ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

FLAGSTAFF AFFORDABLE HOUSING LIMITED PARTNERSHIP
v. DESIGN ALLIANCE, INC.
CV-09-0117-PR

PARTIES AND COUNSEL:

Petitioner: Design Alliance, Inc., represented by Denise J. Wachholz, of Renaud Cook Drury Mesaros, P.A.

Respondent: Flagstaff Affordable Housing Limited Partnership, represented by Robert A. Royal and Chad A. Hester, of Tiffany & Bosco, P.A.

FACTS:

Design Alliance ("Architect") is an architectural firm licensed to perform professional architectural services. On September 8, 1995, Flagstaff Affordable Housing Limited Partnership ("Owner") entered into a contract with Architect for the design of Mountainside Village Apartments in Flagstaff, Arizona. Architect provided Owner with plans, specifications, and drawings. The apartments were constructed in accordance with these plans. Construction was completed in 1996.

On August 26, 2004, the U.S. Department of Housing and Urban Development filed a complaint against Owner for housing discrimination, claiming that the design and construction of the apartments violated the federal Fair Housing Design Construction requirements of 24 C.F.R. 100.205, concerning access and certain physical characteristics of the interiors. Owner was forced to incur substantial expense to remedy the design deficiencies.

On April 7, 2006, Owner filed a complaint for breach of contract and negligence against Architect. (Claims filed against the Builder, which were dismissed for lack of prosecution, are not at issue in this case.) Since no personal injury or property damage had occurred, only economic losses were claimed by Owner.

Subsequently, Owner acquiesced in Architect's motion to dismiss the breach of contract claim based on A.R.S. §12-552, which provides that "[n]o action…based in contract may be instituted or maintained against a person who…performs or furnishes the design…or construction …of an improvement to real property more than eight years after substantial completion of the improvement to real property."

With respect to the only remaining claim against Architect, the professional negligence claim, Architect had argued in a motion to dismiss under Rule 12(b)(6), Arizona Rules of Civil Procedure, that the so-called "economic loss doctrine" was applicable, precluding the claim. In its

response, Owner had argued that the economic loss doctrine did not apply to professional negligence claims.

The trial court granted Architect's Motion to Dismiss, finding that the economic loss doctrine barred professional negligence claims for purely economic damages. The trial court ruled:

> Plaintiff relies on *Donnelly Construction Company v. Obert/Hunt/Gilleland,* 139 Ariz. 184, 677 P. 2d 1292 (1984) and *Smith v. Anderson L.L.P.,* 175 F. Supp. 2d 1180 (D. Ariz. 2001) for its argument that professional negligence claims between contracting parties are not barred by the economic loss rule …. Here, the parties were both parties to the contract and, therefore, *Donnelly's* -reasoning and allowance of a claim based in negligence does not apply.
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> Judge Rosenblatt's … decision in *Wojtunik v. Kealy,* 394 F. Supp. 2d 1149 (D. Ariz. 2005) is more persuasive, even though it is based on a claim of negligent misrepresentation, not professional negligence….
>
> Plaintiff attempts to distinguish its professional negligence claim from a claim of negligent misrepresentation and relies on the "special relationship between the parties" to support its position that a professional negligence claim is an exception to the economic loss rule. The Court is not so persuaded and finds that plaintiff's claim is barred.

The Court of Appeals reversed. Reviewing the legal question presented *de novo* as required by precedent, the Appeals Court determined that professional negligence claims against design professionals are not barred by the economic loss doctrine because they arise from duties imposed by law upon design professionals "to use ordinary skill, care, and diligence in rendering their professional services, and this duty arises out of tort, not contract."

Architect petitioned for review. The Arizona Supreme Court granted the Petition for Review on September 22, 2009.

ISSUES:

Did the Court of Appeals err in determining that the "economic loss rule" did not bar the project owner's tort claim for costs related to alleged FHA violations, reasoning that an architect's duties with respect to design are not contractual in nature?