

June 10, 2020

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Construction Law

Court of Appeals: Subcontractors Cannot Sue Each Other for Negligence

State Bar of Wisconsin

What happens when a subcontractor suffers an economic loss due to another subcontractor? Roy E. Wagner and Lauren A. Triebenbach discuss a recent court of appeals decision that says the economic loss doctrine bars negligence claims for solely economic losses sustained by one subcontractor as a result of another.

On April 22, 2020, the Court of Appeals District II issued an opinion in the case of *Mechanical Inc. v. Venture Electrical Contractors, Inc.*¹ This case, commenced in 2015, involved one subcontractor suing another for negligence, and is the latest in the line of Wisconsin cases extending the economic loss doctrine into the field of construction law. (The authors were attorneys for Mechanical Inc. throughout these proceedings.)

Background

The facts of this dispute are important to a complete understanding of how the Court's holding will impact Wisconsin contractors. Mechanical, Inc., (Mechanical) was the HVAC subcontractor to J.P. Cullen & Sons, Inc. (Cullen) on the \$36 million Great Lakes Research Laboratory addition to the University of Wisconsin-Milwaukee School of Freshwater Sciences (the Project).

During the Project, the electrical subcontractor, Venture Electrical Contractors, Inc. (Venture) engaged Mechanical to perform certain of its electrical work on the Project, including, but not limited to, Trimble™ locations and installation of concrete embeds for installation of supports for electrical conduit. For this work, Mechanical invoiced Venture a total of \$11,961.31. Venture never paid this invoice.

After the Project was completed, Mechanical brought a collection lawsuit against Venture, seeking compensation for the work it performed on the Project at Venture's request. Venture responded with a counterclaim against Mechanical for negligence. Venture's claim arose out of each party's

subcontract with Cullen, and was unrelated to the limited electrical work that Mechanical performed for Venture. Specifically, Venture alleged that Mechanical owed Venture a duty to comply with Mechanical's own work schedule and to timely perform its work on the Project. Venture contended that Mechanical's performance was untimely and out of sequence. According to its experts, Venture's delay damages exceeded \$1.1 million.

Mechanical brought a Motion for Summary Judgment, arguing that the economic loss doctrine bars claims for economic damages by one subcontractor against another. Mechanical's position was that Mechanical and Venture had each negotiated a subcontract with the general contractor (Cullen) that contained a procedure for addressing interference and delay claims. Specifically, each subcontract provided that any interference should be reported to Cullen and that each subcontractor's sole remedy for any delay would be an extension of time. Additionally, all claims for additional time were to be presented to Cullen within seven calendar days of the date when subcontractor knew of the facts giving rise to the delay. Thus, if Venture believed it has been delayed by Mechanical, it should have quickly advised Cullen.

During the discovery process, it was revealed that Venture had submitted a claim to Cullen blaming multiple subcontractors for its losses, and seeking the exact same amount of damages it later sought from Mechanical, but unfortunately for Venture, the claim was tardy. Because Venture did not comply with its contractual claim process, Cullen rejected the claim as untimely.

In support of its Motion for Summary Judgment, Mechanical argued to Judge William Domina of the Waukesha County Circuit Court that, while Mechanical and Venture were not in direct contractual privity, they were both part of the same integrated system of contracts with Cullen. In support of their position, Mechanical argued the entire construction contractual process would be chaotic if subcontractors could ignore the contractual claims process they negotiated with the general contractor and instead sue each other for negligence. Judge Domina agreed, and dismissed Venture's negligence claim against Mechanical in its entirety after applying the economic loss doctrine. Venture appealed.

The Court of Appeals' Decision

The court of appeals agreed with Mechanical's position, and affirmed the circuit court ruling. In its opinion, the court of appeals recognized:

This large construction project ... involved multiple interrelated contracts, where each subcontractor allocated its risks, duties, and remedies in their contracts for the project as part of a single comprehensive scheme to construct a building.

Thus, the policies underlying the economic loss doctrine in other nonprivity cases were applicable to this case. Those policies are as follows:

(1) to maintain the fundamental distinction between tort law and contract law; (2) to protect commercial parties' freedom to allocate economic risk by contract; and (3) to encourage the party best situated to assess the risk of economic loss ... to assume, allocate, or insure against that risk.

In conclusion, the court of appeals held:

Regardless of the absence of a vertical chain of contracts between the horizontal subcontractors, the economic loss doctrine bars a negligence claim for economic loss solely between them. The network of interrelated contracts contained their duties of care and contractual remedies. Thus, there is no

independent tort duty owing from Mechanical to Venture to timely perform its contract with Cullen, or to avoid the risk of economic loss to Venture. Finding otherwise would eliminate the contract/tort distinction. It would undermine the expectancy protection afforded to Cullen and Mechanical when they agreed upon and defined the duties, risks, and costs. Finally, letting Venture ignore its own contract to prosecute a tort claim would discourage other parties who are typically best situated to evaluate the risk of economic loss and take appropriate measures.

Conclusion: Preserving a Distinction

The Court of Appeals' decision preserves the distinction between tort and contract, and is a natural progression to Wisconsin's line of cases addressing the economic loss doctrine.

Furthermore, the ruling prevents the risk and legal confusion that would occur if project subcontractors could sue each other – which would be detrimental to owners, contractors, and overall project stability.

The case is one of first impression in Wisconsin, with only Colorado, Indiana, and Arizona having similar case law, and has been recommended for publication.

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