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CONSTRUCTION LAW BRIEFING

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Do-it-yourself legal troubles

Homeowners' project involvement affects outcome of case

On many homebuilding (or remodeling) jobs, the homeowners engage a contractor to perform a specified set of tasks, and then step back and let that builder do its job. But when the owners themselves stake out a role in the project, much legal confusion can ensue if the job goes awry. Such was the circumstance in *Rice v. Mesa General Contractor.*

A number of things wrong

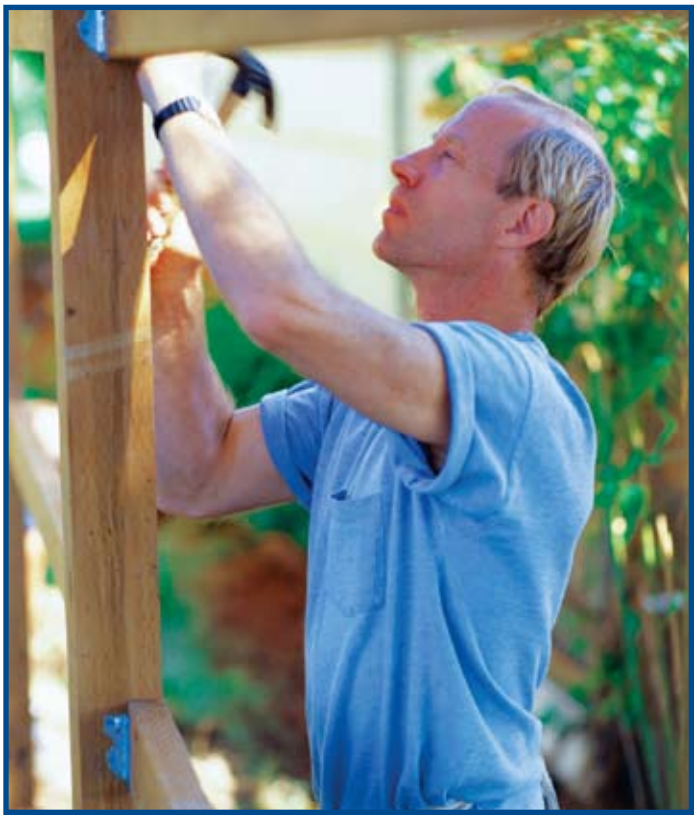
Richard and Carol Rice wanted a room addition built above the garage of their existing home in Jefferson Parish, La. They hired an architect to draw up plans for the addition. To save money, the Rices intended to do the interior finishes themselves.

But they gave the architect's plans to Mesa General Contractor to work up a bid for the structural shell. Mesa's construction supervisor presented a contract document to Mrs. Rice, who was a lawyer, showing $64,875 as Mesa's price for the work assigned to it. Although Mesa's bid varied in many aspects from the architect's plans and specifications, Mrs. Rice signed the contract as presented by Mesa.

During construction, however, Mr. and Mrs. Rice expressed dissatisfaction with a number of the things Mesa did in performing the work, including:

- ✓ Using 2 x 10 joists in place of the 2 x 12 joists the architect had included in the plans,
- ✓ Misaligning the hips and valleys of the new roof with the hips and valleys of the existing roof,
- ✓ Failing to pay subcontractors,
- ✓ Spacing the floor joists unevenly,
- ✓ Using raw lumber beams instead of engineered lumber, and
- ✓ Installing an insufficient number of joist hangers.

By the time the Rices had paid Mesa $57,000 toward completion of the $64,875 contract, the parties had parted ways and the couple had hired another contractor to complete Mesa's work. In fact, Mr. and Mrs. Rice spent $17,000 to correct Mesa's defective work and paid an additional $5,539.08 to subcontractors that Mesa had failed to pay. They also obtained an estimate of $75,000 to realign the roof hips and valleys.



The initial reward

Not surprisingly, Mr. and Mrs. Rice sued Mesa in Jefferson Parish District Court, seeking $170,961.35 in damages, including $22,539.08 in costs for repairs and unpaid subcontractors, return of the $57,000 paid to Mesa, $75,000 to realign the roof, $12,000 for delays in progress of the work Mesa did perform and $4,422.27 for reduced living space in the finished project.

After a bench trial, the Jefferson Parish District Judge ruled that, by not following the architect's plans and specifications, Mesa had breached the contract with Mr. and Mrs. Rice, and he awarded the Rices $79,539.08 in damages. The award included the $22,539.08 in repair and subcontractor costs, plus the return of the $57,000 the Rices had already paid to Mesa.

Appellate revisions

Mesa filed an appeal to the Louisiana Court of Appeal, contending both that it was not in breach of the contract and that the damages awarded were too much. The Court of Appeal modified the trial judge's decision in a number of significant ways.

First, the Court of Appeal ruled that the architect's plans and specifications were not part of the contract because Mrs. Rice — again, an attorney — had signed the Mesa document, which contained many revisions to the architect's specifications. Nevertheless, the Court of Appeal determined Mesa was, in fact, in breach of its own contract document because of its substandard construction techniques, inferior quality of materials, shortcuts and inattention to details.

The Court of Appeal also significantly reduced the damages awarded to Mr. and Mrs. Rice. The award included the $22,539.08 spent to pay off Mesa's subcontractors and repair Mesa's defective work. The Court of Appeal ruled that the lost living space claim should have been allowed but in a reduced amount of $3,477.30.

Furthermore, the Court of Appeal decided that there had been no need to demolish the addition and rebuild it. Consequently, Mesa was entitled to keep the $57,000 Mr. and Mrs. Rice had paid it because it had substantially completed the work assigned to it.

Supervisory role

The difficulties for both sides in this case arose from the Court of Appeal's determination that Mesa was not, in fact, a general contractor on this project. Instead, it ruled that when Mr. and Mrs. Rice reserved the interior finish work for their own "sweat equity" — and obtained their own building permit — they relieved Mesa of any responsibility for overall project supervision as well as for overall job quality.

In the court's view, Mesa's only liability was for the failure to properly perform the limited scope of work it assigned to itself when it worked up the estimate based, however loosely, on the architect's plans and specifications. The Court of Appeal ruled that, as an attorney, Mrs. Rice had no excuse for assuming that Mesa's estimate conformed to the architect's plans and specifications when, had she carefully reviewed them, the two sets of plans and specifications should have been evidently different.

Defining everyone's role up front

As this case shows, any homeowner who wants to save money by performing "sweat equity" finish work on a project needs to invest in the preparation of a document carefully defining who is responsible for overall schedule, quality and cost of the job tasks to be assigned to contractors and subcontractors. The document should also stipulate exactly what role, if any, the homeowner is to have regarding supervision of the project.

And any builder that finds itself in a homebuilding job involving a do-it-yourselfer owner might curtail a looming legal battle, which will likely draw down the funds and energy of both parties, by clarifying these issues with the owner up front.

Economic loss doctrine often provides imperfect protection

In most states, courts have adopted the "economic loss doctrine" to protect parties from liability to outside parties for a "purely economic loss if the parties have not entered into any contract with an outside party." (To learn more, see "The economic loss doctrine: A primer" on page 4.) The doctrine is often invoked in construction defect litigation to prevent architects and contractors sued by owners from suing each other seeking indemnification or contribution for damages assessed in favor of the owner.

Initially heralded as a way to simplify and clarify construction dispute resolution, the doctrine now has courts struggling to find ways to keep parties in lawsuits despite the doctrine's apparent applicability to

release them from the proceedings. One recent example of this trend is *Waynesborough Country Club v. Diedrich Niles Bolton Architects.*

Does the doctrine apply?

Waynesborough Country Club hired Diedrich Niles Bolton architects to design its new clubhouse and contracted with Ehret Construction to build it. Once work was under way, Waynesborough claimed the architecture firm was negligent in the design and construction supervision of the clubhouse — particularly the termination points where water infiltration occurred after the clubhouse opened.

The architects sued Ehret, seeking indemnification and contribution should Waynesborough recover from the architects. Ehret made a motion to dismiss the architects' third-party complaint, asserting that Pennsylvania's economic loss doctrine precluded the claims of indemnity and contribution for the damages sought by Waynesborough. (Again, see sidebar.)

The economic loss doctrine: A primer

The "economic loss doctrine" is a rule of law most states have adopted providing that, in a lawsuit between parties who have no direct contractual relationship, "purely economic" damages aren't recoverable. This means that, while such litigants may recover for death or bodily injury to persons and loss or damage to property other than the construction project itself, there can be no recovery by noncontracting parties for the loss in value or cost to repair the project under construction.

As an example, imagine a new warehouse and office building under construction. Inside the warehouse are stored rolls of carpet: Some are to be used in the office portion of the project, and some are owned by clients of the warehouse owner and stored in the warehouse before the office portion is completed. If the warehouse roof leaks and both inventories of carpet are ruined, the economic loss doctrine dictates that the owner can recover from the roofer the replacement cost of the client's carpeting but not the replacement cost of the carpeting for the office portion of the owner's project.

Selecting a single two-word phrase from the third-party complaint, however, the federal judge denied the motion to dismiss. The court ruled that Waynesborough's claims might possibly include "property damage" that could be the subject of a third-party action in spite of the economic loss doctrine. The two magic words: "water-damaged items."

What's the damage?

The district judge decided that, because it was possible that "water-damaged items" could possibly include property which was not part of the clubhouse as it was built by Ehret, the architects could hold Ehret liable for whatever portion of Waynesborough's damages consisted of loss of property other than the clubhouse itself.

While this may seem silly, the result is that Ehret or its insurers will have to pay a defense attorney to go to court hearings, review documents and participate in depositions for the duration of the entire architecture malpractice litigation. The cost of this participation will quite likely exceed whatever dollar amount of property loss is attributable to the "water-damaged items."

> *Courts have been struggling to keep parties in lawsuits despite the economic loss doctrine's apparent applicability to release them from the proceedings.*

Thus, though the liability of Ehret to the architects may well be minimal or absent at the lawsuit's conclusion, the direct and indirect financial burdens of participation in the litigation will still fall upon the party that was supposed to be protected by the economic loss doctrine.

Where did it all go wrong?

When it comes to the economic loss doctrine, an idea that initially seemed simple in its application has twisted the courts and attorneys into knots in its application to specific cases.

For evidence of this, one need look no further than this case. Even though Waynesborough and its attorneys clearly elected not to involve Ehret in their lawsuit against the architects, it proved impossible for them to achieve the desired result. *T*

Renovations gone wrong can lead to costly litigation

Renovation jobs bring distinctive challenges in that existing components or conditions of the structure may prevent the project from proceeding exactly as planned. And when those challenges turn to legal disputes, the ramifications can be unexpected — and costly. A Virginia contractor learned this very lesson in the case of *Nichols Construction v. Virginia Machine Tool.*

Fixing the roof

Virginia Machine Tool Company paid about $200,000 for an existing industrial building to expand its operations. Because the roof of the building was in bad shape, the company contracted with Nichols Construction to put a new roof on over the existing roof and for other minor renovations to the building. The cost of the new roof was $140,000 out of a total contract price of $165,000.

Although Nichols was a registered dealer of the roof system specified for the new roof, the new roof began to sag and leak even before the project was completed. After a number of failed attempts to remedy the leaky, sagging new roof, Virginia Machine Tool barred Nichols from the site and refused final payment for Nichols' work.

Virginia Machine Tool sued Nichols in the Circuit Court of Henry County, Va., contending that the remedy for Nichols' failure to build a sound new roof was to tear off and replace the new roof at a cost of $450,842. After a three-day bench trial, the judge awarded Virginia Machine Tool damages of $450,842.

Appealing the decision

Nichols appealed to the Supreme Court of Virginia, admitting it had breached its contract but arguing that the $450,842 damage award was excessive in proportion to both the original roofing contract amount of $140,000 and the $200,000 that Virginia Machine Tool originally paid for the building.

The Virginia Supreme Court acknowledged the rule of damages that allows recovery of only the lesser of the cost of repairing defective work or the reduction in value of the property as a result of the defective construction. Nevertheless, it affirmed the trial judge's damages award.

In its ruling, the Virginia Supreme Court pointed out that it was the burden of Nichols to show the disproportionality of the award by either:

- ✓ Producing evidence that effective repairs could be made for significantly less money than the costs shown by Virginia Machine Tool's evidence, or
- ✓ Engaging an appraiser to demonstrate that the value of the building with a new roof would be significantly less than the sum of the $200,000 purchase price plus the estimated costs of repair.

Because neither type of evidence was offered by Nichols at the trial, the Virginia Supreme Court ruled the judge's damages award should stand. The Supreme Court did hold, however, that Nichols was entitled to offset the $450,842 awarded by any unpaid balance due on the original $140,000 price for the new roof.

Avoiding renovation troubles

In the event renovations to an existing structure cannot be successfully completed, contract clauses limiting damages for defective work to a maximum amount equal to the contract price can go a long way toward protecting a renovation contractor against a damages award of more than double his or her contract price. This was a prime lesson of this case — and one that any contractor who works on such jobs should take to heart.

Act as if you have a contract, and you shall have one

In construction disputes, courts tend to disfavor litigants who have proceeded with a project, providing labor and materials and receiving payment as though a contract had been signed, and then come into court and argue that some technicality in the paperwork means there was no contract covering their participation.

In *DLI, Inc. v. Allegheny Jefferson Millwork,* just such a situation arose in connection with the construction of a courthouse annex in Washington, D.C.

Paying the prevailing wage

Centex Construction was awarded a Government Services Administration contract for construction of the courthouse annex. Centex selected Allegheny Jefferson Millwork for fabrication and installation of millwork and casework in the annex. In turn, Allegheny Jefferson sub-subcontracted the installation labor to DLI, in a fixed price contract for floors one, five and six and on a time and material basis for floors two, three and four.

> *DLI claimed it was not bound by the terms of the subcontract because Allegheny hadn't sent a signed copy back to DLI until after commencement of the lawsuit.*

Near the end of the project, disputes arose concerning compliance with the Davis-Bacon Act's requirement that workers on this federal project all be paid the prevailing wage. Many of the workers provided by (and through) DLI traveled from outside the Washington area to the project. In addition to receiving their wages and fringe benefits, these tradesmen were given a per diem living allowance during the time they were staying in Washington to perform their work.

DLI included the amount of the per diem allowance in the Davis-Bacon Act prevailing wage calculation, but its inclusion was ultimately disallowed by the U.S. Department of Labor, and Allegheny deposited $195,509.99 with the Department of Labor to satisfy the prevailing wage claims.

Suing for reimbursement

In its subsequent lawsuit, and under the terms of the subcontract DLI had signed and returned to Allegheny before beginning work on the job, Allegheny sought reimbursement from DLI for the Davis-Bacon Act deposit. DLI claimed it was not bound by the terms of the subcontract because Allegheny hadn't sent a signed copy back to DLI until after commencement of the lawsuit.

The U.S. District Court for the District of Columbia ruled that, by signing the document, sending it to Allegheny and proceeding with the work, DLI had, in fact, entered into all the terms of the contract. Thus, the contractual requirement for DLI to reimburse

Allegheny for all Davis-Bacon Act assessments attributable to workers provided by DLI and its sub-subcontractors under the fixed price agreement must be fulfilled. It also held, however, that the time and material portion of the project was *not* covered by the written reimbursement contract.

Signing off (or not)

The message to contractors and subcontractors is clear: Once you've signed off on a contract, if you proceed with the work on a project as if the document has been signed by the other party involved, a court will likely find you are bound by the contract's terms — even if the other party fails to return a signed copy to you.

CLB *Quickcase*

LeClear v. Fulton

Court decision turns on disregarded deed restrictions

Dale Fulton and his wife subdivided their tract of land for residential development, recording deed restrictions designed to preserve the architectural character and wooded privacy of the neighborhood. Among the restrictions was a requirement that the Fultons had to approve the destruction of any trees in the subdivision. When Durvan LeClear, a resident on the property, decided to build a driveway leading up to his house, his contractor removed two spruce trees and a white pine tree — without seeking permission from the Fultons.

In a lawsuit originally brought by LeClear against the Fultons for consumer fraud, the Fultons countersued LeClear for violation of the restrictive covenants, asserting that LeClear was required to seek approval of his house plans from the Fultons as well as permission to remove the trees. The court dismissed the fraud counts against the Fultons and ruled that the Fultons had no claim against LeClear for violation of the deed restrictions.

On appeal, the Court of Appeals of Michigan partially reversed the trial court, ruling that the removal of the trees without permission was a violation of the restrictive covenants in the deed. Even though there might not be any provable damages from the prohibited tree removal, the Court of Appeals found that the Fultons were entitled to a declaration that the restrictive covenant had been violated and to an award of attorneys' fees and costs in their enforcement action.

The circumstances of this case aren't unusual. Developers of residential neighborhoods often record deed restrictions when subdividing the property for construction. Thus, a contractor building or remodeling in an older subdivision may be doing an owner a great favor by reminding that owner to check for any such deed restrictions before work begins. Doing so may also prevent disputes that could impede job progress.