

CONSTRUCTION LAW ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Tennessee Supreme Court Rules on Implied Duties, Delegation to Subcontractors Delegation of Performance to Subcontractor Does Not Absolve Contractor of Implied Duty to Perform in "Careful, Skillful, Diligent and Workmanlike Manner

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In *Federal Insurance Company v. Winters*, an opinion issued yesterday, the Supreme Court of Tennessee held that all construction contracts carry an implied duty on the part of the contractor to perform in a "careful, skillful, diligent, and workmanlike manner." This marks Tennessee's adoption of the "general rule," as the majority of states that have addressed the issue have adopted a similar rule. Perhaps more importantly for owners, builders, insurers and sureties in Tennessee, the court also held that a contractor may not escape liability with regard to this duty simply by subcontracting the affected work.

The plaintiffs in *Federal Insurance* entered into an oral contract with Martin Winters to install a new roof on their home. When the roof began leaking a few months after completion, Winters entered into a subcontract with Bruce Jacobs to perform the repairs. The subcontract stated that "[a]ny and all work will be the responsibility of Bruce Jacobs" and "[a]ny leaks/damages caused by work performed ... will be [his] responsibility to repair or replace." A few hours after Jacobs completed the repairs, a fire occurred, causing \$871,069 in damages to the plaintiffs' home and personal property. An investigation determined that the fire was caused by Jacobs' use of a propane torch during the repairs.

As subrogee to the claims of the homeowners, Federal Insurance Company filed suit against Winters, alleging that his contract with the homeowners included an implied obligation to complete the roofing work "skillfully, carefully, diligently, and in a workmanlike manner," and that the homeowners never released him from this obligation. In response, Winters sought summary judgment, alleging that Federal had "sued the wrong party" because he had subcontracted the work to Jacobs and was not even at the job site during the repairs.

Although the trial court agreed with Winters and granted his motion for summary judgment, the court of appeals reversed this decision, holding that Winters "had a non-delegable duty to see that the work he was contractually to perform was done in a careful, skillful, and workmanlike manner. The summary judgment was not appropriate, based solely on the fact that the work in question was performed by a sub-contractor." The supreme court granted Winters' application to appeal the decision.

Following an extensive review of case law from other jurisdictions, the supreme court adopted the "general rule" of American jurisprudence that "all contracts for services contain an implied duty to perform services skillfully, carefully, diligently and in a workmanlike manner." Further, after

acknowledging that it had not previously considered the issue, the court held that delegation of this duty, without the consent of the party to whom such duty is owed, does not relieve the contractor of such duty. Quoting a federal court of appeals decision, the court stated definitively, "[o]ne who contracts to perform a undertaking is liable to his promise[e] for the [acts] of an independent contractor to whom he delegates performance."

As the court acknowledged, this principle does not mean that performance of construction contracts cannot be delegated, in whole or part, to a third party. But for such delegation to relieve the contractor from its implied duties, the delegation must be accompanied by a release from the party to whom the original promise was made, which was not done in this case.

[Federal Ins. Co. v. Winters, No. E2009-02065-SC-R11-CV \(Tenn. Oct. 25, 2011\).](#)

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