The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 286
INTRODUCER:	Senator Negron
SUBJECT:	Design Professionals
DATE:	March 5, 2013
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Favorable**
2.	Shankle	Cibula	JU	**Pre-meeting**
3.			CA	
4.				
5.				
6.				

I. Summary:

SB 286 permits a design professional employed by a business entity or an agent of the entity to be immune from tort liability for damages occurring within the course and scope of the performance of a professional services contract if:

- The contract is made between the business entity and a claimant or another entity for the provision of services to the claimant;
- The contract does not name an individual employee or agent as a party to the contract;
- The contract prominently states that an individual employee or agent may not be held individually liable for negligence;
- The business entity maintains any professional liability insurance required under the contract; and
- Any damages are solely economic in nature and do not extent to persons or property not subject to the contract.

This bill amends the following sections of the Florida Statutes: 471.023, 472.021, 481.219, 481.319 and 558.002.

The bill creates section 558.0035, Florida Statutes.

II. Present Situation:

Personal Liability for Professional Services

Under s. 621.07, F.S., a professional service corporation or professional service limited liability company is liable up to the full value of its property for the negligence of its employees. An employee or agent is also personally liable for negligent or wrongful acts or misconduct committed by that person, or by any person under that person's direct supervision and control, while rendering professional service on behalf of the corporation or limited liability.[1]

Liability of Construction Defects by Design Professionals

Chapter 558, F.S., provides the process whereby a property owner can assert a claim against a contractor, subcontractor, supplier, or design professional concerning a construction defect. Section 558.002(7), F.S., defines the term "design professional" to mean "a person, as defined in s. 1.01, licensed in this state as an architect, interior designer, landscape architect, engineer, or surveyor."[2]

Economic Loss Rule

The economic loss rule is "a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses."[3] Under the economic loss rule, economic damages may not be recovered in a negligence action if the damages are not accompanied by physical property damage or bodily injury.[4] This rule "bars a plaintiff from bringing tort claims to recover pure economic damages arising from a breach of contract cause of action absent personal injury or property damages."[5] As a result, if the relationship between the plaintiff and the defendant is derived in contract, and the plaintiff cannot prove a tort independent of some contractual breach, the economic loss rule bars recovery on any noncontract claims.[6]

Economic Loss Rule and Design Professionals

In *Moransais v. Heathman*, the Florida Supreme Court found that professional malpractice and negligence claims are not barred by the economic loss rule.[7] The case involved the assertion of the economic loss rule as a defense to a professional malpractice claim brought by a homeowner (plaintiff). The defendants were licensed engineers who made a pre-purchase inspection of a home and allegedly failed to detect and disclose defects in the condition of the house. The plaintiff contracted with a professional engineering corporation to perform the home inspection

[1] Section 621.07, F.S.
[2] Section 725.08(4), F.S., also defines the term "design professional" to mean "an individual or entity licensed by the state who holds a current certificate of registration under chapter 481 to practice architecture or landscape architecture, under chapter 472 to practice land surveying and mapping, or under chapter 471 to practice engineering, and who enters into a professional services contract."
[3] *Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 536 (Fla. 2004).
[4] 17 FLA. JUR. 2D *Damages* s. 36 (2010).
[5] *Id*.
[6] *Id.*
[7] *Moransais v. Heathman*, 744 So. 2d 973, 983 (Fla. 1999).

services, and the contract did not name the defendants who actually conducted the inspection as parties to the contract.[8]

The court first held that home purchasers have a cause of action for professional malpractice against an employee of the engineering corporation who conducts a home inspection but with whom the home purchaser is not in privity of contract.[9] The court then concluded that professional malpractice and negligence claims are not barred by the economic loss rule. The court's holding was based on two principal reasons:

- Florida's common law and statutory scheme recognizes tort claims against professionals for negligence based on the professional's violation of a duty of care to the injured person.
- The economic loss rule is not intended to apply to professionals who negligently perform their duties.[10]

The court noted that the rule has not eliminated causes of action premised upon torts that are independent of the contract.[11] It also held that the rule was not intended to bar well-established common law causes of action, such as those for neglect in providing professional services.[12] The court stated that the economic loss rule was primarily intended to limit product liability claims, and that it should generally be limited to that context "or situations where the policy considerations are substantially identical to those underlying the product liability-type analysis."[13] Noting that actions against professionals often involve only economic loss without any personal or property damage, the court stated that extending the economic loss rule to tort cases against professionals "would effectively extinguish such causes of action."[14]

Third-Party Liability Limitations in Contracts

Generally, Florida law recognizes limitation of liability clauses in contracts and permits third party beneficiaries to enforce a limitation of liability clause. However, in *Witt v. La Gorce Country Club, Inc.*, the Florida Third District Court of Appeal held that the limitation of liability clause in the contract was invalid and unenforceable as to a geologist in his capacity as a licensed professional.[15] Consequently, the court refused to apply the economic loss rule to bar a negligence claim.

In *Witt*, the plaintiff, La Gorce Country Club, Inc., entered into a design-build contract for a reverse osmosis system with ITT Industries, Inc. (ITT), and Gerald M. Witt and Associates, Inc. (GMWA), the company of professional geologist Gerald M. Witt (Witt). The contract provided a limitation of liability to the benefit of Witt, who in his individual capacity was not a party to the

[8] *Id.* at 974.
[9] Privity of contract is defined as: "The relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so. The requirement of privity has been relaxed under modern laws and doctrines of implied warranty and strict liability, which allow a third-party beneficiary or other foreseeable user to sue the seller of a defective product." BLACK'S LAW DICTIONARY (9th Ed.).
[10] *Moransais* at 983-84.
[11] *Id.* at 981 (citing *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238 (Fla. 1996)).
[12] *Id.* at 983.
[13] *Id.*
[14] *Id.*
[15] *Witt v. La Gorce Country Club, Inc.*, 35 So. 3d 1053 (Fla. 3d DCA 2010).

contract. The reverse osmosis system failed after numerous technical problems during the design and building of the system. The plaintiff then filed suit.[16]

The court relied on the holding in *Moransais*, noting that, as a professional geologist, Witt was specifically subject to personal liability for negligence, misconduct, or wrongful acts under s. 492.111, F.S. Consequently, the court rejected the application of the economic loss rule to a professional malpractice claim against a licensed professional geologist.[17]

In effect, the *Witt* decision is an exception to the rule, as expressed in *Florida Power and Light Company v. Mid-Valley*, that third-party beneficiaries of a contract are entitled protection of a liability limitation clause in a contract.[18] Under *Witt*, professionals are not entitled to that protection. In refusing to recognize the contract's liability limitation and to apply the economic loss rule to limit Witt's liability, the court noted that "claims of professional negligence operate outside of the contract."[19]

Engineers

Professional engineers are regulated by the Board of Professional Engineers within the Department of Business and Professional Regulation (department), which enforces and administers the provisions of ch. 471, F.S. Existing law provides the following education and experience requirements for a person to qualify to take the examination for licensure as an engineer:

- Graduating from an approved engineering curriculum of 4 years or more in a school, college, or university which has been approved by the board and has a record of 4 years of active engineering experience of a character indicating the competence to be in responsible charge of engineering;
- Graduating from an approved engineering technology curriculum of 4 years or more in a school, college, or university within the State University System, having been enrolled or having graduated prior to July 1, 1979, and having had a record of 4 years of active engineering experience of a character indicating competence to be in responsible charge of engineering; or
- Having, in lieu of the education and experience requirements, 10 years or more of active engineering work of a character indicating that the applicant is competent to be placed in responsible charge of engineering. This provision does not apply unless the person notified the department before July 1, 1984, that she or he would be engaged in such work on July 1, 1981.[20]

[16] The claims against Gerald M. Witt, the defendant professional geologist, and his codefendant corporations included: (1) fraud in the inducement against codefendant ITT Industries, Inc. (ITT); (2) aiding and abetting fraud in the inducement by Witt and his company Gerald M. Witt and Associates, Inc. (GMWA); (3) violation of the Florida Deceptive and Unfair Trade Practices Act in ss. 501.201-501.213, F.S., by ITT and GMWA; (4) professional malpractice by Witt and GMWA; and (5) breach of the contract by GMWA. *Witt* at 1037-1038.
[17] *Id*.
[18] *Florida Power and Light Company v. Mid-Valley, Inc.*, 763 F.2d 1316 (11th Cir. 1985).
[19] *Witt* at 1039.
[20] Section 471.013(1), F.S.

Engineer Liability

Licensed engineers may practice through a business organization, including a partnership, corporation, or other legal entity offering professional services.[21] Current law establishes the liability of engineers when practicing through a business organization, including the liability of partners in a partnership and of the business organization's officers, agents, or employees for negligence, misconduct, or wrongful acts.[22] Section 471.023(3), F.S., provides that the "fact that a licensed engineer practices through a business organization does not relieve the licensee from personal liability for negligence, misconduct, or wrongful acts committed by him or her." With regard to the extent of a licensed engineer's liability for his or her own negligence, misconduct, or wrongful acts while employed by a business organization, s. 471.023(3), F.S., also provides that:

> any officer, agent, or employee of a business organization other than a partnership shall be personally liable and accountable only for negligent acts, wrongful acts, or misconduct committed by him or her or committed by any person under his or her direct supervision and control, while rendering professional services on behalf of the business organization.

Partnerships and all partners are also jointly and severally liable for the negligence, misconduct, or wrongful acts committed by their agents, employees, or partners while acting in a professional capacity.[23] A business organization is liable up to the full value of its property for any negligent acts, wrongful acts, or misconduct committed by any of its officers, agents, or employees while they are engaged on its behalf in the rendering of professional services.[24]

Surveyors and Mappers

Surveyors and mappers are regulated by the Board of Professional Surveyors and Mappers within the Department of Agriculture and Consumer Services, which enforces and administers ch. 472, F.S.[25] Existing law provides the following education and experience requirements for a person to qualify to take the examination for licensure as a surveyor and mapper:

- Receiving a degree in surveying and mapping of 4 years or more in a surveying and mapping degree program from a college or university recognized by the board and having a specific experience record of 4 or more years as a subordinate to a professional surveyor and mapper in the active practice of surveying and mapping, which experience is of a nature indicating that the applicant was in responsible charge of the accuracy and correctness of the surveying and mapping work performed.
- Being a graduate of a 4 year course of study, other than in surveying and mapping, at an accredited college or university and having a specific experience record of 6 or more years as a subordinate to a registered surveyor and mapper in the active practice of surveying and

[21] Section 471.023, F.S.
[22] *Id.*
[23] Section 471.023(3), F.S.
[24] *Id.*
[25] The regulation of surveyors and mappers was transferred from the Department of Business and Professional Regulation to the Department of Agriculture and Consumer Services by ch. 2009-66, L.O.F.

> mapping, 5 years of which are of a nature indicating that the applicant was in responsible charge of the accuracy and correctness of the surveying and mapping work performed.[26]

Surveyors and Mappers Liability

Licensed surveyors and mappers may practice through a corporation or partnership. Current law establishes the liability of surveyors and mappers who practice through a corporation or partnership.[27] "The fact that any registered surveyor and mapper practices through a corporation or partnership shall not relieve the registrant from personal liability for negligence, misconduct, or wrongful acts committed by him or her."[28]

In regard to the extent of a licensed mapper and surveyor's liability for his or her own negligence, misconduct, or wrongful acts while employed by a business organization, s. 472.021(3), F.S., also provides that:

> any officer, agent, or employee of a business organization other than a partnership shall be personally liable and accountable only for negligent acts, wrongful acts, or misconduct committed by him or her or committed by any person under his or her direct supervision and control while rendering professional services on behalf of the business organization.

Partnerships and all partners are also jointly and severally liable for the negligence, misconduct, or wrongful acts committed by their agents, employees, or partners while acting in a professional capacity.[29] A business organization is liable up to the full value of its property for any negligent acts, wrongful acts, or misconduct committed by any of its officers, agents, or employees while they are engaged on its behalf in the rendering of professional services.[30]

Architects and Interior Designers

Architects and interior designers are regulated by the Board of Architecture and Interior Design within the Department of Business and Professional Regulation, which enforces and administers the provisions of part I of ch. 481, F.S. Existing law provides the following education and experience requirements for a person to qualify to take the examination for licensure as an architect:

- Graduating from a school or college of architecture accredited by the National Architectural Accreditation Board, or from an approved architectural curriculum at an unaccredited school or college of architecture approved by the board; and
- Completing one year of internship experience.[31]

[26] Section 472.013(2), F.S.
[27] Section 472.021(3), F.S.
[28] *Id*.
[29] *Id.*
[30] *Id*.
[31] Section 481.209(1), F.S.

Current law provides the following education and experience requirements for a person to qualify to take the examination for licensure as an interior designer:

- Graduating from a board-approved interior design program of 5 years or more and completing 1 year of diversified interior design experience;
- Graduating from a board-approved interior design program of 4 years or more and completing 2 years of diversified interior design experience;
- Completing at least 3 years of a board-approved interior design curriculum and completing 3 years of diversified interior design experience; or
- Graduating from an interior design program of at least 2 years and completing 4 years of diversified interior design experience.[32]

Architects and Interior Designers Liability

Licensees may offer architecture and interior design services through a corporation, limited liability company, or partnership.[33] The corporation, limited liability company, or partnership is not relieved of responsibility for the conduct or acts of its agents, employees, or officers.[34]

With regard to the extent of a licensed architect's or interior designer's personal liability, s. 481.219(11), F.S., also provides that:

> the architect who signs and seals the construction documents and instruments of service shall be liable for the professional services performed, and the interior designer who signs and seals the interior design drawings, plans, or specifications shall be liable for the professional services performed.

Corporations, limited liability companies, and partnerships are not relieved of responsibility for the conduct or acts of their agents, employees, or officers.[35]

Landscape Architects

Landscape architects are regulated by the Board of Landscape Architecture within the Department of Business and Professional Regulation, which enforces and administers the provisions of part II of ch. 481, F.S. Existing law provides the following education and experience requirements for a person to qualify to take the examination for licensure as a landscape architect:

- Completing a board-approved professional degree program in landscape architecture; or
- Having 6 years of actual practical experience in landscape architectural work of a grade and character satisfactory to the board.[36]

[32] Section 481.209(2), F.S.
[33] Section 481.219, F.S.
[34] Section 481.219(11), F.S.
[35] *Id.*
[36] Section 481.309(1), F.S.

Practicing landscape architecture through a corporation or partnership does not relieve any landscape architect from personal liability for his or her professional acts.[37]

Landscape Architects Liability

Licensees may offer landscape architect services through a corporation or partnership.[38] Section 481.319(6), F.S., provides that:

> the fact that registered landscape architects practice landscape architecture through a corporation or partnership as provided in this section shall not relieve any landscape architect from personal liability for his or her professional acts.

III. Effect of Proposed Changes:

The bill creates s. 558.0035, F.S., which permits a design professional employed by a business entity or an agent of the entity to be immune from tort liability for damages occurring within the course and scope of the performance of a professional services contract if:

- The contract is made between the business entity and a claimant or another entity for the provision of services to the claimant;
- The contract does not name an individual employee or agent as a party to the contract;
- The contract prominently states that an individual employee or agent may not be held individually liable for negligence;
- The business entity maintains any professional liability insurance required under the contract; and
- Any damages are solely economic in nature and do not extent to persons or property not subject to the contract.

Because the bill permits the liability of a design professional to be limited by a contract between the design professional's employer and a client, the bill effectively overrules the holding of the Florida Supreme Court in *Witt v. La Gorce Country Club, Inc*.

The bill amends s. 558.002(3), F.S., to define the term "business entity" to mean "any corporation, limited liability company, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state."

Section 558.0035(4), F.S., requires that the business entity must maintain professional liability insurance if such is such insurance is required under the contract. However, the bill does not require that the business entity maintain professional liability insurance.

If a claimant enters into a contract with a business entity and the contract meets the conditions set forth in the bill, a claimant may be barred from potential tort claims against a design

[37] Section 481.319(6), F.S.
[38] Section 481.319, F.S.

professional employed by the business entity for recovery of economic damages resulting from a construction defect.[39]

The bill amends the current liability provisions in ss. 471.023(3), F.S. (engineers), 472.021(3), F.S. (surveyors and mappers), 481.219(11), F.S. (architects and interior designers), and 481.319(6), F.S. (landscape architects), to create an exception to provisions specifying the potential liability of a design professional.

The bill takes effect July 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Section 21, Article I, of the Florida Constitution provides the constitutional right of access to court. It provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

In *Johnson v. R. H. Donnelly Company*, the Florida Supreme Court held that the constitutional right of "access to courts guarantees the continuation of common law causes of action and those causes of action may be altered only if there is a reasonable substitution which protects the persons protected by the common law remedy."[40] In *Kluger v. White*, the Florida Supreme Court also held that the Legislature cannot abolish a common law cause of action "unless the Legislature can show an overpowering public

[39] A "construction defect" is defined in s. 558.02(5), F.S., as a deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of real property resulting from:

- Defective material, products, or components used in the construction or remodeling;
- A violation of the applicable codes in effect at the time of construction or remodeling which gives rise to the cause of action;
- A failure of the design of real property to meet the applicable professional standards of care at the time of governmental approval; or
- A failure to construct or remodel real property in accordance with accepted trade standards for good and workmanlike construction at the time of construction.

[40] *Johnson v. R. H. Donnelly Co.*, 402 So. 2d 518, 520 (Fla. 1981).

necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown."[41] However, this only applies to common law causes of action present before the adoption of the Florida Constitution in 1968.[42]

As noted in the Present Situation, in *Moransais v. Heathman*, the Florida Supreme Court stated that Florida's common law and statutory scheme recognizes tort claims against professionals for negligence based on the professional's violation of a duty of care to injured persons.[43]

As noted in the Present Situation, in *Witt v. La Gorce Country Club, Inc.*,[44] the Third District Court of Appeal held that a limitation of liability clause in the contract for the benefit of a third-party professional geologist was invalid and unenforceable as to a licensed professional. Consequently, the court refused to apply the economic loss rule to bar a negligence claim against the professional under the principle that claims of professional liability operate outside of the contract and cannot be waived.

By limiting negligence claims against licensed engineers, surveyors and mappers, architects, and landscape architects, the bill may implicate concerns relating to the constitutional right of access to courts to the extent that the bill limits causes of actions for professional negligence and professional malpractice. However, the effect of the bill is to not bar such claims in all instances. It permits a claimant, as defined in s. 558.02(3), F.S., and a business entity, as defined in the bill, to waive by contract professional liability of the business entity's employees and agents. In effect, the bill would reject the holding in *Witt*.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill limits the tort claims against a business entity's employees and agents, including licensed engineers, surveyors and mappers, architects, and landscape architects (design professionals). The design professionals affected by the bill may experience lower costs for professional liability insurance and may charge lower prices to their customers for their professional services as a consequence of the liability limitations that may be provided in a contract.

Parties to a contract who experience an economic loss that may be attributable to the professional negligence or professional malpractice of a design professional or by an employee or agent of a business entity may be limited to the remedies available under

[41] *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).
[42] *Id.*
[43] *Moransais v. Heathman*, 744 So. 2d 973, 975, 976 (Fla. 1999).
[44] *Witt* at 1039.

contract law, e.g., they may be barred from claims for negligence that resulted solely in economic harm to the extent that the contract does not authorize such claims.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

Section 1 of the bill defines the term "business entity" for the purposes of ch. 558, F.S. That term, however, is not currently used in the chapter and will appear only in s. 558.0035, F.S., which is created by the bill. For clarity, the Legislature may wish to move the definition to s. 558.0035, F.S., and limit its application to that section.

Line 41 of the bill refers to "this act." For clarity, the Legislature may wish to revise the bill to refer to this "section." The reference to "this act" could be interpreted to mean the Law of Florida in which the bill is codified upon becoming a law.

The apparent intent of s. 558.0035, F.S., is to allow design professionals to limit their individual liability for professional negligence by contract. However, the term design professional is not used in the lead-in language for the section. For clarity, the Legislature may wish to restructure s. 558.0035, F.S., to refer to design professionals in the lead-in language of s. 558.0035, F.S.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.