Legal Briefs

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AGC WISCONSIN
Associated General Contractors

Wisconsin Court of Appeals Finds Economic Loss Doctrine Bars Owner's Negligence Claim

On October 30, the Wisconsin Court of Appeals issued a robust, thoughtful decision that summarized and applied Wisconsin's "Economic Loss Doctrine," a legal doctrine that must always be considered (if not utilized) in lawsuits between owners and contractors.

In so many words, the Economic Loss Doctrine (ELD) limits damages to what, at the time of contracting, was or should have been contemplated by the parties to be the probable result of a breach of the contract. In practice, this means that contracting parties cannot pursue tort claims against each other (e.g., negligence) for economic losses arising from their contractual relationship. Instead, the parties must rely on the remedies set forth in their contracts. While that sounds straightforward, even experienced attorneys can find the ELD difficult to apply.

In the recent Court of Appeals case, Kmart sued a contractor, Herzog, after the roof of its Eau Claire store collapsed. Kmart alleged that Herzog was negligent in failing to secure the necessary permits and inspections during the roof's construction. The Court determined that the ELD barred Kmart's negligence claim, and ruled that Kmart was limited to bringing a breach of contract claim. And here, because the statute of limitations to bring such a claim had expired, Kmart was out of luck. Accordingly, the Court granted Herzog summary judgment.

The decision is available on the Court of Appeals website at *Kmart Corp. v. Herzog Roofing, Inc.* (Wis. Ct. App. Oct. 30, 2018). While the case is not recommended for publication (meaning it only has limited precedential value), it still offers a terrific analysis of the ELD.

OSHA ISSUES NEW CRANE OPERATION STANDARDS

The AGC recently alerted contractors of the Nov. 9 publication of OSHA's final rule regarding the qualification and evaluation of crane operators. Here are the key takeaways:

■ As of **Dec. 10, 2018**, crane operators must be certified by an accredited body (e.g., a testing service or an independently audited employer program). Certifications can be issued by crane "type and capacity" **or** simply by crane "type."

■ As of **February 7, 2019,** employers must evaluate their crane operators according to specified criteria and a stipulated process, and then must document this evaluation. This duty is distinct from the certification process. Employers that have already evaluated their crane operators need not conduct new evaluations, but must document the previous evaluations.

OSHA published a sheet answering FAQs on its homepage.

Spearin at a Crossroads?

The Spearin Doctrine protects contractors from liabilities for design defects. But in the ever-increasing world of design "collaboration," new risks emerge.

Announced by the U.S. Supreme Court a century ago, the *Spearin* Doctrine states that a project's owner, by providing a project's plans and specifications, gives to the contractor an implied warranty that those plans and specifications are free from design defects.

In short, a contractor that constructs a project according to those designs is insulated from liability for loss or damage that results solely from the plans' insufficiencies or defects.

For decades, when the design-bid-build delivery method was the only game in town, the *Spearin* Doctrine made perfect sense, as design and construction were relatively distinct. But as more "collaborative" delivery methods have emerged, the *Spearin* Doctrine has become harder to utilize.

This is particularly true when it comes to construction management (CM) activities. The CM delivery method generally requires the owner – not the construction manager – to furnish plans for the project. But one of the attractive aspects of hiring a construction manager is that it can provide "pre-construction services" to the owner, including advice during the design process.

The resulting danger to the construction manager is evident: the more it is involved in the project's design, the less it can safely rely on the *Spearin* Doctrine to bail it out if that design has problems.

This was demonstrated a couple years ago in *Coghlin Elec. Contractors, Inc. v. Gilbane Bldg. Co.*, where the Massachusetts Supreme Judicial Court announced that it will apply *Spearin's* implied warranty differently in DBB and CM contexts.

Specifically, the Court stated that a DBB contractor may benefit from the implied warranty where it relies on the plans and specifications in good faith, but a CM at Risk contractor may benefit from the implied warranty only where it has acted in good faith on the design and acted reasonably in light of its own design responsibilities.

In short, the court stated that a construction manager invoking the *Spearin* Doctrine will face heightened scrutiny when it attempts to shield itself from liability for faulty design. As case law concerning CM projects develops, it will be interesting to see how other courts, including Wisconsin's utilize the *Coghlin* decision.

This is an excerpt of an article, "*Holes in the Shield: Spearin in the Age of Evolving Delivery Methods*," authored by Patrick Whiting and published on the State Bar of Wisconsin's *Construction & Public Contracting Law* blog.

ODDS & ENDS

■ On November 15, Christian Yelich was named the 2018 National League MVP. He's the fourth Milwaukee Brewer to be presented with the award, following Rollie Fingers (1981), Robin Yount (1982, 1989), and Ryan Braun (2011). Hank Aaron won the award as a Milwaukee Brave in 1957.

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