

## The Saiber Construction Law Column: December 2024

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*Source: MetroBuilders' Construction Law Column*

The legal concept of “privity of contract” is a common law principle which provides that only parties directly involved in a contract can enforce its terms or be held liable for its obligations. This means that third parties generally cannot enforce a contract, even if they were intended to benefit from it. A court of appeal in California recently held that a geotechnical company could be held liable to a homeowner even though the company’s contract to provide geotechnical services was with the general contractor and not the homeowner.

In *Lynch v. Peter & Associates etc.*, homeowners hired a general contractor to perform home improvement construction, including an addition on their residential property. The general contractor engaged Peter & Associates (“Peter”) to perform a geotechnical inspection of the soil at a footing trench it had excavated for the work. Peter conducted a visual inspection of the trench and used a three-foot probe to check the feel of the soil before issuing a report to both the contractor and the homeowners which stated that the soils were geotechnically acceptable and suitable for the intended use of supporting the addition to the plaintiffs’ home. Based on the report, the general contractor poured the footing for the project, but the soil proved inadequate, causing the footing to collapse and damaging the plaintiffs’ home. Plaintiffs sued various parties, including Peter for its professional negligence. Peter moved to dismiss the action against it, claiming, among other things, that it had no contract with plaintiffs.

The appeals court rejected the geotechnical company’s claim. The court recognized that historically there had been no liability for negligence committed while performing a contract in the absence of privity, but noted that courts had more recently permitted plaintiffs not in privity to recover damages in situations involving the negligent performance of a contract. In *Lynch*, the California court agreed that there was no privity between plaintiffs and Peter, but the court also found that Peter knew its geotechnical services would directly impact the plaintiffs’ home and, in addition, Peter’s report was addressed to the homeowners. The court concluded that the Peter firm also knew that its agreement with the general contractor was for the benefit of the homeowners. Accordingly, the appeals court ruled that the homeowners should be permitted to show at trial that Peter failed to perform its geotechnical services with the skill expected of a professional in its position.

Similarly, it is well-settled in New Jersey that there is no privity of contract defense to a claim of negligence. Consequently, contractors should understand that if they do something negligently in the performance of a contract which causes damage to a third party, the contractor could be held liable for the third-party’s damages.

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Each issue's Saiber Construction Law Column will discuss a recent decision by New Jersey courts or, like here, courts from other states which may be of interest to people in the construction industry.

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