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# Texas Court Upholds Engineer's Tort Duty to Third Parties

The Texas appellate decision recently confirmed that state's general rules regarding the outer limits of common law tort liability arising from alleged construction defects. *USA Walnut Creek, DST v. Terracon Consultants, Inc.*, 2015 Tex. App. LEXIS 1806 (Tex. App. – Corpus Christi 2015) involved an apartment complex owner's negligence claims against the prior owner, developer and general contractor that constructed a group of apartments in Austin, Texas. The fourteen building complex was completed in 2002, and sold to plaintiff/appellant three years later. Within three to four years thereafter, various engineers inspecting the complex reported systemic flaws in most of the buildings, including significant drywall cracks, foundation movement, unlevel floors, out-of-plumb door jambs and numerous other issues. Plaintiff and its retained engineers attributed most or all of these defects to insufficient or poorly performed soil testing, site preparation and composition of foundations.

After appearances by the original owner, developer and general contractor, the parties agreed to amend the pleadings and add Terracon Consultants, Inc. ("Terracon") as an additional defendant. Terracon was an engineering consultant that performed soil borings, inspections and other geotechnical engineering services as a subcontractor of the developer.

Terracon Consultants, Inc. ("Terracon") moved for summary judgment on the ground that it had operated as a professional services subcontractor under contract to the developer and general contractor and, therefore, owed no contractual or tort duty to plaintiff. Following a hearing on the motion, the trial court granted Terracon's motion and dismissed the action. Plaintiff appealed.

The appellate court rejected Terracon's attempt to define the theory of liability asserted against it as requiring direction or control over the apartment complex construction. In this regard, the court noted that plaintiff did not allege Terracon's negligent management of the construction process. Rather, plaintiff alleged that Terracon negligently performed its services including soil testing, reporting and advice on structure foundations to the general contractor. Moreover, the appellate court favorably cited Texas case law holding that the existence of a construction contract (or other type of contract) does not always limit claims against the design professional to those in privity. In other words, the contract does not insulate the engineer from tort liability claims brought by third parties. In the instant matter, an expert's affidavit concluded that remediation of damage in all of the buildings would cost over \$6,000,000, an amount exponentially greater than Terracon's contract fee. The court found this evidence compelling enough to create an issue of fact as to Terracon's tort liability.

The Court finally cited with approval to an earlier Texas decision considering the issue of contractor/designer liability to third-parties: "A party cannot avoid tort liability to the world simply by entering into a contract with one party [otherwise] the economic loss rule [would] swallow all claims between contractual and commercial strangers." *Id.* at 10. In the end, the Court reversed the trial court's grant of Terracon's motion and reinstated the claims and cross claims against that party.