

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

DHI Communities Construction of )  
Delaware, LLC, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
Pennoni Associates, Inc., John Haupt, )  
and Kevin Ellis, )  
 )  
Defendants. )  
 )

C.A. No: S24C-02-035 MHC

**ORDER**

Submitted: March 31, 2026

Decided: June 29, 2026

*Upon Consideration of Plaintiff’s Motion for Summary Judgment – DENIED and  
Defendants’ Motion for Summary Judgment – PARTIALLY GRANTED*

Sarah B. Cole, Esquire, Marshall Dennehey, P.C., *Attorney for the Plaintiff*

Andrea Brooks, Esquire, and Matthew C. Conover, Esquire Wilks Law, LLC,  
*Attorney for the Defendants*

**CONNER, J**

## INTRODUCTION

Before the Court is DHI Communities Construction of Delaware, LLC's ("Plaintiff") and Pennoni Associates, Inc. ("Pennoni"), John Haupt ("Haupt"), and Kevin Ellis' ("Ellis") (collectively, "Defendants") cross Motions for Summary Judgment. For the reasons set forth hereinafter, Plaintiff's Motion for Summary Judgment is denied, and Defendants' Motion for Summary Judgment is partially granted.

## STATEMENT OF FACTS

Plaintiff is the developer of Tupelo Sands, an apartment complex under construction at or near the intersection of Roxana Road and Waters Edge Way in Millville, Delaware ("Tupelo Sands").<sup>1</sup> On or about September 13, 2022, Plaintiff entered into an agreement with Pennoni for professional services (the "Agreement"). Under the Agreement, Pennoni was to perform construction staking and surveying services for the construction of Tupelo Sands.<sup>2</sup>

Pennoni began to work on the project in September and/or October of 2022. Pennoni employed Ellis, an unlicensed land surveyor, to perform the survey work under the supervision of Haupt, a professional land surveyor.<sup>3</sup> Around October

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<sup>1</sup> Compl., D.I. 1, ¶ 7.

<sup>2</sup> *Id.* ¶ 8.

<sup>3</sup> *Id.* ¶ 28.

2023, Plaintiff and/or its subcontractors had difficulty connecting the roadway in Tupelo Sands to the public roadway, Roxanna Road.<sup>4</sup> Plaintiff learned that this issue was due to a difference in elevation, or vertical datum difference, from the plans.<sup>5</sup> As a result, the Delaware Department of Transportation delayed approval of certain phases of construction, which allegedly caused Plaintiff to lose time and money on the project.<sup>6</sup>

Plaintiff alleges that the difference in elevation was caused by Pennoni staking the entire site too high.<sup>7</sup> The entire site had a vertical datum difference of 4 5/8”, which was too high according to the engineering benchmarks.<sup>8</sup> The vertical datum difference caused issues with drainage, accessibility, and construction.<sup>9</sup> Plaintiff also alleges that Building 6 was staked approximately 4” too low.<sup>10</sup> There was approximately an 8” variance in elevation between Building 6 and the rest of the site, causing issues with drainage, construction, and accessibility.<sup>11</sup>

In the Complaint, Plaintiff alleges: (1) breach of the Agreement against Pennoni; (2) negligence against Pennoni, Ellis, and Haupt; (3) breach of the implied

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<sup>4</sup> *Id.* ¶ 32.

<sup>5</sup> *Id.* ¶ 33.

<sup>6</sup> *Id.* ¶ 34-35.

<sup>7</sup> *Id.* ¶ 36.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* ¶ 37.

<sup>10</sup> *Id.* ¶ 38.

<sup>11</sup> *Id.* ¶ 39.

warranty of good quality and workmanship against Pennoni; and (4) professional malpractice against Pennoni, Ellis, and Haupt. Plaintiff requests compensatory and/or direct, consequential, and incidental damages, as well as attorneys' fees, interest, and costs of suit.

Defendants filed a Motion for Summary Judgment on February 27, 2026.<sup>12</sup> Defendants ask the Court to grant summary judgment on Plaintiff's negligence claim, professional malpractice claim, breach of implied warranty claim, consequential damages, and attorneys' fees. Plaintiff filed its Motion for Summary Judgment on February 27, 2026.<sup>13</sup> Plaintiff asks the Court to grant summary judgment on the issue of liability for all four claims. Defendants filed their response in opposition to Plaintiff's Motion for Summary Judgment on March 24, 2026.<sup>14</sup> Plaintiff filed its answering brief in opposition to Defendants' cross Motion for Summary Judgment on March 24, 2026.<sup>15</sup> Defendants filed a reply brief in support of the Motion for Summary Judgment on March 31, 2026.<sup>16</sup> Plaintiff filed its reply brief in support of its Motion for Summary Judgment on March 31, 2026.<sup>17</sup>

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<sup>12</sup> Defs.' Mot. for Summ. J., D.I. 36.

<sup>13</sup> Pl.'s Mot. for Summ. J., D.I. 37.

<sup>14</sup> Defs.' Resp. in Opp'n to Pl.'s Mot. for Summ. J., D.I. 42.

<sup>15</sup> Pl.'s Answ. Br. in Opp'n to Defs.' Mot. for Summ. J., D.I. 43.

<sup>16</sup> Defs.' Reply Br. in Supp. of Mot. for Summ. J., D.I. 45.

<sup>17</sup> Pl.'s Reply Br. in Supp. of Mot. for Summ. J., D.I. 47.

## STANDARD OF REVIEW

Under Delaware Superior Court Civil Rule 56, a party is entitled to summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.<sup>18</sup> If the moving party satisfies the initial burden, then the burden of proof shifts to the nonmoving party to establish the existence of genuine issues of material facts.<sup>19</sup> The motion will be viewed in the light most favorable to the non-moving party. “[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.”<sup>20</sup> “If the evidence is *merely colorable, or is not significantly probative*, summary judgment may be granted.”<sup>21</sup>

## DISCUSSION

### **I. Defendants’ Motion for Summary Judgment on Plaintiff’s Negligence Claim and Professional Malpractice Claim is Granted, Therefore, Plaintiff’s Motion for Summary Judgment on the Negligence Claim and Professional Malpractice Claim is Denied.**

Defendants and Plaintiff have filed separate motions for summary judgment on Plaintiff’s claims against Defendants for negligence and professional malpractice. For the reasons stated hereinafter, the Court grants Defendants’ Motion for Summary

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<sup>18</sup> Super. Ct. Civ. R. 56(c).

<sup>19</sup> *Brown v. Dollar Tree Stores, Inc.*, 2009 WL 5177162, at \*2 (Del. Super. Ct. 2009).

<sup>20</sup> *Health Sols. Network, LLC v. Grigorov*, 2011 WL 443996, at \*2 (Del. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)).

<sup>21</sup> *Id.* at 250-51.

Judgment on the negligence and professional malpractice claims and therefore, denies Plaintiff's cross Motion.

Generally, tort claims based on purely economic damages are barred by the economic loss doctrine. The economic loss doctrine "is a judicially created doctrine that prohibits recovery in tort where a product has damaged only itself (i.e., has not caused personal injury or damage to other property) and, the only losses suffered are economic in nature."<sup>22</sup> Economic loss is defined as "any monetary loss[ ], costs of repair or replacement, loss of employment, loss of business or employment opportunities, loss of good will, and diminution in value."<sup>23</sup> The economic loss rule "prohibits certain claims in tort where overlapping claims based in contract adequately address the injury alleged."<sup>24</sup> Contract law provides a "better" and "more specific" remedy than tort law.<sup>25</sup> "The economic loss rule is especially suited to situations where privity of contract exists."<sup>26</sup> Delaware courts have found that there is no reason "to extend tort law into areas that can be adequately governed by contract law."<sup>27</sup> "[E]conomic loss 'is essentially the failure of the purchaser to receive the benefit of its bargain-traditionally the core concern of contract law.'"<sup>28</sup>

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<sup>22</sup> *Brasby v. Morris*, 2007 WL 949485, at \*6 (Del. Super. Ct. 2007).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at \*7.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

Plaintiff argues that the economic loss doctrine does not apply to the present case because the claim falls under an exception outlined in the Restatement (Second) of Torts § 552.

*A. Plaintiff's negligence claim does not fall under an exception of the economic loss doctrine.*

Plaintiff argues that it may bring its negligence claim against Defendants because it falls under an exception of the economic loss doctrine. The Restatement (Second) of Torts § 552, which was adopted by this Court, states the following:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.<sup>29</sup>

Delaware courts apply a narrow and strict construction of § 552. First, “the plaintiff must establish that the defendant supplied the information to the plaintiff for use in business transactions with third parties.”<sup>30</sup> Then, the plaintiff must establish that “the defendant is in the business of supplying information.”<sup>31</sup> “To determine whether a defendant is in the business of supplying information, a court must conduct a case-specific inquiry, looking to the nature of the information and its

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<sup>29</sup> Restatement (Second) of Torts § 552(1) (1977).

<sup>30</sup> *Christiana Marine Serv. Corp. v. Texaco Fuel & Marine Mktg.*, 2002 WL 1335360, at \*6 (Del. Super. Ct. 2002).

<sup>31</sup> *Id.*

relationship to the kind of business conducted.”<sup>32</sup> A defendant is in the business of supplying information when “information is the end and aim product of a defendant's work.”<sup>33</sup> However, when the “information supplied is merely ancillary to the sale of a product or service . . . defendant will not be found to be in the business of supplying information.”<sup>34</sup>

In *Guardian Const. Co. v. Tetra Richardson, Inc.*, the plaintiffs brought a negligence claim against the defendant for negligent preparation of project plans and specifications, and negligent misrepresentation of material information that was relied upon by the plaintiffs when calculating construction bids.<sup>35</sup> The plaintiffs did not have a direct contractual relationship with the defendant.<sup>36</sup> After beginning the project, the plaintiffs discovered that the tidal heights and project benchmarks were miscalculated. The issue before the Court was whether the plaintiffs could recover purely economic losses under their negligence claim without privity of contract with the defendant. The Court applied § 552, and found that at the time the defendant prepared the plans and specifications for the project, it knew that the information would be supplied to and relied upon by project bidders.<sup>37</sup> The Court found that the

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<sup>32</sup> *Kuhn Const. Co. v. Ocean & Coastal Consultants, Inc.*, 844 F. Supp. 2d 519, 527 (D. Del. 2012).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Guardian Const. Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378, 1381 (Del. Super. Ct. 1990).

<sup>36</sup> *Id.* at 1380.

<sup>37</sup> *Id.* at 1386.

“information negligently supplied was not an indirect or collateral consequence . . . it was the end and aim of the transaction.”<sup>38</sup> Therefore, the Court found that the plaintiff could seek purely economic damages for its negligence claims.

In the case, *Kuhn Const. Co. v. Ocean and Coastal Consultants, Inc.*, the defendant was hired by a third party to prepare bid documents in anticipation of contractors bidding on a project.<sup>39</sup> The defendant prepared the bid documents, which were relied upon by the plaintiff when making its bid. The plaintiff was hired to be the general contractor on the project and the defendant was hired to assist with the construction. The plaintiff brought a negligent misrepresentation claim against the defendant because there were material changes to the bid documents, undisclosed subsurface conditions, and welding issues that were misrepresented. The Court held that “defendants who produce plans and drawings for a construction project are not in the business of supplying information since the information they provide is ancillary to the sale of their finished product.”<sup>40</sup> The Court distinguished the facts from *Guardian*, stating that the *Kuhn* defendant, unlike the *Guardian* defendant, remained involved in the project beyond the bidding phase of the construction project.<sup>41</sup> Therefore, the exception did not apply.

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<sup>38</sup> *Id.*

<sup>39</sup> *Kuhn Const. Co.*, 844 F. Supp. 2d at 523.

<sup>40</sup> *Id.* at 527.

<sup>41</sup> *Id.* at 529.

Additionally, in *State Dept. of Transp. v. Figg Bridge Engineers, Inc.*, the Court declined to extend § 552 to a negligence claim involving alleged misinformation in reports that were intended to provide information for the reconstruction of a bridge.<sup>42</sup> The Court found that the first element of § 552 was not met because the plaintiff could not prove that it relied on the defendant's reports to pursue a business transaction with a third party. The plaintiff had already signed and executed a contract with the third party prior to defendant's reports.<sup>43</sup> The Court found that "[t]he reports were not intended to entice or persuade but to provide accurate information for reconstruction of the bridge."<sup>44</sup> Therefore, § 552 did not apply.

More recently, in *Wohlsen Construction Company v. Berkel & Company Contractors*, the Court found that § 552 did not apply.<sup>45</sup> The plaintiff and the defendant entered into an agreement to build a parking garage's foundation.<sup>46</sup> The defendant performed surveying work. While the construction was ongoing, the plaintiff discovered a discrepancy between the garage and the original survey

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<sup>42</sup> *State Dep't of Transp. v. Figg Bridge Eng'rs, Inc.*, 2011 WL 5593163, at \*5 (Del. Super. Ct. 2011).

<sup>43</sup> *Id.* at \*5.

<sup>44</sup> *Id.* at \*4.

<sup>45</sup> *Wohlsen Constr. Co. v. Berkel & Co. Contractors*, 2025 WL 2306140, at \*3 (Del. Super. Ct. 2025).

<sup>46</sup> *Id.* at \*1.

drawings.<sup>47</sup> The plaintiff filed suit against the defendant for breach of contract and professional negligence. However, even though the defendant performed surveying services for the project, the defendant was also “doing hands-on physical deep foundation construction itself based off the surveys.”<sup>48</sup> The plaintiff acknowledged that the issues did not arise from the survey. Instead, the plaintiff alleged that the defendant’s construction work was not in accordance with the survey.<sup>49</sup> The Court found that the defendant was not an “information supplier” under § 552, therefore, the professional negligence claim was barred by the economic loss doctrine.<sup>50</sup>

In its response in opposition to Defendants’ Motion for Summary Judgment, Plaintiff argues that the elements under § 552 have been established. Plaintiff argues the first element, that Defendant supplied information to Plaintiff for the use in business transactions with third parties, is satisfied. Plaintiff used Pennoni’s vertical control calculations in its dealings with third parties. Next, Plaintiff argues the second element, that Defendant is in the business of supplying information, is established because Delaware courts have consistently held that land surveyors are information providers. Defendants’ calculations were the “end and aim” of their duties. Defendants, on the other hand, argue that § 552 does not apply because the

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at \*3.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at \*4.

parties are in privity of contract. Furthermore, Defendants argue that they are not “information providers” under § 552.

With the aforementioned cases’ guiding principles in mind, it is clear to the Court that the § 552 exception does not apply to the present case. First, Plaintiff has not established the first element. While Plaintiff asserts that it relied on Defendants’ vertical control calculations in its dealings with third parties, it does not allege that it relied on Defendants’ findings for business transactions with a third party. Under § 552, the defendant must supply the information to the plaintiff for use in a business transaction with a third party, for example, information that is to be used by subcontractors to submit a bid for a project. Instead, Plaintiff argues that it, as well as other third parties hired by Plaintiff, relied upon the calculations during construction. The information was not provided to Plaintiff for the purpose of entering a business transaction.

Furthermore, Plaintiff has failed to establish the second element of § 552. Defendants provided construction stake out services for the construction of Tupelo Sands. The “end and aim” of Defendants’ services was to assist with the construction of Tupelo Sands. Similar to *Kuhn*, Defendants were involved in the construction of the building beyond the bidding phase. In the present case, Defendants were required to “visit the site, calculate the vertical control using the benchmarks that DFB [Davis Bowen and Friedel Inc.] installed, and create stakes that DHI could use

when constructing each building.”<sup>51</sup> Information supplied by Defendants is “merely ancillary to the sale of a product or service,” which is providing construction stakeouts.<sup>52</sup>

Plaintiff argues that Delaware courts routinely find surveyors to be suppliers of information. While this is true, Delaware courts have also found that “[a] precise, case-specific inquiry is required to determine whether a particular enterprise is in the business of supplying information for the guidance of others in their business transactions.”<sup>53</sup> Even though Defendants provided surveying and staking services, the information supplied does not fall under the § 552 exception. Defendants provided a construction stakeout to assist in constructing Tupelo Sands. The information provided through the construction stakeout was not the “end and aim” of Defendants’ duties.

Plaintiff also argues that the negligence claim is not solely against Pennoni, but it is against Ellis and Haupt as well. However, this does not change the analysis. Ellis and Haupt were employed by Pennoni to provide services to Plaintiff. Ellis and Haupt do not have an independent obligation to Plaintiff outside of the Agreement.

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<sup>51</sup> Pl.’s Mot. for Summ. J., D.I. 37, at 3.

<sup>52</sup> *Kuhn Const. Co.*, 844 F. Supp. 2d at 527.

<sup>53</sup> *Christiana Marine Serv. Corp.*, 2002 WL 1335360, at \*6 (quoting *Rankow v. First Chicago Corp.*, 870 F.2d 356, 360 (7th Cir. 1989)).

For these reasons, Plaintiff's negligence claim is barred by the economic loss doctrine. Plaintiff seeks purely economic loss, the loss is not independent from a duty under the parties' contract, and § 552 does not apply. Therefore, Defendants' Motion for Summary Judgment on the negligence claim is granted, and Plaintiff's Motion for Summary Judgment on the negligence claim is denied.

*B. Plaintiff's professional malpractice claim is barred by the economic loss doctrine.*

Defendants' Motion for Summary Judgment on Plaintiff's professional negligence claim is granted, and therefore, Plaintiff's Motion for Summary Judgment is denied. As aforementioned, tort claims based solely on economic damages are generally barred by the economic loss doctrine.

The economic loss rule "prohibits certain claims in tort where overlapping claims based in contract adequately address the injury alleged." For the same reasons stated above, Plaintiff cannot assert a professional malpractice claim and a breach of contract claim based on the same conduct "in attempt to have two bites at the apple."<sup>54</sup>

Plaintiff brings professional negligence claims against Defendants, which stem from obligations under the Agreement. Section 2.8 of the Agreement sets forth the standard in which Defendants must perform the required tasks. Plaintiff has not

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<sup>54</sup> *HealthTrio, Inc. v. Margules*, 2007 WL 544156, at \*11 (Del. Super. Ct. 2007).

alleged that the professional negligence claims stem from an obligation outside of the contract. The economic loss doctrine prohibits a party from recovering in tort for economic losses which flow from the contract.<sup>55</sup> Plaintiff's professional malpractice claim and breach of contract claim arise from the same conduct. Additionally, similar to the negligence claim, Ellis and Haupt do not have duties to Plaintiff independent of Pennoni's duties under the Agreement.

For these reasons, Defendants' Motion for Summary Judgment on Plaintiff's professional malpractice claim is granted. Plaintiff's Motion for Summary Judgment on the professional malpractice claim is denied.

**II. Defendants' Motion for Summary Judgment on the Implied Warranty of Good Quality and Workmanship Claim Against Defendant Pennoni is Granted, Therefore, Plaintiff's Motion for Summary Judgment on this Claim is Denied.**

Plaintiff brings a breach of implied warranty of good quality and workmanship claim against Pennoni. In its Motion for Summary Judgment, Pennoni argues that the implied warranty of good quality and workmanship does not apply to the present case because Pennoni is not a builder. Plaintiff does not address this argument, but rather argues that Pennoni breached an express warranty outlined in section 2.8 of the Agreement.

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<sup>55</sup> *Edelstein v. Goldstein*, 2011 WL 721490, at \*7 (Del. Super. Ct. 2011).

Pennoni argues, and Plaintiff does not dispute, that the implied warranty of good quality and workmanship does not apply to the present case. Pennoni argues that it did not provide construction services, therefore, the warranty does not extend to its services. Additionally, Plaintiff is not a homebuyer and therefore is not an intended beneficiary of the warranty. Defendants recognize one case, *Casale Construction, LLC v. Best Stucco, LLC*, where a contractor was permitted to recover against a subcontractor for breach of this implied warranty.<sup>56</sup> The Court rejected the defendant’s argument that the implied warranty of good quality and workmanship “has never been applied” to contracts between contractors and subcontractors, and that it is limited to “persons in the business of selling homes to consumers.”<sup>57</sup> Even though all of the cases cited by the plaintiff involved those in the business of selling homes, “[n]one of the cases cited provide any language *limiting* this implied warranty *only* to those in the business of selling homes . . . .”<sup>58</sup> The Court relied upon *Malinak v. Kramer*, and noted that “there must be a construction contract or builder-customer relationship between the parties onto which such an implied warranty could bind.” However, the Court also held that it “[i]s not, at this juncture, prepared to rule that the implied warranty did not attach to [Defendants’] work

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<sup>56</sup> Defs.’ Reply Br. in Supp. of Mot. for Summ. J., D.I. 45, at 8 (citing *Casale Constr., LLC v. Best Stucco LLC*, 2014 WL 1316150 (Del. Super. Ct. 2014)).

<sup>57</sup> 2014 WL 1316150, at \*2.

<sup>58</sup> *Id.* at \*4.

merely because [Defendant] is being sued by Casale, rather than the underlying property owners, given, as stated above, the case *sub judice* arises from indemnification.”<sup>59</sup> The Court’s reasoning was dependent on the case arising from indemnification.

Pennoni argues that the implied warranty claim in *Casale* was not dismissed because the contractor sought reimbursement for money it had paid to the homebuyer.<sup>60</sup> The present case does not involve indemnification for a claim raised by homeowners. Plaintiff has not cited to any case law that would support its claim for implied warranty of good quality and workmanship against Pennoni. Instead, Plaintiff argues that it has a claim for breach of an express warranty against Pennoni.

Plaintiff argues that count III is sufficient to put Pennoni on notice of a claim for breach of an express warranty. However, the claim specifically states that it is against Pennoni for breach of the implied warranty of good quality and workmanship. Plaintiff argues that breach of an express warranty was adequately pled because the complaint states that “Pennoni explicitly and implicitly warranted that its work would be performed in a good, workmanlike manner and be fit for the intended purpose.”<sup>61</sup> In its reply brief in opposition to Defendants’ Motion, Plaintiff

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<sup>59</sup> *Id.* at n. 36.

<sup>60</sup> Defs.’ Reply Br. in Supp. of Mot. for Summ. J., D.I. 45, at 8.

<sup>61</sup> Compl., D.I. 1, ¶ 84.

argues that Pennoni created an express warranty under section 2.8 of the Agreement, which states:

While performing the Services, Professional shall act with reasonable care and competence and shall apply the technical knowledge and skill which are ordinarily applied by members of the licensure holder's profession which are practicing in good standing. Professional understands that Owner has relied upon this representation, without independent investigation, as a material inducement to enter into this Agreement. Professional represents and warrants that all Services will meet or exceed any applicable building code or other legal requirements of intended use of any Services Product of Professional. Professional shall secure and maintain all permits, licenses, and approvals necessary for or applicable to the performance of the Services hereunder.

Specifically, in its response, Plaintiff points to the sentence which states "all Services will meet or exceed any applicable building code or other legal requirements of intended use of any Services Product of Professional."<sup>62</sup> However, the Complaint does not put Defendant on notice of a breach of express warranty claim. The language of count III specifically states that it is for the implied warranty of good quality and workmanship. Merely stating that Defendant Pennoni "explicitly and implicitly warranted that its work would be performed in a good, workmanlike manner and be fit for the intended purpose" is not sufficient to put Defendant on notice of an express warranty claim based on section 2.8 of the Agreement.<sup>63</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

For these reasons, Defendants’ Motion for Summary Judgment on the breach of implied warranty claim is granted. Plaintiff does not dispute that it cannot bring a breach of implied warranty claim against Pennoni and instead argues a claim for breach of an express warranty, which Defendant Pennoni had no notice of.

### **III. Defendants’ Motion for Summary Judgment on Plaintiff’s Claim for Consequential Damages is Granted.**

Defendants’ Motion for Summary judgment on consequential damages is granted. “Consequential damages are those which are reasonably foreseeable, but which do not result directly from the act of a party; rather from the consequences of the act.”<sup>64</sup> In a breach of contract claim, “a plaintiff is entitled to compensation sufficient to place the non-breaching party in the same position as if the contract had been performed.”<sup>65</sup> A plaintiff may also recover incidental and consequential damages from the breach.<sup>66</sup> However, “[c]onsequential damages in the form of good will, lost future profits, and lost customers are not awarded in breach of contract actions . . . . Delaware courts have consistently found these damages to be speculative in nature, and; therefore, have barred recovery for them”<sup>67</sup> However,

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<sup>64</sup> *Murphy Marine Servs. of Delaware, Inc. v. GT USA Wilmington, LLC*, 2022 WL 4296495, at \*16 (Del. Ch. 2022).

<sup>65</sup> *Active Day OH, Inc. v. Wehr*, 2024 WL 3201167, at \*5 (Del. Super. Ct. 2024)(quoting *Devincentis v. Eur. Performance, Inc.*, 2012 WL 1646347, at \*3 (Del. Super. 2012)).

<sup>66</sup> *Id.*

<sup>67</sup> *JanCo FS 2, LLC v. ISS Facility Servs., Inc.*, 344 A.3d 1009, 1039 (Del. Super. Ct. 2025)(quoting *Crowell Corp. v. Himont USA, Inc.*, 1994 WL 762663, at \*3 (Del. Super. 1994) (citations omitted).

lost profits can be established by “concrete data of past profit history . . . .”<sup>68</sup> On a motion for summary judgment, “the non-movant need only present some credible evidence that supports a claim for damages.”<sup>69</sup> The Court “cannot resolve factual issues on a motion for summary judgment.”<sup>70</sup>

Defendants argue that summary judgment must be granted on the issue of consequential damages because Plaintiff has not produced documentation to support its claim. However, Plaintiff asserts that it produced 155 pages of documentary evidence, including invoices from Bunting & Murray, additional cost estimates from Davis Bowen & Friedel, email correspondence discussing remedial costs, and documents provided by Century Engineering.<sup>71</sup> Defendants argue that these documents support a claim for incidental damages, not consequential. Furthermore, in its response to Defendants’ interrogatories, Plaintiff alleges that it suffered \$521,916 in lost revenue and \$624,131 in carry costs. In response to Defendants’ argument that the damages are too speculative, Plaintiff argues that the jury is able to multiply how long the delay was, how many apartments could have been rented, and the price of rent for each apartment.<sup>72</sup>

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<sup>68</sup> *Active Day OH, Inc.*, 2024 WL 3201167, at \*5.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Pl.’s Resp. in Opp’n to Defs.’ Mot. for Summ. J., D.I. 43, at 18.

<sup>72</sup> *Id.* at 16.

The produced documents do not demonstrate evidence of consequential damages. Plaintiff does not provide evidence that supports a claim for consequential damages. While “mathematical certainty” is not required, Plaintiff asks the Court to allow the jury to calculate consequential damages based on fact testimony regarding the number of apartments affected, the duration of the remedial work, and the cost of rent of the apartments. This is entirely speculative. Plaintiff produces no documents supporting its lost profits claim and instead relies on the idea that every apartment would have been rented but for the breach. The Court has held that loss of future profits are not awarded in breach of contract actions because it is too speculative. The fact of consequential damages has not been taken out of the area of speculation.

There is no genuine issue of material fact regarding the claim for consequential damages because Plaintiff has not established damages with reasonable certainty. Plaintiff’s claim for consequential damages is speculative, which is disfavored in Delaware. For these reasons, Defendants’ Motion for Summary Judgment on consequential damages is granted.

**IV. Defendants’ Motion for Summary Judgment on Plaintiff’s Claim for Attorneys’ Fees is Denied.**

Defendants' Motion for Summary Judgment on attorney's fees is denied. There is a genuine issue of material fact as to whether section 8.1 of the Agreement requires Defendants to pay for Plaintiff's attorneys' fees.

Delaware follows the American Rule regarding attorneys' fees, which provides that "a litigant must, himself, defray the cost of being represented by counsel."<sup>73</sup> It is well-settled in Delaware that attorneys' fees are not recoverable, unless it falls under a limited exception, such as fees authorized by statute or contract, or if there is bad faith.<sup>74</sup> Plaintiff argues that section 8.1 of the Agreement contains an indemnification provision, which states that Pennoni would pay for Plaintiff's attorneys' fees and costs resulting from a breach of the Agreement. Defendants disagree and argue that the indemnification provision does not require Defendants to pay attorneys' fees. The contract provision excludes the word "defend" and does not create an obligation for Pennoni to indemnify Plaintiff for "loss of use."<sup>75</sup> The contract provision states:

**TO THE FULLEST EXTENT PERMITTED BY LAW, PROFESSIONAL [Pennoni Associates, Inc.] SHALL PROTECT, ~~DEFEND~~, INDEMNIFY, AND HOLD OWNER [DHI Communities Construction of Delaware, LLC] AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THESE ENTITIES' RESPECTIVE OFFICERS, DIRECTORS,**

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<sup>73</sup> *In re Delaware Pub. Schs. Litig.*, 312 A.3d 703, 715 (Del. 2024)(quoting *Dover Hist. Soc., Inc. v. City of Dover Plan. Comm'n*, 902 A.2d 1084, 1089 (Del. 2006)).

<sup>74</sup> *In re Delaware Pub. Schs. Litig.*, 312 A.3d 703, 716 (Del. 2024).

<sup>75</sup> Defs.' Reply Br. in Supp. of Mot. for Summ. J., D.I. 45, at 15.

PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY "INDEMNITEE"), FREE AND HARMLESS FROM AND AGAINST ~~ANY AND ALL~~ CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LOSSES OR LIABILITIES ~~OF EVERY KIND AND CHARACTER~~ (INCLUDING ALL COSTS THEREOF, REASONABLE SETTLEMENT AMOUNTS, REASONABLE ATTORNEYS' FEES AND INTEREST), WHETHER ASSERTED BY OWNER OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY PROFESSIONAL AND ITS CONSULTANTS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY, ~~INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO THE EXTENT,~~ ARISING OUT OF, OR IN CONNECTION WITH: (a) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF PROFESSIONAL SET FORTH IN THIS AGREEMENT; (b) THE SERVICES, AS DEFINED IN SECTION 1, INCLUDING BUT NOT LIMITED TO SERVICES PERFORMED OR TO BE PERFORMED BY PROFESSIONAL, OR ITS CONSULTANTS OF ANY TIER; OR (c) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF PROFESSIONAL OR ANY OF PROFESSIONAL'S AGENTS, EMPLOYEES, OR CONSULTANTS RELATED IN ANY WAY TO THE SERVICES, ~~REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE,~~ OR (d) ANY NEGLIGENT ACT OR OMISSION, OR ANY STRICT LIABILITY, OF INDEMNITEE RELATED IN ANY WAY TO THE SERVICES OR THE SELECTION NOR SUPERVISION OF PROFESSIONAL OR PROFESSIONAL'S AGENTS, EMPLOYEES, OR CONSULTANTS. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE PROFESSIONAL TO INDEMNIFY OR HOLD HARMLESS INDEMNITEE FOR DAMAGES ARISING FROM LIABILITY FOR BODILY INJURY OR DEATH TO PERSONS OR DAMAGE TO PROPERTY CAUSED PARTIALLY OR SOLELY BY, OR RESULTING PARTIALLY OR SOLELY FROM, OR ARISING

**PARTIALLY OR SOLELY OUT OF THE NEGLIGENCE OF INDEMNITEE.<sup>76</sup>**

The contract provision states that Pennoni will protect, indemnify, and hold Plaintiff free and harmless from lawsuits, whether asserted by Plaintiff or a third party, for “bodily or personal injury, death, or damage to or loss of tangible or intangible property” arising from a breach of an obligation or services performed by Pennoni. As aforementioned, the general rule in Delaware is that each party will bear its own costs for attorneys’ fees. However, it is well-settled that parties may contractually agree to pay attorneys’ fees. In this case, the parties dispute over whether this provision indemnifies Plaintiff of attorneys’ fees. Plaintiff’s reading of the contract provision is reasonable, and therefore, the claim for attorneys’ fees survives the Motion for Summary Judgment.

For these reasons, the Court finds that there is a genuine issue of material fact that precludes the Court from granting Defendants’ motion for summary judgment on attorneys’ fees.

**V. Plaintiff’s Motion for Summary Judgment on its Breach of Contract Claim is Denied.**

There are genuine issues of material facts that preclude Plaintiff from prevailing on its Motion for Summary Judgment on the breach of contract claim. Plaintiff argues that there is no genuine issue of material fact that Defendants

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<sup>76</sup> Compl., D.I. 1, Ex. 1, at 6.

breached the Agreement, and therefore, the only issue for the jury to decide is the amount in damages. Plaintiff brings three arguments before the Court in support of its Motion: (1) Pennoni failed to abide by the standard of care outlined in section 2.8 of the Agreement; (2) Pennoni failed to notify Plaintiff in writing of the supposed discrepancy in elevation; and (3) Pennoni had an unlicensed surveyor create the sewer as-built.

*A. There is a genuine issue of material fact as to whether Pennoni breached the Agreement by failing to abide by the standard of care in section 2.8, and whether Pennoni breached the agreement by allowing Defendant Ellis to create the sewer as-built.*

There is a genuine issue of material fact as to whether Pennoni breached the Agreement.

First, Plaintiff argues that Defendants failed to abide by the standard of care, as required by section 2.8 of the Agreement. Section 2.8 of the Agreement states the following:

~~Professional agrees to exercise the highest degree of professional care and act consistent with the highest professional standards with respect to all Services performed pursuant to the Agreement.~~ While performing the Services, Professional shall act with reasonable care and competence and shall apply the technical knowledge and skill which are ordinarily applied by members of the license holder's profession which are practicing in good standing. Professional understands that Owner has relied upon this representation, without independent investigation, as a material inducement to enter into this Agreement. Professional represents and warrants that all Services will meet or exceed any applicable building code or other legal requirements of intended use of any Services Product of Professional. ~~The standard of care for all professional services performed or furnished by Consultant~~

~~under this Agreement will be the skill and care used by members of the Consultant's profession practicing under similar circumstances at the same time and in same locality.~~ Professional shall secure and maintain all permits, licenses, and approvals necessary for or applicable to the performance of the Services hereunder.<sup>77</sup>

Pennoni argues that it did not breach section 2.8 of the Agreement because Defendants performed the work in accordance with the contract and professional regulations. There is a genuine issue of material fact as to whether Pennoni breached section 2.8 of the Agreement.

Plaintiff's expert, Gregory Moore, opined that Pennoni created the elevation error and failed to follow industry standards by utilizing GPS instrument for the entire stakeout services. Defendants failed to utilize the benchmarks provided in the design drawings, which was the standard of care. Furthermore, Mr. Moore opines that Haupt was professionally negligent in his duty as a professional surveyor by sealing three documents prepared by unlicensed professionals.

Defendants' expert, Scott Landis, was asked during his deposition if it was industry standard to only use a GPS base station, in which he replied that he did not think there was a specific standard as to what instrument to use.<sup>78</sup> He continued to testify that it only matters if the surveyor is comfortable with the results.<sup>79</sup> He also testified that if he observed a discrepancy such as the elevation discrepancy in the

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<sup>77</sup> Compl., D.I. 1, Ex. 1, at 3 § 2.8.

<sup>78</sup> Pl.'s Mot. for Summ. J., D.I. 37, Ex. 5, at 36:11-24 to 37:1-3.

<sup>79</sup> *Id.*

present case, he would notify the client of the issue, which he believed Ellis did.<sup>80</sup> Furthermore, Mr. Landis testified that it is typical for unlicensed workers to be on the site without a licensed professional surveyor.<sup>81</sup> Defendants' other expert, Michael Scott, also testified that it is entirely conventional for an unlicensed worker to work under a professional surveyor.<sup>82</sup>

The experts offer conflicting opinions on the standard of care and whether Pennoni breached the contract by utilizing a GPS base station and allowing Ellis to create the sewer as-built. These are questions of fact that must be decided by a jury, not on a motion for summary judgment.

*B. There is a genuine issue of material fact as to whether the contract requires Pennoni to notify Plaintiff in writing of any inconsistencies between the subcontract documents and discoveries in the field.*

Whether Defendants were required to notify Plaintiff in writing of any inconsistencies or errors is a genuine issue of material fact that precludes the Court from granting summary judgment. Plaintiff argues that Pennoni breached the Agreement by failing to notify Plaintiff of the discrepancies in writing. Defendants argue that Ellis notified Plaintiff via a phone call, which is in accordance with the Agreement. Both parties cite to different sections of the Agreement to support their argument.

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<sup>80</sup> *Id.* at 25:11-20.

<sup>81</sup> *Id.* at 31:4-15.

<sup>82</sup> Pl.'s Mot. for Summ. J., D.I. 37, Ex. 6, at 57:5-24.

In order to prevail on a motion for summary judgment, one party “must establish that [its] construction is the *only* reasonable interpretation.”<sup>83</sup> When both parties offer reasonable constructions, “‘even if one might appear more reasonable than the other,’ the Court ‘may, in its discretion, deny summary judgment [so that it may] ... inquire into or develop more thoroughly the facts at trial in order to clarify the law or its application.’”<sup>84</sup>

In the present case, Plaintiff references paragraph 3 of the Scope of Work section of the Agreement, which states, “Subcontractor shall notify, in writing, Contractor of any areas where ‘Industry Standard’ may deviate from what is shown in the Subcontract Documents prior to beginning effected work.”<sup>85</sup> Defendants reference paragraph 14 of the Scope of Work section of the Agreement, which states, “Subcontractor is responsible for cross referencing any drawings and notifying Contractor of any conflicts of errors.”<sup>86</sup> It is unclear whether the discrepancies found between the elevation in the construction plans and the elevation found in the field constitute an area where “industry standard” deviates from the subcontract documents. However, Plaintiff’s interpretation of the contract is reasonable because the elevations found in the field deviate from what was included in the subcontract

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<sup>83</sup> *AM Gen. Holdings LLC v. Renco Grp., Inc.*, 2017 WL 2167193, at \*2 (Del. Ch. 2017)(quoting *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007) (emphasis in original).

<sup>84</sup> *Id.* (quoting *In re Comverge, Inc. S'holders Litig.*, C.A. No. 7368–VCMR (Del. Ch. 2016) (citing *Alexander Indus., Inc. v. Hill*, 211 A.2d 917 (Del. 1965)).

<sup>85</sup> Defs.’ Reply. Br. in Supp. of Mot. for Summ. J., D.I. 45, Ex. A at 1.

<sup>86</sup> *Id.* at 2.

documents. Defendants' interpretation, though, is also reasonable. Defendants cite to a provision that requires Defendants to notify Plaintiff of any errors, but is silent as to whether the notice must be in writing. Therefore, both interpretations are reasonable at this stage in litigation.

It is undisputed that Ellis did not notify Plaintiff in writing of an inconsistency between the elevation on the plans and what was found in the field.<sup>87</sup> It is disputed, however, whether Ellis called Timothy Twigg, the on-site construction manager for Plaintiff, to inform him of the discrepancy between the elevation identified in the plans and the elevation discovered in the field.<sup>88</sup> Defendants assert that Ellis called Twigg to notify him of the discrepancies, and Twigg told Ellis to continue to work and use the elevations found in the field, not the elevations in the plans.<sup>89</sup> Defendants argue that Ellis followed the standard practice by notifying Twigg and following his orders.<sup>90</sup> Defendants argue that Twigg was Plaintiff's contact for the project, and by notifying Twigg of the discrepancy, Defendants' fulfilled the obligation under the Agreement. Twigg testified that Ellis did not notify him of any discrepancies, and had this conversation occurred, he would have advised Ellis to verify the three benchmarks, not to continue with the project.<sup>91</sup> Twigg testified that he informed DHI

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<sup>87</sup> Defs.' Mot. for Summ. J., D.I. 36, Ex. B, at 33:17-21.

<sup>88</sup> Defs.' Mot. for Summ. J., D.I. 36, Ex. D, at 72:12-25 to 73:1-21.

<sup>89</sup> *Id.* at 72:12-19.

<sup>90</sup> Pl.'s Mot. for Summ. J., D.I. 37, Ex. 5, at 66:4-24 to 67:1-13.

<sup>91</sup> Defs.' Mot. for Summ. J., D.I. 36, Ex. D, at 73:1-25.

of the error, not Defendants.<sup>92</sup> Plaintiff argues that Ellis should have contacted the design engineer or his supervisor.<sup>93</sup>

There is a genuine issue of material fact as to whether Defendants needed to notify Plaintiff of the discrepancies in writing, and whether Defendants notified Twigg of the discrepancy. Therefore, Plaintiff's Motion for summary judgment must be denied.

### CONCLUSION

For these reasons, the Court **DENIES** Plaintiff's Motion for Summary Judgment on the negligence claim, breach of implied warranty of good quality and workmanship claim, negligence claim, and professional negligence claim. The Court **GRANTS** Defendants' Motion for Summary Judgment on the negligence claim, professional negligence claim, and consequential damages. The Court denies Defendants' Motion for Summary Judgment on attorneys' fees.

**IT IS SO ORDERED.**

*/s/ Mark H. Conner*

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Mark H. Conner, Judge

oc: Prothonotary  
via File & Serve

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<sup>92</sup> *Id.* at 74:16-21.

<sup>93</sup> Pl.'s Reply Br. in Supp. of Mot. for Summ. J., D.I. 47, at 9.