and liabilities of design professionals must be defined by contract. What the parties to one construction project may require of a structural engineer may be very different from what different parties require for another project.

Liability theories should account for the realities and variabilities of the construction process. Where the claim attaches to an architect’s performance as an arbiter, for example, the standard should more properly reflect the limited immunity that such a role should carry with it. In circumstances where the contract calls for specific, non-professional undertakings, a breach of contract may be found without negligence. An engineering firm’s duties to a contractor may be different from its duties to an architect or owner.

2. Availability of Third-Party Beneficiary Theory

It is a commonplace truism today that the privity defense is eroding. One may inquire whether owners or design professionals face exposure to claims for economic losses from contractors and subcontractors even if they have had no contractual relationships with such parties. Cases from other jurisdictions permit such claims.69


70. See, e.g., Conforti & Eisele, Inc. v. John C. Morris Assocs., 175 N.J. Super. 341, 418 A.2d 1290 (N.J. Super. Ct. Law Div. 1980), aff’d, 199 N.J. Super. 498, 489 A.2d 1233 (N.J. Super. Ct. App. Div. 1985). The court assumed the design professional owed a duty to bidders to supply them with drawings prepared in accordance with the standard of the profession. With that assumption and others, the court inevitably concluded that the design professional is answerable in tort to a contractor who sustains economic damages as a result of the negligence of the design professional. The difficulty is that the court’s initial assumption should have been tested.

In Minnesota, the owner is subject to an implied warranty that its specifications are suitable. See, e.g., McCree & Co. v. State, 253 Minn. 295, 310-11, 91 N.W.2d 713, 723 (1958). The design professional, however, is not subject to the same implied
Some who argue in support of allowing negligence actions in construction litigation assume, incorrectly, that such actions provide the only avenue for recovery beyond a strict identification of parties in contractual privity. First, the suggestion that the liability theory in a construction setting is founded upon negligence principles need not automatically imply the abandonment of privity requirements. More importantly, the third-party beneficiary doctrine entitles intended beneficiaries to enforce contractual obligations or remedies despite the absence of formal privity. This doctrine, rather than a limitless negligence theory, should be the focus of attention for commercial cases in which parties not in privity seek recovery of economic loss.

The Minnesota Supreme Court has adopted the provisions of the Restatement (Second) of Contracts § 302 (1979) concerning third-party beneficiaries of contract, in Cretex Cos. v. Construction Leaders.71 Cretex expanded the availability of third-party beneficiary claims as compared to prior Minnesota law. Section 302 defines an intended beneficiary, one who can seek to enforce contractual liabilities, as follows:

Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary, or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.72

The first factor specified in section 302 should not be overlooked. General conditions, made a part of the contract documents, frequently specify that no contractual relation exists between, for example, the architects and contractors or between the owner and subcontractors.73

Where agreements do not negate consideration of third-
party beneficiaries, the other factors can be considered. Decid-
ing whether recognition of a right “is appropriate” vests the
courts with considerable discretion. Determining whether
“the circumstances indicate” intent to benefit calls into play all
the attendant circumstances, including the inquiry as to whom
performance is to be rendered.\textsuperscript{74} The “duty owed” is separate
from the “intent to benefit.”\textsuperscript{75}

To date, Minnesota courts have not been called upon to ex-
plore in detail the extent to which owners, contractors, design
professionals, suppliers, and other parties to the construction
process can take advantage of third-party beneficiary theories.
The extent to which it is appropriate to recognize a right of
performance will vary with the nature of the dealings and
contracts.

It seems certain that parties to some construction projects
will succeed in enforcing the contracts of others despite a lack
of privity. Not all cases stem from formally-bid projects with
general conditions that specify that contracts do not exist be-
tween design professionals and contractors or subcontractors.
In design-build and fast-track projects, architects, contractors,
and developers often have a mutual responsibility to cooperate
in the consummation of a project. Third-party beneficiary ob-
ligations may be entirely appropriate in many design-build or
fast-track projects.

Some cases from other jurisdictions have permitted contrac-
tors to sue design professionals where the contractor can
demonstrate a clear causal connection between design errors
and contractor losses.\textsuperscript{76} The better reasoned of these cases,
however, permit such claims only with careful attention to the
entire set of contract documents.\textsuperscript{77}

\textsuperscript{74.} \textit{Cretex}, 342 N.W.2d at 137-40. \textit{See also} Buchman Plumbing Co., Inc. v. Re-
gents of the Univ. of Minnesota, 298 Minn. 328, 335-36, 215 N.W.2d 479, 483-84
(1974); Chard Realty, Inc. v. City of Shakopee, 392 N.W.2d 716 (Minn. Ct. App.
1986); Twin City Constr. Co. of Fargo v. ITT Indus. Credit Co., 358 N.W.2d 716,
718 (Minn. Ct. App. 1984); Julian Johnson Constr. Corp. v. Parranto, 352 N.W.2d

\textsuperscript{75.} \textit{Cretex}, 342 N.W.2d at 138, 139.

\textsuperscript{76.} \textit{See, e.g.}, Mayor & City Council v. Clark-Dietz, 550 F.Supp. 610 (N.D. Miss.

\textsuperscript{77.} \textit{See, e.g.}, \textit{Huber}, 67 Cal. App. 3d at 278, 136 Cal. Rptr. at 608. \textit{See also} Heritage
tractor not a third-party beneficiary of prime contractor’s contract); Donovan v. Roth,
700 S.W.2d 140 (Mo. Ct. App. 1985) (owner not a third-party beneficiary of subcon-
tractor’s contract).
The detailed provisions of the contract documents reflect expectations and practices of construction project participants which bear on both the "duty owed" and the "intent to benefit" tests. For example, many project manuals instruct contractors to identify ambiguities or errors prior to bids for any needed clarifications or corrections. Nearly all contracts for construction projects provide a change order procedure for use during the construction process to cover any latent errors, omissions, or required changes. Where contractors have failed to avail themselves of such nonjudicial remedies during the project, absent justification, recognition of extra-contractual rights may not be appropriate. Contractors who have no right to additional compensation from owners obviously do not deserve a second bite at the apple against designers.

A California appellate court allowed, in theory, a contractor to pursue economic loss claims against an architect in *Huber, Hunt & Nichols, Inc. v. Moore.* 78 The *Huber* court conditioned such claims upon proof that the contractor had made an accurate original estimate, that the design contained an error, that the error caused the contractor's loss, and that the damages could not have been compensated for by the change order process. 79 For the circumstances of that case, including the terms of the project manual, the case imposed sensible conditions upon the contractor's recovery. In Minnesota, these factors would be germane to the determination of whether recognition of third-party beneficiary rights are appropriate to effectuate the intention of the parties. 80

79. Id. at 301-03, 136 Cal. Rptr. at 617-18.
80. Contractual obligations do not exhaust the exposure of design professionals. The nature of the injury or damage bears on the theory of liability. For obvious policy reasons, the courts uniformly permit persons not in privity with architects and engineers to recover damages for personal injury caused by an unsafe design. One duty which designers may seldom avoid by contract is the duty to exercise reasonable care, skill, and diligence for the personal safety of foreseeable users. See, e.g., *Stephen v. Sterns*, 106 Idaho 249, 678 P.2d 41 (1984) (tenant sued architect for injuries sustained from fall down a stairwell without a handrail); *Hiatt v. Brown*, 422 N.E.2d 736 (Ind. Ct. App. 1981) (patron of airport injured by blast from jet aircraft sued architect). These observations must be qualified.

Where workplace injuries are concerned, courts do recognize contractual and common law responsibilities and limitations. See, e.g., *American Institute of Architects, General Conditions for Construction*, AIA Doc. No. 201 (General Conditions) ¶¶ 101.1, 102.1 (1976). When the design professional undertakes to protect workers on the project, reasonable care must be exercised for their safety. *Simon v. Omaha Pub. Power Dist.*, 189 Neb. 183, 191, 202 N.W.2d 157, 163 (1972). There is,
In any event, if a court permits a third party to present a claim in the absence of privity, the third party should have no better rights against the obligor than the party who is in privity. This should be true whether one relies on third-party beneficiary theory or some other rationale. To effectuate the expectation of the parties, one must recognize that design professionals will measure their duties under their contracts with their clients. If contractors are found to be legitimate third-party beneficiaries of a design professional’s duty to an owner, the scope of the duty should be defined as if the owner were the aggrieved party, either directly or for an indemnity claim.

Close attention to contractual relationships does not necessarily mean that design professionals will be indifferent to the fate of contractors or subcontractors merely because they have no mutual contracts. Contractual obligations to indemnify and third-party beneficiary concepts may generate liabilities which, in effect, result in payments to parties with whom one had no privity. On the other hand, clarity of analysis and fairness are enhanced if courts do not attempt to imply contractual obligations that did not exist in the dealings of the parties.

3. Misrepresentation Still Available

Increasing attention to the theories of fraud and misrepresentation has followed the Superwood constraints upon the availability of negligence claims. The elements of fraud have been itemized in various ways, but the elements include at least the following:

1. False representations;
2. [M]ade with the intent to deceive;
3. [P]laintiffs took action or refrained from taking action in reliance on these misstatements;
4. [R]esulting in damages;

however, no common law duty upon the design professional to ensure construction safety. Brown v. Gamble Constr. Co., 537 S.W.2d 685, 687 (Mo. Ct. App. 1976); Luterbach v. Mochon, Schutte, Hackworthy, Juresson, Inc., 84 Wis. 2d 1, 5, 267 N.W.2d 13, 16 (1978).

This article is not intended to address claims involving personal injury, but only claims involving economic loss. See, e.g., Hogan, 695 P.2d at 1042 (disclosed-principal concept precludes architect's liability to contractor; court also acknowledged likelihood that architect might be held to indemnify the owner).

82. See supra notes 41-50 and accompanying text.
5. Which are proximately caused by the misstatements.\textsuperscript{83}

The scienter element can be satisfied in the case of intentional misrepresentation or in certain cases of negligence.\textsuperscript{84}

Even if one accepts contract law as the exclusive avenue of liability analysis for economic loss cases in the commercial setting, one cannot dispense with the law of fraud and misrepresentation. The essential policy reason in favor of contract law is to recognize the bargained-for expectations of the parties. To preserve the integrity of the bargaining process, the courts should be prepared to enforce the tort remedies for misrepresentation that affects the inducement or terms of the contract. If false representations compromise the integrity of the bargain, it is only proper to provide parties with extra-contractual relief.\textsuperscript{85}

While most allegations of fraud involve affirmative misstatements, the Minnesota Supreme Court has also permitted recovery for fraudulent omissions. As a general rule, there is no duty to disclose information.\textsuperscript{86} The court qualifies this, how-

\textsuperscript{83} Atcas v. Credit Clearing Corp., 292 Minn. 334, 349, 197 N.W.2d 448, 457 (1972). A more rigorous, and preferable, statement of the elements can be found in Davis v. Re-Trac Mfg. Corp., 276 Minn. 116, 117, 149 N.W.2d 97, 99 (1967) (relying upon and clarifying the Hanson elements). See also Clements Auto Co. v. Service Bureau Corp., 444 F.2d 169, 175 (8th Cir. 1971).

\textsuperscript{84} See Florenzano v. Olson, 387 N.W.2d 168 (Minn. 1986); Control Data Corp. v. Garrison, 305 Minn. 347, 233 N.W.2d 740 (1975).

\textsuperscript{85} See Northern States Power Co. v. International Tel. and Tel. Corp., 550 F. Supp. 108 (D. Minn. 1982). See generally Clements Auto Co., 444 F.2d at 190 (where misrepresentation by data processing company that its services could provide effective inventory control for wholesale supply companies was established, trial court did not abuse its discretion in awarding damages).

One should not permit the law of misrepresentation to supplant contract law. Lewis v. Axinn, 100 A.D.2d 617, 473 N.Y.S.2d 575 (N.Y. App. Div. 1984). Claims of fraud should be tested with skepticism, particularly where the specifications call for requirements and are not expressed as representations of material fact. In Jasper Constr., Inc. v. Foothill Junior College Dist., 91 Cal. App. 3d 1 (1979), a California appellate court properly held that, absent intentional concealment or active misrepresentation, a contractor may not recover for "error and omissions" in plans and specifications.

Misrepresentation is not necessarily the only tort theory that may come into play. In Skepton v. County of Bucks, Pa., 628 F. Supp. 177 (E.D. Pa. 1986), a federal district court denied a motion to dismiss a claim against a structural engineering firm under 42 U.S.C. § 1983. The plaintiff claimed that the structural engineering firm conspired with government officials to terminate a contract of a general contractor who threatened to publicize inadequacies in a building project.

\textsuperscript{86} Klein v. First Edina Nat'l Bank, 293 Minn. 418, 422, 196 N.W.2d 619, 622 (1972).
ever, by requiring disclosure of information necessary to prevent statements made from being misleading. 87 Also, the court recognizes a duty to disclose in cases involving fiduciary obligation or similar circumstances. 88 In the construction context, an owner may have occasion to rely upon design professionals in relationships tantamount to fiduciary relationships. Contractors and subcontractors will rarely occupy a similar relationship with design professionals. Numerous Minnesota cases permit contractors to obtain additional recovery from owners on the basis of misrepresentations as to concealed conditions. 89 The Minnesota Supreme Court has recognized that owners impliedly warrant that plans and specifications are sufficient for construction by a contractor. One should consider these implied warranties with care, however, when studying any particular case. Contract documents may impose a duty upon a contractor or its subcontractors to obtain independent verification prior to bid. 90 There may be contractual remedies available for errors, omissions, or inconsistencies in the plans and specifications. It is the custom for most designers and contractors to anticipate oversights and errors in design documents. If the construction contract documents adequately accommodate errors, then courts should not hastily embrace the application of fraud theories as an end-run on the construction contracts.

The Fine Arts opinion discussed the contention that the manufacturer owed a duty to warn users of special precautions for the use of the glazed bricks. 91 The supreme court rejected this argument, not because it was unavailable as a theory, but rather because the facts did not support liability under such an analysis. The court cited the proposition that "there is no duty to warn if the user knows or should know of potential danger." 92 The facts of Fine Arts persuaded the court that the ar-

87. Id.
88. Id.
89. See infra note 95.
90. In Megary Bros., Inc. v. State, 291 Minn. 12, 188 N.W.2d 919 (1971), the supreme court rejected a claim by a contractor for extra compensation for facts equally susceptible of discovery by the owner and the contractor. Under the contract, the contractor had the duty to discover and correct errors. However, the supreme court did not allow the contractor to claim reliance on representations it had an opportunity and duty to test.
91. Fine Arts, 354 N.W.2d at 821-22.
92. Id. at 821.
chitects employed by the owner should have known of the risks of glazed brick and of the proper procedures to avoid those risks. The owner, charged with the knowledge and actions of its agents, the architects, could not take advantage of the duty to warn theory. In dicta, the court concluded:

Absent an "unreasonably dangerous condition" created by a manufacturer's failure to warn which the jury determined was not here present, or absent misrepresentations made by the manufacturer which [the owner] has not here alleged, the action for failure to warn of the sensitive nature of the brick is precluded by warranty or contract law, which provides the only remedies for a consumer's disappointed expectations.93

This is somewhat surprising. As discussed, the supreme court has established a duty to disclose when circumstances indicate some special duties to disclose material information, even in the absence of affirmative misrepresentations.94 Fine Arts seems to foreclose such duties in the commercial loss context. On the facts of that particular case, the result appears correct, but different facts might indicate a different result.95

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93. *Id.* at 822.
94. *Klein*, 293 Minn. at 422, 196 N.W.2d at 622.
95. Design professionals regularly rely upon manufacturers for information about the performance of their product. The Restatement of Torts defines a potential liability theory for those who supply incorrect information negligently in connection with a business enterprise. The Restatement provides:

1. 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 transaction, 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.

2. Except as stated in subsection (3), the liability stated in subsection (1) is limited to loss suffered:
   (a) By the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
   (b) Through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

3. The liability of one who is under a policy duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, and any of the transaction in which it is intended to protect them.

**Restatement (Second) of Torts § 522.**

The duty defined in this section tracks rather closely with Minnesota law and with third-party beneficiary theory. Minnesota adopted these general principles in

http://open.mitchellhamline.edu/wmlr/vol13/iss1/2
4. Resolution of Confusion Regarding Statute of Limitations

The choice of liability theory for commercial loss cases may determine the applicable statute of limitations. In some cases, claims which would be timely under one theory are untimely if considered under another theory.

Superwood provides an obvious example of the importance of the applicable doctrine. In Superwood, the court recognized that claims for damages were unavailable under any warranty theory by the expiration of the UCC statute of limitations. Had the court elected to permit claims in negligence or strict liability, the claims would have been allowed.

A similar contrast in results may be postulated for commercial cases not governed by the UCC. Both the statute of limitations for general contract actions and the statute for general negligence actions run six years from the date that the causes of action accrue, but the action may be said to accrue at a different point in time depending upon whether it is characterized as a claim in contract or in negligence.

The statute of limitations for general contract actions in Minnesota is six years. The statute does not specify when the limitations period begins to run, but the Minnesota Supreme Court has said that "a cause of action for breach of contract accrues immediately on a breach, though actual damages resulting therefrom do not occur until afterwards." For design professionals, an analogy can be made to the commencement of limitation periods for other professionals such as physicians and attorneys. For physicians, the cause of action accrues when the treatment for the particular condition ceases. Gondahl v. Bulluck, 318 N.W.2d 240, 243 (Minn. 1982); Johnson v. Winthrop Labs. Div. of Sterling Drug, Inc., 291 Minn. 145, 147, 190 N.W.2d 77, 80 (1971); Miller v. Mercy Medical Center, 380 N.W.2d 827, 830 (Minn. Ct. App. 1986).

For attorneys, the point is not settled. In Marker v. Greenberg, 313 N.W.2d 4
This can mean that a contract action can accrue before one notices economic loss or other damage.

This contrasts with the rule that applies to negligence actions. The statute of limitations for negligence actions is also six years.\textsuperscript{102} The supreme court, however, has stated that "an action for negligence cannot be maintained, nor does the statute of limitations begin to run, until damage has resulted from the alleged negligence."\textsuperscript{103} Although there is ordinarily a coincidence of the negligence with the appearance of damages, this is not always the case. In construction cases, it is not uncommon for an unsafe or defective condition of a building to result in actual damage only after the passage of time, the operation of weather, or certain loading conditions.

Many economic loss claims will be said to accrue earlier if the claim is found in a contract action than if the claim is found in negligence. Generally, for cases of contract and negligence, ignorance of a cause of action not involving continuing negligence or fraud on the part of the defendant does not toll the statute of limitations.\textsuperscript{104} Doubt as to the correct characterization of a claim casts doubt on the timeliness of certain actions.

Cases involving fraud operate somewhat differently. The

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\textsuperscript{102} \textit{Minn. Stat.} § 541.05, subd. 1 (5).

\textsuperscript{103} \textit{Reliance Ins. Co.}, 322 N.W.2d at 604; \textit{Dalton v. Dow Chem. Co.}, 280 Minn. 147, 153, 158 N.W.2d 580, 584 (1968).

\textsuperscript{104} \textit{Toombs v. Daniels}, 361 N.W.2d 801, 809 (Minn. 1985). \textit{See also Wild v. Rarig}, 302 Minn. 419, 449-50, 234 N.W.2d 775, 794-95 (1975) (fraudulent concealment will toll statute of limitations until discovery or reasonable opportunity to discover). The doctrine of equitable estoppel may toll the running of the applicable statute of limitations for either contract or negligence actions. \textit{See, e.g., Bethesda Lutheran Church v. Twin City Constr.}, 356 N.W.2d 344, 349-50 (Minn. Ct. App. 1984).
The statute of limitations applicable to fraud claims is six years.\textsuperscript{105} The six-year period begins to run when the facts constituting fraud were discovered or, by reasonable diligence, should have been discovered.\textsuperscript{106}

Considerable attention has been directed recently to section 541.051 of the Minnesota Statutes,\textsuperscript{107} a special statute for improvements to real property.\textsuperscript{108} For purposes of this discussion, it is necessary only to comment that the statute applies similarly to actions in contract or tort.\textsuperscript{109} Because section 541.051 provides a limitations period which is premised upon discovery of the defective or unsafe condition,\textsuperscript{110} the operation of this statute will be entirely different than the statute applicable to general contract or negligence actions, which do not turn upon discovery.\textsuperscript{111} Only fraud is specified as an exception to the running of section 541.051.\textsuperscript{112}

III. APPLICATION OF COMPARATIVE FAULT

A. Generally

Understanding whether commercial loss cases are to be analyzed in terms of contract or tort is important for a proper economic loss allocation. Minnesota practitioners have grown relatively comfortable with the modified comparative fault scheme established in section 604.01 of the Minnesota Statutes.\textsuperscript{113} More than one recent appellate opinion reveals that trial lawyers and judges have relied on comparative fault principles to test commercial loss cases, although the appellate courts reject the analysis as a general rule.\textsuperscript{114} The appellate courts prefer the notion that general economic damages in

\begin{itemize}
  \item 105. \textit{Minn. Stat.} § 541.05, subd. 1 (6).
  \item 106. \textit{Toombs}, 361 N.W.2d at 808-09. In \textit{Toombs}, the court noted that "delay in discovering fraud may be excusable when a confidential relationship exists." \textit{Id.} at 809.
  \item 107. \textit{Minn. Stat.} § 541.051.
  \item 109. \textit{Minn. Stat.} § 541.051(1).
  \item 110. \textit{Id.}
  \item 111. \textit{See id.} (limitation period begins to run at discovery of defect); \textit{id.} § 541.05, subd. 1(1), (5) (limitation period not tied to discovery of defect).
  \item 112. \textit{Id.} § 541.051, subd. 1(6).
  \item 113. \textit{Minn. Stat.} § 604.01 (1984).
  \item 114. \textit{See Lesmeister}, 330 N.W.2d at 102.
\end{itemize}
contract cases should be analyzed without reference to comparative fault principles. The rules are confusing and, at times, overlapping claims can lead to inherent contradictions in a single case.

This section of this Article will review the rules that come to us from the leading Minnesota cases on loss allocation. One should not expect a simple, unyielding rule for all cases. Careful consideration of the reasons for the rules, however, will help practitioners reach the proper result even in the absence of clear precedents.

The thoughtful and provocative opinion of Justice Simonett in *Peterson v. Bendix Home Systems, Inc.* 115 sets the background for the line drawing that defines the limits of comparative fault. The focus of that case involved a warranty claim that formaldehyde fumes had made a mobile home uninhabitable. 116 Justice Simonett explained the history and nature of warranty claims:

Originally warranty actions were seen as tortlike breaches of the seller's representations and assurances to the buyer, but their central role in sales law led them to be treated more generally as an element of contract law. Thus, warranties evolved as a unique amalgam of tort and contract law. As warranty began to be used more and more to cover consequential harms caused by defective products, however, the tortlike nature of the actions was increasingly emphasized. So, in a leading Minnesota case abolishing privity requirements for breach of warranty actions, the tort basis of warranty was used to establish that a buyer could sue a manufacturer for a defective project, even though the buyer's "contract" has been with the seller-dealer and not the manufacturer. * * * Then, in 1978, our comparative negligence statute was amended to include fault, and "fault" was defined as including, among other things, breach of warranty and misuse of product. 117

The opinion went on to note that contributory negligence clearly stood as "a defense to a breach of warranty action insofar as consequential damages are concerned." 118 This observation derived from the tort-like origin of consequential damages.

115. 318 N.W.2d 50 (Minn. 1982).
116. *Id.* at 51-52.
117. *Id.* at 52 (citation omitted).
118. *Id.* at 53.
The issue in Peterson dealt with the applicability of comparative fault for nonconsequential damages.119 After consideration of the precedents and the logic of contract actions, the court concluded that claims for general and incidental damages are not subject to comparative fault.120 The court explained: "The buyer is seeking a remedy for a bad bargain, a matter more like contract, not for consequential damages resulting from a bad product, a matter more like tort."121 Thus, although the jury had concluded that the plaintiff's fault exceeded the fault of the manufacturer, which foreclosed any award of consequential damages, the supreme court affirmed an award of direct and incidental damages.122

The Peterson holding could be read to cover not only breach of warranty actions, but also other contract actions. Lesmeister123 recognized that the comparative fault "statute was not intended to apply generally to contract cases."124 This observation came, however, without any reference to the Peterson opinion. However, the Lesmeister court applied rules of law that were generally consistent with Peterson. For example, although the Lesmeister opinion observed at one point that allocation of fault in a contract action would be reversible error,125 the opinion also reduced the plaintiff's recovery of consequential damages because of his fault in causing them.126 The opinion expressed an apology for the confused procedural posture and

119. Id.
120. Id. at 53-54.
121. Id. at 54.
122. Id. at 55.
123. 330 N.W.2d 95 (Minn. 1983).
124. 330 N.W.2d at 101.
125. Id. at 102. Later in the opinion, the court discussed the damages.
126. Id. at 103. The court explained:

Lesmeister should not necessarily recover all his consequential damages. He was under a duty to take reasonable steps to mitigate his damages.

[B]ecause Lesmeister participated in construction of the building and ordered work done in a way inconsistent with good workmanlike practices, we believe the loss of the expected value should be treated not as a general damage but as another item of consequential damage subject to reduction for his failure to mitigate damages. Where his actions helped to cause the loss of the expected value of the building, Lesmeister ought not be allowed to shift the whole loss onto Monarch. We conclude that Lesmeister's total damages are $102,064. This award should be reduced by the percentage of fault attributable to Lesmeister for failure to mitigate his damages, i.e., 42.11 percent.

Id.
the unique law of the case, which bears attention.\textsuperscript{127} Even though the \textit{Lesmeister} opinion provides observations which have apparent application outside that case, we must wait for the supreme court to tell us what we may rely upon and what is not consistent with other accepted principles in this state.

The supreme court missed an opportunity to provide some clarification in \textit{Zontelli}.\textsuperscript{128} As had been discussed, the court of appeals rejected comparative fault for a breach of contract action, citing the \textit{Lesmeister} "holding" as a persuasive although not precedential opinion.\textsuperscript{129} The supreme court reversed, but approved of the appeals court's determination that the city's liability to the contractor was contractual, citing \textit{Lesmeister}.\textsuperscript{130} The supreme court also rejected the application of comparative fault to the contractor's claims.\textsuperscript{131} The supreme court did this without reference to the analysis of the court of appeals, however, and expressed its ruling narrowly by concluding that the specific factors mentioned by the trial court were "inappropriate to support a finding of either fault or a failure to mitigate damages."\textsuperscript{132} Absent from the opinion is any declaration whether a finding of fault or a failure to mitigate damages, \textit{if properly proven}, is relevant or whether comparative fault can reduce contractual claims for damages. Nor did the court attempt to characterize the damages as direct or consequential.

If the principles of \textit{Peterson} apply generally, as they should, then it would seem that failure to mitigate damages, \textit{if properly proven}, should be relevant as a defense to a claim for consequential damages. The question is more subtle as to direct damages.

The question of failure to mitigate damages warrants careful consideration in direct damages analysis for construction claim cases. Direct damages have been defined as:

\begin{quote}
[E]ither the cost of reconstruction in accordance with the contract, if this is possible without unreasonable economic waste, or the difference in the value of the building as contracted for and the value as actually built, if reconstruction
\end{quote}

\textsuperscript{127} \textit{Id.} at 10.

\textsuperscript{128} 373 N.W.2d 744 (Minn. 1985).

\textsuperscript{129} \textit{Zontelli} \& \textit{Sons v. City of Nashwauk}, 353 N.W.2d 600 (Minn. Ct. App. 1984).

\textsuperscript{130} 373 N.W.2d at 751.

\textsuperscript{131} \textit{Id.} at 754.

\textsuperscript{132} \textit{Id.}
would constitute unreasonable waste.  

For contrast, we can compare the types of damages generally classed as consequential:

In addition, non-breaching parties should recover damages sustained by reason of the breach which arose naturally from the breach or could reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of the breach.  

In a construction claim arising out of the defective condition of a building, the measure of direct damages relates to the condition of the building, while the measure of consequential damages addresses the foreseeable consequences of a defective building, such as lost rents.  

If the direct damages having to do with the condition of the building are measured at the time of the breach, then it is unlikely that the owner’s conduct will bear on the extent of the damage. On the other hand, if one measures direct damages at a later point, such as the date of discovery of deterioration or the date of repairs, then the owner’s comparative fault having to do with maintenance or delayed repairs would be relevant. In Peterson, the court preferred to address the damage issue at the time and place of acceptance. In other words, damages are to be awarded for loss in value or cost of repair required at the time of delivery, not for any loss incurred subsequently due to misuse or assumption of risk. This rule

133. Northern Petrochemical, 297 Minn. at 124, 211 N.W.2d at 165. See also Asp v. O'Brien, 277 N.W.2d 382, 384 (Minn. 1979) (measure of damages applies whether the breach of contract is functional or cosmetic); Johnson v. Garages, Etc., Inc., 367 N.W.2d 85, 86 (Minn. 1985) (measure of damages applies whether the breach of contract is functional or cosmetic).

This characterization of direct contract damages clearly is appropriate when the subject of the breach is the contractor’s performance. However, one might argue that these types of damages are not direct but rather are consequential when one is considering a design professional’s contract. The designer promises to deliver a design in exchange for compensation. If the designer breaches the contract, the direct damage might be said to be the difference in value of the design documents, with the results in the building being consequential. This argument tends to introduce confusion, however, and does not find any support in supreme court opinions to date.

134. Lesmeister, 330 N.W.2d at 103 (citing Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854)).

135. Id.

136. This is the same point in time at which breach of contract actions can be commenced.

137. 318 N.W.2d at 56.

138. Id. at 54 n.2.
should be followed in construction cases to preserve the integrity of the "no comparative fault" idea for contract cases.

Those with experience in construction cases will recognize that ascertaining differences in value or cost of repair as of the date of building completion will often present severe evidentiary difficulties. If courts are tempted to permit plaintiffs to rely upon measurements of damage assembled at a time after the building completion, then the court should put the plaintiff to the burden of relating the damages to the original condition of the building. If the courts are persuaded that damages having to do with building conditions are inextricably related to maintenance as well as construction practices, then it would seem that comparative fault might be required for a fair allocation of responsibility. The point made in Peterson is to examine the facts carefully to determine whether the law to be applied is "inconsistent with the true facts." 139

Equally difficult evidentiary issues arise in cases in which two or more defendants have breached independent contractual duties. On this subject, the opinion of the supreme court in Northern Petrochemical 140 is the leading authority. In that case, the owner of a building sued for damages which resulted from building settlement. 141 The court assumed that the independent breaches of contract by several parties to the construction process, including the architect and the contractor, had caused the plaintiff's loss. 142 In explaining loss allocation, the court applied the "single injury" rule:

[W]here it is not reasonably possible to make a division of the damage caused by separate acts of negligence, closely related in point of time, the negligent parties, even though they acted independently, are jointly and severally liable. 143

There being no suggestion that the owner was at fault for the damage, the court placed the burden upon the defendants to show that the damage could be apportioned. 144 Failing such a showing, each defendant would be fully liable for all of the plaintiff's damages. 145

139. Id. at 55.
140. 297 Minn. 118, 211 N.W.2d 159 (1973).
141. Id. at 121-23, 211 N.W.2d at 163-64.
142. See id. at 122-23, 211 N.W.2d at 164-65.
143. Id. at 128, 211 N.W.2d at 167.
144. Id. at 128-29, 211 N.W.2d at 167-68.
145. Id. at 128, 211 N.W.2d at 167.
The *Lesmeister* opinion undertook to clarify the *Northern Petrochemical* holding:

Where A and B owe contract duties to C under separate contracts, and each breaches independently, and it is not reasonably possible to make a division of the damage caused by the separate breaches closely related in point of time, the breaching parties, even though they acted independently, are jointly and severally liable.\(^{146}\)

*Lesmeister* added a footnote cautioning that the same rule might not apply if one or both of the breaching parties intentionally breach the contract.\(^{147}\)

A different rule might apply also if the facts showed that the loss to be allocated was truly caused, in part, by the owner. One example might involve an owner’s intervention in a design decision with facts supporting an assumption of risk argument. Another example might include deferred maintenance or actual building abuse with resulting aggravation of a problem. In such cases, law would be inconsistent with the true facts if the owner were relieved of the consequences of its own malfeasance. A preferable rule would be to require the application of comparative fault. As discussed above, the timing of the damages measure may have a direct bearing on the likelihood that conduct of the owner is relevant in some cases.

One must note other qualifications, as well. For example, one can easily envision a case in which the breaches are not independent. If a contractor has failed to follow specifications or plans, and the only breach of contract by the inspecting architect stems from failure to discover the contractor’s error, each of the parties might have contractual liability to the owner. It would seem in this case, however, that the architect should be entitled to indemnity from the contractor.\(^{148}\)

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146. 330 N.W.2d at 102.

147. *Id.* at 102 n.6.

148. The leading case regarding indemnity in Minnesota is *Hendrickson v. Minnesota Power & Light Co.*, 258 Minn. 368, 104 N.W.2d 843 (1960). The court stated that a party is entitled to indemnity in the following circumstances:

1. Where the one seeking indemnity has only a derivative or vicarious liability for damage caused by the one sought to be charged.
2. Where the one seeking indemnity has incurred liability by action at the direction, in the interest of, and in reliance upon the one sought to be charged.
3. Where the one seeking indemnity has incurred liability because of a breach of duty owed to him by the one sought to be charged.
4. Where the one seeking indemnity has incurred liability merely because
Assessing the availability of indemnity (or contribution) among defendants jointly liable for independent breaches also creates problems. Should one compare the fault of the defendants to each other? Given that the single injury rule is borrowed from the law of tort, one might assume so, but there is no answer for this in Minnesota cases as yet.

In Zontelli, the court put the burden on the engineer to prove that its breach of contractual duty was not the cause of the city's entire liability.\(^{149}\) This is a deviation from the normal allocation of burden of proof at trial. Perhaps it seemed to the court that putting the burden on the engineer flowed naturally from Northern Petrochemical.\(^{150}\) In that case, the supreme court placed the burden on several defendants to show that the plaintiff's damage could be apportioned.\(^{151}\) The burden indicated in Zontelli, however, is conceptually different. For purposes of the city's indemnity claim, there was one plaintiff and one defendant.\(^{152}\) Ordinarily, the plaintiff has the burden to prove breach of duty, cause, and amount of damages. Essentially, Zontelli reversed the ordinary burden of proof.\(^{153}\) This author respectfully submits that the reference to the engineer's burden in Zontelli was intended only for the rather specific facts of that case.

Another application of comparative fault arises in economic loss claims pursued on a negligent misrepresentation theory. In Florenzano v. Olson,\(^{154}\) the Minnesota Supreme Court held of failure, even though negligent, to discover or prevent the misconduct of the one sought to be charged.

(5) Where there is an express contract between the parties containing an explicit undertaking to reimburse for liability of the character involved.

\(^{149}\) Id. at 372-73, 104 N.W.2d at 848. In Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362 (Minn. 1977), the supreme court determined that contribution based upon relative fault, not indemnity, should govern circumstances described in the fourth category of Hendrickson. 255 N.W.2d at 366-67. To that extent, Tolbert reversed the Hendrickson rule. The court has, however, sometimes left open the availability of indemnity in cases which might be characterized as falling within the fourth category. See, e.g., Polaris Indus. v. Plastics, Inc., 299 N.W.2d 414, 420 (Minn. 1980); Frey v. Montgomery Ward & Co., Inc., 258 N.W.2d 782, 788-89 (Minn. 1977). For an excellent discussion of these cases, see generally Steenson, The Fault with Comparative Fault: The Problem of Individual Comparisons in a Modified Comparative Fault Jurisdiction, 12 WM. MITCHELL L. REV. 1 (1986).

\(^{150}\) Northern Petrochemical, 297 Minn. at 118, 211 N.W.2d at 159.

\(^{151}\) See id. at 128-29, 211 N.W.2d at 167-68.

\(^{152}\) Zontelli, 373 N.W.2d at 755.

\(^{153}\) Id. at 755-56.

\(^{154}\) 387 N.W.2d 168 (Minn. 1986).
that comparative fault applies to cases involving negligent misrepresentation.\textsuperscript{155} The court reserved for another day the question for cases involving intentional misrepresentation.\textsuperscript{156} Most commercial loss cases will involve claims of negligent, as opposed to intentional, misrepresentations.

B. Settlements and Releases

The supreme court’s observations that construction liabilities are a matter of contract and that comparative fault considerations should not apply in such cases would seem to suggest that Pierringer releases could not be useful. The central idea of a Pierringer release is that the plaintiff agrees to discharge the portion of his claim attributable to the comparative fault of the settling defendant.\textsuperscript{157} The release normally applies only to situations where the nonsettling defendants have contribution claims against the settling defendant. In the construction context, the crossclaims often involve indemnity claims based upon contract.

In his groundbreaking article on Pierringer releases, then-attorney Simonett described the “emergency of a ‘comparative indemnity’ approach to replace traditional ‘all or nothing indemnity.’”\textsuperscript{158} This explanation has proven prescient, for the Minnesota Legislature in 1983 enacted a statute that limited indemnity clauses in construction contracts.\textsuperscript{159} The effect of the statute is to transform indemnity clauses into contribution clauses based upon comparative fault. This statute has not yet been tested or explained in any appellate decisions, but the new law confirms the thinking of Simonett that Pierringer releases can be of use in some indemnity situations. He pointed out that complete indemnity still applies for claims based on vicarious liability. In such cases, he perceived that the strategy considerations might vary, but he saw no reason to limit the

\begin{itemize}
  \item \textsuperscript{155} Id. at 176.
  \item \textsuperscript{156} Id.
  \item \textsuperscript{157} See Frey v. Snelgrove, 269 N.W.2d 918 (Minn. 1978).
  \item \textsuperscript{159} Act of June 14, 1983, ch. 337, 1983 Minn. Laws 2135, 2136-37 (codified at MINN STAT. §§ 337.01-.05 (1984)). See also Braegelmann v. Horizon Dev. Co., 371 N.W.2d 644 (Minn. Ct. App. 1985) (agreements which seek to indemnify a party for losses resulting from that party’s negligent acts are void and unenforceable in building and construction contracts).
\end{itemize}
availability of the claims.\textsuperscript{160} 

The supreme court had an opportunity to consider the appropriateness of Pierringer releases in construction contract disputes in Barr/Nelson, Inc. v. Tonto's, Inc.\textsuperscript{161} In that case, the plaintiff owner had sued a contractor and the contractor's surety. The plaintiff settled with the contractor and released claims against the surety for the acts of the contractor, but retained claims against the surety based upon certain independent acts. The surety objected that the Pierringer release was collusive and had the effect of juxtaposing the parties. Without any extended discussion, the court approved the release as a settlement tool.

Under the circumstances of that case, the Barr/Nelson conclusion seems appropriate. Had the plaintiff attempted to settle with the contractor and still pursue claims against the surety for the acts of the contractor, however, analysis would have been more difficult. Ordinarily, contractors undertake to indemnify their strategies. It would be difficult to conceive of a rationale which would permit a plaintiff to settle with a contractor, agree to indemnify the contractor, and yet have a claim remaining against the surety for the acts of the contractor. Since the surety would be entitled to indemnity from the contractor, and the plaintiff is to indemnify the contractor, the plaintiff's release of the contractor implies release of the surety.

There are different situations, however, in which Pierringer releases, coupled with appropriate assignments, make ample sense. For example, if the plaintiff were to pursue a settlement with a general contractor, and receive from the general contractor an assignment of the general contractor's claims against a subcontractor, it would seem that the plaintiff would be able to settle with the contractor for that amount which was owing for the contractor's responsibility and yet also step into the contractor's shoes to press a claim for indemnity against the subcontractor. Certain theoretical questions might be raised to the effect that the assignment comes before a judicial determination that the contractor is entitled to indemnity from the subcontractor. On the other hand, given the practice and virtual requirement of our courts that parties to construction

\textsuperscript{160} Simonett, supra note 158, at 25.

\textsuperscript{161} 336 N.W.2d 46 (Minn. 1983).
disputes bring claims for contribution or indemnity before they have technically accrued, and given the general favor in which courts hold creative settlements, so long as they do not prejudice the remaining parties, these objections should not be sustained. So long as the subcontractor is asked to pay no more than it would have paid had the contractor first been adjudged vicariously liable and then pursued indemnity, the combination Pierringer release and assignment should be approved.

To date, this author is aware of only one case in which an agreement of this sort has been presented to the trial courts for consideration. A practical recommendation is that the parties to these types of arrangements condition the agreement upon formal court approval. Court approval is required in any event to secure the dismissal of the released party, and it is only logical to couch the agreement in language that voids the agreement in the event that the courts are not persuaded that the arrangement is legitimate.

If a defendant is properly dismissed from a commercial loss case in a Pierringer-type situation, the effect in trial is similar to any other case. For example, in Rediske v. Minnesota Valley Breeders Association, the court of appeals indicated that the negligence of a contractor who had been dismissed from the suit during trial should be submitted to the jury notwithstanding the dismissal. If one were to assume that the court properly relied on negligence theory, then clearly Frey v. Snelgrove required presentation of the contractor’s liability to the jury. On the other hand, even if the only liability theory was in contract, then the contractor’s responsibility would be relevant at least to the extent that plaintiff’s damages were consequential in nature.

IV. APPELLATE COURT APPLICATION OF TORT THEORY IN COMMERCIAL LOSS CASES

Different approaches in reconciling the concepts of negligence and contract in construction project lawsuits can be seen

162. Hormel v. Best Wrecking Co., No. 44-84-1187, District of Minnesota, United States District Court.
163. Minn. R. Civ. P. 41.01, 54.02.
164. 374 N.W.2d 745 (Minn. Ct. App. 1985).
165. 374 N.W.2d at 749.
166. 269 N.W.2d 918, 922 (Minn. 1978).
in various opinions reported by the court of appeals. These opinions have been selected for discussion because they depart from contract law and introduce tort concepts. In the main, the result is confusion.

One case of interest is Rediske v. Minnesota Valley Breeders Association. In that case, the court of appeals cited and relied upon Lesmeister v. Dilly but did so in a ruling which is inconsistent with Lesmeister. The plaintiffs in that case were farmers who had suffered substantial economic losses as a result of the failure of several defendants to complete a waste handling system in a timely and proper manner. The plaintiffs relied upon theories of breach of contract, negligence, and misrepresentation. The trial court submitted the negligence claims against the defendant contractors to the jury. The court of appeals rejected the argument of the defendants that Lesmeister foreclosed the negligence theory. The court of appeals characterized the Lesmeister opinion as a case which ruled that comparative fault was not applicable to contract cases, but not one which “limited [the plaintiffs] to one theory of recovery.” The Rediske opinion cannot be reconciled with the language of Lesmeister, nor can it be reconciled with Zontelli.
Superwood, Fine Arts, or S.J. Groves. The Rediske trial court refused defendants' request to submit the case on a comparative fault basis. The court of appeals ruled that this was error and remanded the case. In doing so, the court of appeals directed the trial court to employ a special verdict to separate out which damages were attributable to breach of contract and which to negligence and fraud. The court reasoned that only the negligence and fraud claims should be subject to comparative fault.

With the benefit of nothing more specific about the case than the opinion of the court of appeals, this author will offer an assessment of the rules that should have been applied in Rediske. First, the evidence of negligent installation should have been relevant only to prove breach of contract, not as an independent tort issue. Contract liabilities should generally have been determined among those in privity, with due recognition for third-party beneficiary liabilities. Second, theories of fraud or misrepresentation could have resulted in independent or joint and several liability of numerous defendants. Comparative fault, including negligence in reliance would have applied to claims for negligent misrepresentation. As to direct and incidental damages measured as of the date of breach, comparative fault would have been irrelevant. Principles of comparative fault should have been permitted only in the context of consequential damages. Comparative fault for the consequential damages could have included failure to mitigate damages or independent causation of damages. Ultimately, in the event of liability, allocation among defendants should have proceeded on the basis of indemnity principles grounded in respective contractual duties.

174. The Rediske opinion was issued on September 24, 1985. The supreme court's opinion in Zontelli was filed on August 9, 1985. It is possible that the Zontelli opinion did not come to the attention of the court in Rediske. In any event, the Rediske opinion cannot be reconciled either with the holding of the court of appeals in Zontelli or with the holding of the supreme court in Zontelli.

The supreme court accepted review of Rediske "for the limited purpose of considering the propriety of the remand to the trial court for a determination of comparative fault on issues of both fraud and negligence and the question of whether it was error to submit to the jury [plaintiff's] claim of negligence against defendants." 377 N.W.2d at 459. This case would have presented a perfect opportunity for the supreme court to shed additional light in this area. Unfortunately, the case was settled by stipulation filed May 5, 1986 and the supreme court will not issue an opinion in this case.

175. 374 N.W.2d at 749.
Other panels of the court of appeals have issued opinions which address the availability of the negligence theory in the context of professional services. Three cases advance the view that negligence actions are available for the recovery of economic losses resulting from the negligent performance of services.

The first of these is *Valley Farmers' Elevator v. Lindsay Bros. Co.* In that case, the court provided rather lengthy dicta in support of the view that those who provide professional services may be liable in tort for negligence, as opposed to contract. *Waldor Pump & Equipment Co. v. Orr-Schelen-Mayeron & Associates, Inc.* expressly issued a holding to the same effect. *McCarthy Well Company, Inc. v. St. Peter Creamery, Inc.* broadened the holding to apply to all services, not merely professional services. Arguably, the discussions of all three opinions erred regarding negligence as the theory applicable to claims involving services.

Even though the *Valley Farmers* opinion presented dicta, it

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176. 380 N.W.2d 874 (Minn. Ct. App. 1986).
177. 386 N.W.2d 375 (Minn. Ct. App. 1986).
179. The supreme court granted review of *Valley Farmers* on April 11, 1986. Oral argument was scheduled for September 17, 1986. No petition for review was filed in *Waldor Pump*. A petition for review is pending in *McCarthy Well*.
180. In *Valley Farmers*, the court held that the transaction in question was governed by the UCC, notwithstanding that the seller provided services along with the sale of goods. 380 N.W.2d at 879.

The Minnesota Supreme Court has been inclined to apply the UCC to suppliers of material for construction projects. In *Kopet v. Klein*, 275 Minn. 525, 532-33, 148 N.W.2d 385, 390-91 (1967), the court applied the Uniform Sales Act to the sale of a water softener where the purchase included the cost of installation. In *O'Laughlin v. Minnesota Natural Gas Co.*, 255 N.W.2d 826, 830 (Minn. 1977), the court applied the UCC to a contract for the installation of a furnace where the contractor also selected the furnace and purchased it. The *O'Laughlin* case was cited with approval but without much discussion in *Alden Well Veterinarian Clinics v. Wood*, 324 N.W.2d 181, 184 (Minn. 1982). See also *Tri-State Ins. Co. of Luverne v. Lindsay Bros. Co.*, 364 N.W.2d 894 (Minn. Ct. App. 1985), aff'd mem., 381 N.W.2d 446 (1986).


The arguments presented by the parties in their briefs to the supreme court for *Valley Farmers* address primarily the question whether the court of appeals properly determined that the transaction was governed by the UCC. The appellant argued
presented the rationale for the rule adopted in the two succeeding cases. *Valley Farmers* observed:

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).  

It is revealing to note that the authorities cited did not include *Lesmiester* or *Zontelli*. The failure to refer to the cases in which the Minnesota Supreme Court has expressly disclaimed any intention to allow negligence actions for the recovery of economic losses revealed the faulty foundations of the two more recent holdings of the court of appeals.  

*Valley Farmers* went on to distinguish the line of cases followed by Lindsay Brothers could be sued in negligence, as opposed to contract, because it provided professional services in connection with the transaction. Lindsay Brothers seemed to concede that negligence would be the proper theory for claims against professional designers, but contended that the facts do not permit an inference that it provided design services.

Both Lindsay Brothers and Martin Steele defended the holding of the court of appeals that the transaction was governed exclusively by the UCC. Accordingly, the respondents argued that the claim in negligence was not available and that summary judgment was appropriate because the statute of limitations barred the warranty claim.

Based upon this author’s review of the court of appeals’ opinion and the briefs of the parties before the supreme court, it appears that the court of appeals ruled properly that the UCC governed the transaction and that the claims of the plaintiff were, therefore, barred. The dicta of the court of appeals concerning the liability of design professionals was, evidently, issued without the benefit of any extensive briefing on that subject, and the briefs before the supreme court also do not directly address the principal questions of this article.

181. 380 N.W.2d at 877.

182. In a decision which preceded *Buetow* and the succeeding opinions of the Minnesota Supreme Court, the Eighth Circuit relied upon a negligence theory in a construction claim. In *Continental Grain Co. v. Fegles Constr. Co., Inc.*, 480 F.2d 793, 795 (8th Cir. 1973), the claim involved alleged negligence in the design and construction of a grain dryer. Some eight years after construction was completed, the grain dryer collapsed. *Id.* Investigation showed that the collapse was due to the settling of the foundation slab. *Id.* The court held that a provision in the construction contract in which the defendant guaranteed that it would replace any defective materials or workmanship that might develop within two years following the acceptance of the work did not limit the defendant’s liability for negligence. *Id.* at 797 (AIA General Conditions now expressly explain that the guarantee period is not intended as a limitation on other remedies). Because the plaintiff succeeded in proving the negligence of the contractor, the plaintiff recovered damages for the collapsed grain dryer. It is doubtful that *Continental Grain Company* could be relied upon as good authority today, in view of the numerous subsequent Minnesota Supreme Court cases which have addressed the general theories of recovery.
ing Superwood on the premise that those cases involved the sale of goods. The opinion quoted extensively from the S.J. Groves & Sons opinion which contrasts tort law and the Uniform Commercial Code. The implied reasons for this were to suggest that UCC cases are more validly distinguished from negligence theory than are other contract cases. This point does not survive analysis.

The UCC is a codification of certain principles of contract law. Within the parameters set out in the UCC, parties are free to negotiate for such warranties, remedies, and limitations as they choose. In a case governed by the UCC, the question whether a plaintiff has a remedy available depends upon the prior negotiations of the parties and upon an assessment of the contract terms in light of the principles codified in the UCC.

Similarly, the participants in a construction project are invariably in a position to negotiate rights and obligations. Although the legislature has not deemed it necessary to codify general principles of contract law for commercial cases primarily involving services, the contracts in such cases are neither less valid nor less important than contracts which exist in sales of goods cases. The only reason that parties to a construction process come together is because of contractual undertakings. The roles and duties of the participants are defined by contract.

Valley Farmers offers another argument derived from an Illinois appellate decision which holds that professionals can be liable in negligence for economic loss:

In allowing the action for economic loss, the Rosos Litho court reasoned that since the UCC is inapplicable to the provision of professional services, a plaintiff injured as a result of professional services would have no warranty remedy for economic loss. Therefore, 'the UCC policy of protecting consumers by means of implied warranties would not be promoted by depriving [plaintiff] of a viable cause of action for economic loss. 123 Ill. App. 3d at 296, 78 Ill. Dec. at 453, 462 N.E.2d at 572.'


183. 380 N.W.2d at 877.
184. Id. at 878. Valley Farmers cited an earlier Illinois appellate court decision which upheld the dismissal of professional engineering negligence counts seeking damages for economic losses. Palatine Nat'l Bank v. Charles W. Greenard Assocs. Inc., 119 Ill. App. 3d 376, 456 N.E.2d 635 (1983). Valley Farmers overlooked a third, more recent, case from Illinois which agreed with Palatine National Bank and dis-
Valley Farmers found this point persuasive. Two problems with this analysis present themselves. First, to argue that design professionals should be liable on a theory of implied warranties is precluded by City of Mounds View v. Walijarvi. Second, there is no reason to suspect that proper contract analysis in commercial cases for economic loss will unfairly deprive plaintiffs of a viable cause of action. As recognized by the supreme court in Zontelli, contract principles, supplemented by indemnity awards, will satisfactorily cover appropriate remedies in most cases.

Valley Farmers assumed the the Superwood line of cases should not apply to all commercial loss cases:

If the court had intended to abolish professional malpractice actions for economic losses, we believe it would have done so explicitly and not by mere inference.

As this Article has discussed, this statement overlooks the supreme court opinions in the Buetow, Lesmeister, and Zontelli cases which indicate that the theory of professional malpractice actions does not sound in tort. Moreover, the principles discussed in Superwood, Fine Arts, and S.J. Groves and the explicit agreed with Rosos Litho. See Bates & Rogers Constr. Corp. v. North Shore Sanitation Dist., 128 Ill. App. 3d 962, 471 N.E.2d 915 (Ill. App. 1984) (a carefully researched, thorough discussion; suit by contractor and subcontractor against architect/engineer for economic loss barred where contractor and architect are not in privity of contract). See also Waldinger Corp. v. CRS Group Engineers, Inc., 775 F.2d 781 (7th Cir. 1985) (following Illinois law) (examining the qualified privilege of an engineer to interpret specifications in case involving claims for economic loss); Intamin, Inc. v. Figley-Wright Contractors, Inc., 605 F. Supp. 707 (N.D. Ill. 1985) (following Illinois law) (no right to contribution where party seeking contribution is limited to contract remedies).

185. 380 N.W.2d at 878.
186. 263 N.W.2d 420, 423-25 (Minn. 1978).
187. 380 N.W.2d at 878. One may approach the question of professional malpractice actions in three ways. First, one may ask whether such actions have been abolished, as was done in Valley Farmers. In that event, one can study the question whether opinions of the supreme court have abolished the theory. Second, one may study the contracts of the parties to determine whether the parties have limited their remedies by contract. Parties may contract for an exclusive remedy which shall be binding on them in the event of breach of contract. Independent Consol. School Dist. No. 24, Blue Earth County v. Carlstrom, 277 Minn. 117, 120, 151 N.W.2d 784, 786 (1967). The third, and more appropriate, approach to the question of malpractice actions for economic losses is to ask whether the actions are available on the basis of the contractual or other relationships among the parties. This approach does not assume the existence of an action in the absence of some disclaimer. Rather, it assumes that the action is available only if the claimant can demonstrate the origin of a duty in a contractual or similar relationship.
language of these cases, covering all commercial cases, should be honored.\textsuperscript{188}

\textit{Waldor Pump}\textsuperscript{189} continued the discussion of the nature of professional liability. A subcontractor sought to recover economic loss from an engineer.\textsuperscript{190} In \textit{Waldor Pump}, the court of appeals advanced the view that “the reasonable skill and judgment expected of professionals must be rendered to those who foreseeably rely upon the services.”\textsuperscript{191} The opinion continued: “Next we must decide whether a subcontractor who sustains economic loss due to negligent performance of a consulting engineer may foreseeably rely on the engineer’s services.”\textsuperscript{192} The court answered this question by finding that subcontractors who were bound to follow the specifications prepared by the engineer could be harmed by negligence in drafting or interpretation of the specifications.\textsuperscript{193} On that basis alone, the court concluded that the engineer owed a duty to the subcontractor reasonably to draft and interpret the project specifications.\textsuperscript{194}

This approach seems to suggest that the subjective reliance of third parties, rather than the objective terms of the engineer’s contract, should determine both the scope and the beneficiary of an engineer’s duty.\textsuperscript{195} This approach is contrary to

\begin{itemize}
  \item \textsuperscript{188} One case from another jurisdiction which accommodates both the lines of reasoning found in the Minnesota Supreme Court cases is \textit{R.H. Macy & Co. v. Williams Tile & Terrazzo Co.}, 585 F. Supp. 175 (N.D. Ga. 1984). In that case, the court dismissed claims against an architect by a subcontractor and a supplier reasoning that architects would be liable only in the case of property damage or personal injury or in situations where one could define a relationship approaching that of “privity.” \textit{Id.} 386 N.W.2d 375 (Minn. Ct. App. 1986).
  \item \textsuperscript{189} \textit{Id.} at 377.
  \item \textsuperscript{190} \textit{Id.}
  \item \textsuperscript{191} \textit{Id.}
  \item \textsuperscript{192} \textit{Id.}
  \item \textsuperscript{193} This approach was suggested in \textit{Donnelly Constr. Co. v. Oberg/Hunt/Gilleland}, 677 P.2d 1292, 1296 (Ariz. 1984). \textit{Donnelly} does not offer any discussion of the contractor’s claim against the owner. There is no recognition of the fact that the contractor’s claim against the owner should provide satisfactory accommodation for any legitimate claims of the contractor. \textit{See, e.g., Lesmeister,} 330 N.W.2d at 102.
  \item \textsuperscript{194} \textit{Waldor Pump}, 386 N.W.2d at 377.
  \item \textsuperscript{195} In most cases, specifications present requirements which a subcontractor is to bid upon. While subcontractors are to consider the specifications in their bids, the reason is to determine a price for compliance. Typical forms call upon the subcontractor to identify areas of ambiguity or contradiction. \textit{See, e.g., American Institute of Architects, General Conditions of the Contract for Construction, AIA Doc. No. 201 (Construction Management Edition 1980); American Institute of Architects, Standard Form of Agreement Between Contractor and Subcontrac-
Bueto and Zontelli. Nowhere in Waldor Pump does one find reference to the contractual undertakings of the engineer to the engineer's client or to the terms of the contracts between the owner, the contractor, and the subcontractor. Neither does one find any acknowledgment of the factors governing third-party beneficiary theory. The approach adopted in Waldor Pump seems to ignore, without justification, any assessment of the bargained-for expectations of the several parties.

The approach followed in Zontelli is much more satisfactory. If the subcontractor sustained loss as a result of improper specifications, the subcontractor may have been entitled to a change order for additional compensation or other contractual remedy.\(^{196}\) Formally, the subcontractor's claim may have run to the general contractor who could have, in turn, presented the claim to the owner. The owner, in turn, might have been entitled to look to the engineer if the engineer breached a contracted-for duty in drafting or interpreting the specifications. This line of analysis follows the contractual relationships among the parties and is consistent with the bargained-for expectations of the various parties.

To permit parties to ignore contractual requirements upsets the normal administration of construction projects, often works an inequity where specific duties and liabilities have been allocated by contract, and creates undesirable conflicts of interest.

General conditions of construction contracts often specify

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\(^{196}\) See Zontelli, 373 N.W.2d at 753. The circumstances under which a contractor or subcontractor may be entitled to additional compensation have been examined in several Minnesota Supreme Court decisions. See, e.g., Alley Constr. Co. v. State, 300 Minn. 346, 349-50, 219 N.W.2d 922, 924-25 (1974) (contractor's reliance on owner's plans and specifications can be inferred from facts and circumstances surrounding the award of the contract; direct evidence of contractor's reliance unnecessary); McCree & Co. v. State, 253 Minn. 295, 315-17, 91 N.W.2d 713, 726-27 (1958) (party furnishing plans and specifications to contractor impliedly warrants their sufficiency for their intended purpose). These cases are cited and relied upon in Zontelli. Id. at 752-54.
the situations in which a subcontractor may be entitled to a change order for additional compensation.\textsuperscript{197} Included in these contractual terms may be requirements of timely notice or other conditions which are ultimately intended to facilitate successful project completion and timely resolution of disputes. To permit a subcontractor to sue an engineer after a project is completed upon a theory of negligence will encourage subcontractors to ignore the notice requirements spelled out in contract conditions. This can lead to a less efficient resolution of project issues and disputes, because affected owners, professionals, or other contractors may not learn of problems until it is too late to bring about economical solutions.

To permit parties to ignore privity requirements increases the likelihood of having the wrong party pay for loss. For example, consider two hypothetical cases in which a contractor can demonstrate that the failure of the designer's plans and specifications to disclose adequately subsurface conditions entitle the contractor to extra compensation. In the first case, assume that the extra cost is entirely attributable to the condition of the owner's property. Even though the designer was negligent, had the designer adequately described the property, the bids would have been higher. Thus, the designer's error did not cause the loss and the owner should pay the increase.\textsuperscript{198}

In the second case, assume that the extra cost consists of wasted effort attributable to the designer's error, and not the condition of the property. The owner should be entitled to look to the designer for indemnity.

If the contractor can sue the designer directly without directly pursuing its claims against the owner, then the designer may be obliged to pay the contractor without any clear theory of indemnity or contribution against the owner. In the first example, this would be unfair. To require the contractor to sue

\textsuperscript{197} An example of a paragraph anticipating reimbursement for extra work caused by subsurface conditions materially different from those shown on plans or soil borings is provided in Zontelli. 373 N.W.2d at 751.

\textsuperscript{198} An owner should not recover from other expenditures which are required because of the condition of the property and not occasioned by torts or breaches of contract. See Freeport Sulphur Co. v. The S.S. Hermosa, 526 F.2d 300, 304 (5th Cir. 1976) (damages issues decided under federal maritime law).
the owner does not leave the contractor without a remedy in either case. It merely ensures that the right party pays the bill.

To generalize that engineers have a duty running to parties with whom they have no contract provides construction participants with novel opportunities to sue those with whom they have no mutuality of obligation. It exposes engineers and architects to liabilities beyond those contemplated at the commencement of the project and for which there was no bargaining. 199

To hold that designers have a duty running to subcontractors can present engineers with an irreconcilable conflict of interest. Engineers, architects, and other design professionals ordinarily have contractual obligations to the owner or developer. In many situations, the design professionals act as the owner’s agent in a capacity that is at least arm’s length from the contractors and subcontractors and, in some cases, may be adverse to the interests of the contractors and subcontractors. 200 If it were to become law that design professionals owe a duty to any party that relies upon their services, then design professionals would be asked to serve two masters. This is contrary to the spirit of their undertaking with their clients.

The point is that duties in a commercial construction project should be determined by reference to the contracts negotiated by the parties, not an after-the-fact reallocation of responsibility by the courts. The contracts of the parties, with all their limitations and remedies as negotiated by the parties, should be respected by the courts. For these reasons, it is submitted, the *Waldor Pump* holding is not only inconsistent with supreme court decisions, it also reflects poor policy.

199. It should be understood that some contractors and subcontractors are required by contract to elect or retain engineers or other design professionals in their own right. In those cases, of course, the design professionals would have duties running to their clients, the contractors.

200. For an example of potential conflicts see Richard & Assocs., Inc. v. Boney, 604 F. Supp. 1214 (E.D.N.C. 1985). In that case, a subcontractor sued an architect for advising the owner not to pay the subcontractor’s balance until a dispute between the parties was resolved. The court ultimately dismissed the subcontractor’s claim for a failure to show duty, breach, causation, and damages. Nonetheless, the claim illustrates the architect’s dilemma. If the court had concluded that the architect owed the subcontractor a duty, then the architect would have had a duty running both to the owner, the architect’s client, and the subcontractor, the party whose work the architect was obligated to evaluate.
McCarthy Well201 extends the notion that economic loss may be pursued in tort claims to all cases involving services. The remarkable point of this opinion is that the claim arose between two parties who had been in contractual privity. Nonetheless, the court of appeals affirmed negligence analysis without any specific regard for the contractual terms.

McCarthy Well, like Lesmeister, was tried on the theory of negligence without objection. Therefore, the law of that case should not be taken as precedent for other cases. It is notable that the opinion makes no reference to the apparently equal bargaining power of the parties. It relies entirely on Waldor Pump and Valley Farmers. For the same reasons that call those opinions into question, McCarthy Well should not be followed.

CONCLUSION

Careful attention to contractual terms and undertakings guarantees that the bargained-for expectations of the parties will be honored. The duties and liabilities of design professionals in construction disputes should be defined primarily by contractual relationships. That juries are asked to test the conduct of design professionals in terms of professional negligence should not necessarily imply that the underlying theory of liability is found in negligence. Proper analysis will recognize the importance of contract.

The issues of liability theory and loss allocation are difficult. It is impossible to provide a road map through all of the foreseeable types of situations. Application of the theories and policies relating to economic loss cases requires flexibility. Generally, however, contract principles are fair and effective for commercial loss cases. Courts will produce the best decision if they recognize the contractual allocation of duties among the parties for each specific project rather than to substitute an assumed, generic world view.

This viewpoint implies that contract law is the primary theory for economic loss cases. The Minnesota Supreme Court has recognized this generally when making a choice among competing tort and contract rules. The court has demonstrated flexibility, however, with the most important idea being that the law should fit the facts of the specific case.

201. 389 N.W.2d 514 (Minn. Ct. App. 1986).