

Construction Law Update

4/2/2012

Washington Supreme Court: Independent Duty Rule Doesn't Bar Contractor's Tort Claims, But Facts Do

The Washington Supreme Court continues to keep parties to construction contracts guessing about when remedies might be available, other than those set forth in the contract itself. The issue has been less than clear since the Court's 2010 ruling in *Eastwood v. Horse Harbor Foundation Inc.*, which replaced the "economic loss rule" — the principle that contracting parties should be limited to their contract remedies when a loss potentially implicates both tort and contract relief — with the "independent duty rule" — the principle that an injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract.

The Court's latest decision on the subject, *Elcon Construction v. Eastern Washington University*, doesn't shed much light on the scope of the independent duty rule. In *Elcon*, the Court decided that the independent duty rule could not be applied to support a contractor's claims of fraud and tortious interference with a contractual relationship, but did not provide any clues as to what facts might support such claims.

Elcon had submitted the winning bid to refurbish two existing water supply wells at the Eastern Washington University ("EWU") campus. EWU's instructions to bidders required acknowledgment that the bidder had taken the steps necessary to investigate the site conditions, that it satisfied itself with the quality of the subsurface conditions, and that it was not relying upon any statements of the owner regarding the site conditions. Before submitting its bid, the contractor requested, and EWU provided, all the information it had about the project and the wells. EWU, however, did not provide a water capacity study prepared three years earlier because the study did not pertain to the project, although it had recommended that future wells be drilled into a much deeper aquifer.

The contractor stopped drilling after it reached the depth of the existing wells and insisted upon payment for increased costs. EWU terminated the contract for convenience but several months later discovered damage to a replacement well and issued a termination for cause letter to Elcon and its surety.

Elcon asserted claims for contract damages, for fraud based upon EWU not providing the water capacity study report, for interference with its contractual relationship with its surety, and other

tort claims. An arbitrator awarded Elcon contract damages of \$891,000, in addition to the \$946,000 that Eastern had paid for work performed, but denied post-award statutory interest. Elcon then attempted to pursue its tort claims in superior court. However, the court granted summary judgment dismissing the fraud and intentional interference claims as being barred by the economic loss rule. The Court of Appeals affirmed the trial court's decision.

The Supreme Court affirmed the dismissal of the fraud and intentional interference claims but on factual grounds rather than under the independent duty rule. Nevertheless, the Court discussed the rule and said that it applied as an analytical tool to maintain the boundary between torts and contracts to claims arising out of construction on real property and real property sales, and that it had done so "based upon considerations unique to those industries." It refused to apply the doctrine to bar claims for fraud or tortious interference. It did not find that Elcon had alleged facts sufficient to establish either fraud or tortious interference claims. Specifically, it found:

- The withheld report was not relevant to the contractor's scope of work;
- The contract required the contractor to perform its own reasonable investigation and that the trial court concluded that the contractor failed to do so; and
- That the contractor was not entitled to interest on the arbitrator's award because it failed to request a statutory interest award at arbitration and the arbitrator correctly concluded it did not have authority to amend the award to include interest.

While the Court failed to provide any broad guidance on the circumstances when the independent duty analysis will result in recognition of the right to seek tort remedies outside of the contract, the decision does serve as a reminder that the Court will enforce contractual risk allocations regarding site conditions. The decision also highlights an important procedural lesson that, when applicable, a demand for statutory interest on the award should be included in the submission to arbitration and not left to post-award proceedings.

**For more information, please contact the Construction Practice Group at
Lane Powell: lanepowellpc@lanepowell.com**

1.800.426.5801 ■ Your Pacific Northwest Law Firm® ■ www.lanepowell.com

This is intended to be a source of general information, not an opinion or legal advice on any specific situation, and does not create an attorney-client relationship with our readers. If you would like more information regarding whether we may assist you in any particular matter, please contact one of our lawyers, using care not to provide us any confidential information until we have notified you in writing that there are no conflicts of interest and that we have agreed to represent you on the specific matter that is the subject of your inquiry.

Copyright © 2012 [Lane Powell PC](http://www.lanepowell.com)
Seattle | Portland | Anchorage | Olympia | Tacoma | London