

## OWNER'S HAVE MORE THAN ONE THEORY OF RECOVERY IN CONSTRUCTION DEFECT CASES

As this author has explained in previous publications, there are two clearly recognizable streets of legal liability that exist in professional and commercial endeavors, including the design of engineering systems and the design and construction of real estate improvements. Those two separate streets are contract and tort.

Legal commentators and state and federal courts have recognized that there are facts that give rise to both an action in contract and in tort and that permits the aggrieved party to select between the two. In *Brooks v. Hayes*, 133 Wis.2d 228, 395 N.W.2d 167 (1986), the Wisconsin Supreme Court stated as follows:

“According to conventional wisdom, a tort arises from a violation of some obligation imposed by law (*ex delicto*) and a breach of contract arises from a violation of an obligation assumed consensually (*ex contractu*). Especially when parties to a contract are disputing, tort and contract overlap, making it difficult to draw a clear distinction between the two...The overlap between tort and contract is evident in this Court’s observation that ‘accompanying every contract is a common law duty to perform it with care and skill, and a failure to do so is a tort as well as a breach of contract.’”

In *Brooks v. Hayes*, the plaintiffs were owners of a residence that burned, allegedly because of defective work performed by a masonry subcontractor. The owners sued the prime contractor to recover fire and smoke damage to their house and personal belongings. The question before the courts was whether the owners could sue both in contract and in tort. The court held that they could.

As to the owner’s right to sue in contract, the Supreme Court held that the prime contractor was legally permitted to delegate performance of its obligation to the owners but that it could not delegate its responsibility to the owners. The prime contractor, therefore, could delegate the obligation to perform the masonry work to the subcontractor but could not delegate their obligation to the owners that such work be properly performed by the masonry subcontractor. That obligation remained the obligation of the prime contractor to the owner under the contract.

The prime contractor argued on appeal that it could not be liable to the owner for tort damages as a result of the masonry subcontractor’s negligent work performance, because the masonry subcontractor was an independent contractor and the general rule of law protects one independent contractor from the negligent conduct of another independent contractor. The Wisconsin Supreme Court rejected that argument, holding that the prime contractor could hire a subcontractor to perform a portion of the construction contract, but the delegation of that performance to an independent contractor did not relieve the prime contractor of liability to the owners for property damage resulting from a failure by the subcontractor to perform its work without negligence. The court concluded that a prime construction contract impliedly contains an obligation that the work be performed with due care, and the prime contractor may not delegate that responsibility to the subcontractor and shield itself from the consequences of the subcontractor’s negligent performance.

While owners and the design professionals that advise them may feel that this ruling is appropriate and provides them with unlimited rights of recovery, such optimism should be tempered with common sense. Owners and their design professionals often inadvertently deal directly with subcontractors, particularly on the job site where an owner’s representative requests a change, which when performed negligently may not be the obligation of the prime contractor. Further, owner’s requests for changes could arguably involve owner’s negligence where the owner could foresee that the change requested may result in a risk of damage or injury. A variety of other conduct by the owner may mitigate the ability of the owner to hold the contractor vicariously responsible for the conduct of the subcontractor. Each case must be examined on its own facts. Nonetheless, the body of law that has been created by court decisions in the areas of real estate design and construction have provided owners with broad opportunities to recover for damages to property and injuries to person arising out of negligent performance of construction contracts.

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