

SUMMARY OF *MARINO V. DWYER-BERRY CONSTRUCTION CORP.*

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by

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Note: The principles discussed may not apply to all states. The reader is encouraged to research the law in their own state.

An engineer prepared a subdivision plan that erroneously showed that soil conditions would support a septic system. The discovery of the error sometime later resulted in a permit for house construction being revoked. The lot owner sued the engineer for breach of contract alleging they were a third-party beneficiary of an agreement between the engineer and the developer. The engineer made a motion to dismiss claiming there was no privity with the lot owner and the lot owner was not a third party beneficiary. The motion to dismiss was rejected by the trial court. The engineer appealed the trial court's decision. The appellate court reversed the trial court's decision and held the cause of action for breach of contract should be dismissed. The appellate court in reaching their decision stated:

1. A subsequent lot owner could not bring a breach of contract action against a practitioner since the subsequent lot owner was not a party to the terms of the contract, was not contemplated in the contractual arrangement between the engineer and developer, and was not intended to benefit from the contract.
2. The lot owner and engineer had no privity between each other since there was no contract or agreement between the lot owner and the engineer.

When applying these points to a survey practice, the practitioner should consider the following:

1. As a general rule, a claim for breach of contract can only arise between the parties forming the contract (in privity with each other). An exception to this rule arises where the purpose for the contract was to benefit a third party (e.g. insurance policy) and that party is named or otherwise clearly identified in the contract.

Note: Another option that was not mentioned would have been for the lot owner to

obtain a “chose in action” from the developer and sue the engineer in the developer’s stead.

2. The “privity of contract” defense has been discussed extensively in surveying articles because the defense has been rejected in litigation involving the tort of negligent misrepresentation. However, privity of contract continues to be a valid defense for breach of contract actions.