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**NEGLIGENT CONSTRUCTION: IT'S NOT JUST ABOUT WARRANTIES ANYMORE**

By David Briggs

Last December, the Oregon Court of Appeals (the "*Court*") decided two cases that should be of great concern for construction contractors. These cases expand the law of negligence to allow building owners to assert negligence claims against general contractors for alleged construction defects. Although building owners have brought these claims in the past, prior law prevented the building owner from prevailing when the owner was only seeking monetary damages.

Generally, building owners have a number of remedies for construction defects, including breach of warranty and, potentially, breach of contract. The issue for building owners who do not have a contract or warranty with the contractor is how to recover for defects in construction. The new law in Oregon allows for building owners to recover for damages without a contract or a warranty through a negligence claim.

In a negligence claim, when the owner is only seeking money, Oregon law requires that the owner show that the parties had a "special relationship." A special relationship exists where one party must actively pursue the interests of the other party. Typically, these relationships were held to be professional relationships (e.g., attorneys, doctors, architects) or those of a principal and broker (e.g., trustee/beneficiary or insurer/insureds).

In 2003, Oregon courts recognized that contractors do not generally have special relationships with their building owner clients. Contractors and their clients typically are involved in what the court referred to as an "arms-length" transaction. That means that the contractor has no special obligation to look after the interests of the individual he is working for. Absent a special relationship, building owners could not sue their contractors for negligence. The lack of a special relationship historically prevented a building owner from obtaining damages on a negligence claim against the contractor.

The Court held that building owners can sue contractors for negligence. In both cases, the owners were subsequent purchasers who had no contract with the builder, purchased the property knowing that it had construction defects, and even negotiated lower prices for the property with the previous owners. However, despite knowledge of the defects, the owners brought negligence claims against the general contractor. The trial court dismissed the negligence claims prior to trial. The Court reversed the trial courts, stating that both plaintiffs should be allowed to sue the contractors for negligence. The Court reasoned that plaintiffs were not suing for economic or monetary damage. Instead, plaintiffs were bringing claims for property damage. The Court drew a distinction between economic loss and property damage, reasoning that property damage went beyond mere economic or monetary loss. The Court concluded that when a plaintiff brings a claim for property damage, that plaintiff is not required to prove any special relationship. Thus, the Court removed the only barrier that prevented building owners from suing contractors for negligence under existing law.

It is important to note that Oregon law is unique in this regard. In most states, the courts have decided that a building owner's remedy when construction is defective is to rely on the contract, such as the contractor's warranty or perhaps the purchase and sale agreement for the property. Most other states bar building owners from suing contractors for negligence. However, Oregon courts have specifically declined to follow these decisions and now allow negligence claims to be brought against general contractors. These cases are now the law in Oregon and will remain so unless the Supreme Court takes up the issue or the state legislature enacts a new law that prevents contractors from being sued for negligence.

These decisions are surprising and should be on the radar screen of general contractors working in Oregon. Owners are no longer limited by the construction contract or contractor's warranty, even when the subsequent owner of the building knew of defects in the construction and nonetheless purchased the building. These decisions could mean more litigation in the future for contractors on cases that will be more likely to survive attempts to dismiss the cases prior to trial. If you have any questions regarding this topic, please feel free to give us a call.