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Economic Loss Rule: A Viable Defense in Colorado for Design Professionals

By Marisa Skoglund, Esq.

THE COLORADO DISTRICT COURT RECENTLY APPLIED the Economic Loss Rule ("ELR") in granting summary judgment for a Colorado land planner as to negligence claims arising from professional services it provided to a developer. In *Stan Clauson Associates, Inc. v. Coleman Brothers Construction, LLC et al.*, Colorado District Court Case No. P09CV53, the Court entered an order on Plaintiff's Motion for Summary Judgment Based on Economic Loss Rule holding, that, "there is no recognized common law duty of a land planner to a developer," and that negligence claims for damages against the land planner were barred by the ELR.¹

The plaintiff, Stan Clauson Associates, Inc. ("Clauson"), a land planner in Aspen, Colorado, was retained by the defendant, Coleman Brothers Construction, LLC ("Coleman"), real estate developer, to provide land planning services in connection with Coleman's development plans for two pieces of property. Coleman and Clauson entered into two contracts with respect to those services. Notably, the first of the two contracts provided in writing that:

¹ The Colorado Court refers in this case to the "Economic Loss Rule." The Economic Loss Rule is similar to the "Economic Loss Doctrine," as it is referred to in other jurisdictions. The definition of the terms Economic Loss Rule and Economic Loss Doctrine differ by jurisdiction with respect to the ways in which the same general legal concept is applied and enforced.

... [T]he outcome of any land use process is by no means certain. Our sole obligation is to make a good faith effort to present the project in the application and hearing process in a manner that is responsive to the code and other identified issues. No warranty is expressed or implied as to the acceptance of any project proposal in the land use approval process.

Clauson and Coleman subsequently entered into a second, oral contract for the development of a separate property, known as the "Emma Property", in which the parties agreed that the terms would replicate those in that contract. In performing its land planning services, Clauson stated in a letter to Coleman that the Emma Property "could possibly be subdivided into +/- 12 lots."

Coleman subsequently failed to timely pay Clauson's bills and, eventually, along with the other defendants, Coleman Ranch, LLC and Crown Mountain Plaza, LLC, executed a promissory note in which all three parties agreed to be jointly and severally liable for payment to Clauson. *Id.* Approximately one month later, Coleman's request for development rights for the Emma Property was denied, and the defendants ceased all payments to Clauson.

After Clauson filed its lawsuit asserting claims for breach of promissory note, breach of contract, and unjust enrichment, Coleman and Coleman Ranch, LLC filed counterclaims against Clauson, and a third party complaint against Dan Coleman ("D. Coleman"). D. Coleman then filed a third party claim against Clauson (Coleman, Coleman Ranch, LLC, and D. Coleman are collectively referred to as "Coleman Defendants"). The Coleman Defendants alleged that Clauson breached its duty of care and competency and, therefore, was negligent in issuing its letter with respect to the likelihood that Coleman would be granted property development rights for the Emma Property.

Clauson moved for summary judgment on the Coleman Defendants' negligence claims, asserting the ELR as a bar to those claims. The Coleman Defendants responded that the ELR did not apply because Clauson is a professional, and that Clauson's duty to exercise due care was not encompassed in the agreements with Coleman.

In addressing the ELR under Colorado law, the Court stated that "[t]he economic loss rule, in general, provides that 'a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law.'" (Quoting *Town of Alma v. Azco Construction, Inc.*, 10 P.3d 1256, 1264 (Colo. 2000)). The Court continued that, while a breach of a duty arising independently from a contract duty may support a tort action, "[t]he economic loss rule indicates that where economic damages only are claimed and the relationship between the parties is based on a contract, the duties owed from one contracting party to the other are limited to the contractual duties unless there is a recognized common law duty of care in tort."

The Court articulated that the ELR is supported by the policy of enforcing expectancy interests of contracting parties to enable them to allocate risks within the contract through the bargaining process, knowing that they will not be able to recover economic damages in tort. The Court ultimately determined that: (1) the Coleman Defendants' pursuit of solely economic damages warranted the application of the ELR; (2) there is no recognized common law duty of care owed by a land planner to anyone; and, therefore, (3) there is no common law duty of care to compare to Clauson's contractual obligations to Coleman. Specifically, the Court concluded that, "there is no recognized common law duty for a land planner to exercise care and competence is [sic] providing services to clients and all the factors favor a finding that the economic loss rule bars the Coleman defendants' claims of negligence."

In so doing, the Colorado District Court has bolstered the state of the ELR in Colorado, particularly with respect to services rendered by design professionals. Thus, the ELR remains a viable defense in Colorado for design professionals, and serves an important function in maintaining a distinction between contract and tort law. ■