Exceptions to the Economic Loss Rule in North and South Carolina: Yes, an owner MAY be able to sue that subcontractor after all!

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06.10.2019

In North Carolina, the economic loss rule will not bar recovery on a negligence claim when there is no contract between the parties. In *Lord v. Customized Consulting Specialty, Inc.*, a general contractor contracted with the plaintiff owners to construct a home. The owners subsequently sued the general contractor for alleged defects in the home's construction. The general contractor named as defendants the subcontractors with whom the general contractor had contracted with to provide the trusses for the home. These subcontractor defendants asserted that the economic loss rule should apply to bar the plaintiffs' negligence claim against them. The court acknowledged that, "simply stated, the economic loss rule prohibits recovery for purely economic loss in tort, as such claims are instead governed by contract law." However, the court recognized the economic loss rule is not fair to those plaintiffs who have suffered economic loss or damage from improper construction but "who have no basis for recovery in contract" in the absence of a contract between the parties. Therefore, the court held "that the [subcontractor defendants] had a duty to use reasonable care in performing its promise to provide reliable trusses to [the general contractor] for use in the construction of the [plaintiffs'] residence, and it further held that because there was no contract between the plaintiffs and the subcontractor defendants, the economic loss rule did not apply and therefore did "not operate to bar the plaintiffs' negligence claims."

The North Carolina Court of Appeals recently acknowledged in the 2016 case *Buffa v. Cygnature Constr. & Dev., Inc.*, 796 S.E.2d 64 (unpublished) Lord's holding that the economic loss rule does not bar a negligence claim where there is no contract between parties in a home construction case. However, the court qualified this holding by stating

that "where a basis for recovery is available by warranty," the economic loss rule will apply to prevent recovery for purely economic loss under a negligence claim. In this case, the plaintiffs sustained damage to their home as a result of defective windows. The seller of the windows did not have a contract with the plaintiffs, as the windows were purchased by the subcontractor who installed the windows. These windows were covered by the manufacturer's express warranty. Because a basis for recovery was available by warranty, the court held that it was appropriate to apply the economic loss rule to bar negligence claims seeking to recover for purely economic loss.

However, it may be important to note that the Buffa case concerned an express warranty. A more detailed analysis may be required as to the issue of whether an implied warranty would bar a negligence claim per the economic loss rule, but the general rule in North Carolina is that a contract "is required to assert a claim for breach of an implied warranty involving only economic loss." *Energy Inv'rs Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 338, 525 S.E.2d 441, 446 (2000). Therefore, the economic loss rule will likely bar negligence claims if a court has recognized the existence of an implied warranty, because an implied warranty typically only exists when there is a contract between parties.

South Carolina law is complicated in that there are a number of uncoordinated opinions touching on the subject. However, similar to the Lord case above, the South Carolina Supreme Court has ruled that the economic loss rule will not bar a negligence action against a builder when a legal duty has been violated, "no matter the type of resulting damage. . . . But the economic loss rule will apply [to bar negligence actions] where duties are created solely by contract." *Kennedy v. Columbia Lumber & Mfg. Co.* This case further emphasized that "privity of contract as a defense to an implied warranty action" has been abolished in South Carolina. So, unlike in North Carolina, the existence of an implied warranty is not likely to bar a negligence claim for economic loss in South Carolina where there is no contract between the parties. Further, in *Beachwalk Villas Condo. Ass'n, Inc. v. Martin*, the holding in Kennedy was expanded to architects in addition to builders, as the court stated that "architects may be held liable to home buyers for negligence in connection with home construction projects and breach of implied warranty where no contractual privity exists between the architect and the home buyer." However, the South Carolina Supreme Court has since held that the principle set forth in Kennedy is limited to the residential real estate construction context. *Sapp v. Ford Motor Co.*

In sum, in both North and South Carolina the economic loss rule will not apply in certain instances to bar recovery for purely economic loss in tort, although the justification for such an exception may differ somewhat between the two states. Therefore, if a party seeks to recover for pure economic loss and does not have adequate recourse via typical contract law, it would be wise to explore the various exceptions in North and South Carolina regarding the economic loss rule when bringing a claim.
