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Bucking the Trend

The "Completed and Accepted Work Doctrine" Lives On In North Carolina

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In recent years, a majority of states have ruled that a contractor can be found liable for personal injuries suffered by third parties from accidents occurring after the contractor's work is completed and accepted.

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Not North Carolina.

In a decision handed down on August 7, 2012, the N.C. Court of Appeals ("COA") once again embraced the "completed and accepted work doctrine." This doctrine provides that an independent contractor is not liable for injuries to third parties occurring after the contractor's work is completed and accepted. The doctrine has been the "law of the land" in the Old North State since 1946, and our appellate courts show no signs of reversing course.

This article explores the COA's decision in *Lamb v. D.S. Duggins Welding, Inc.*, considers the merits and drawbacks of the completed and accepted work doctrine and concludes with some observations about the rule's exceptions and limitations.

The *Lamb* Decision

The plaintiff in *Lamb* was a general contractor's site superintendent who was injured by the alleged negligence of the project's steel deck installer, a sub-subcontractor in the contractual chain. The super claimed that the sub-sub installed a perimeter safety cable in a negligent fashion, resulting in catastrophic injuries during a safety inspection occurring after the sub-sub's work had been completed and accepted.

The sub-sub asserted the completed and accepted work doctrine as one of its defenses to the super's personal injury lawsuit. The super made two arguments in response to this defense: either the doctrine did not apply to his case, or an exception to the doctrine applied. The trial court and the COA rejected both of these arguments.

With respect to whether the doctrine applied at all, the super contended that he wasn't a "third party" on the construction site, but rather one of the project participants to whom the sub-sub owed a duty of safety. In rejecting this argument, the COA noted that the general contractor had subcontracted out the steel decking fabrication and installation scope of work, and that its subcontractor had sub-subbed out the installation work. That made the general contractor a third party to the agreement between sub and sub-sub, bringing the completed and accepted work doctrine into play. In reaching this conclusion, the COA cited with approval a 1963 Mississippi case that applied the completed and accepted work doctrine on very similar facts.

The COA also found unpersuasive the super's argument that an exception to the doctrine applied. Where (a) the work of a contractor is so negligently defective as to be imminently dangerous to third persons, (b) the contractor knows or should know of the imminently dangerous condition, (c) the owner or other contractee does not know of the dangerous condition and (d) would not discover it by reasonable inspection, the contractor might still be held liable for negligence to third parties despite the completed and accepted work doctrine. On the facts of the *Lamb* case, however, the exception did not apply. Employees of the general contractor modified the installation of the perimeter safety cable in question after the sub-sub had demobilized from the site, and so any "inherently dangerous" condition was not the responsibility of the steel decking installer.

Is the Completed and Accepted Work Doctrine Fair?

Perhaps the best defense to the completed and accepted work doctrine can be found in this blog post by two California attorneys, Michael McLain and Nick Kohan. The authors write as follows:

> Such doctrine is based upon sound public policy. Once an owner accepts a building, the contractor cannot be liable, *ad infinitum*, to all persons coming onto the premises. Rather, once the owner accepts the building, responsibility for the safety of those using the premises transfers to the owner/operator/manager of the property.

I would add to this rationale the fact that once a project is accepted and turned over, the contractor typically loses control over maintenance of the new facility, and this lack of control arguably creates additional justification for the rule.

However, at least 38 states have abandoned the completed and accepted work doctrine in its entirety and have adopted a more plaintiff-friendly approach. *See Davis. v. Baugh Indus. Contractors, Inc.*, 150 P.3d 545 (Wash. 2007). These courts have concluded that sound public policy requires that a contractor remain liable for the foreseeable consequences of its own negligence. The Supreme Court of Washington neatly summarizes this argument in the *Davis* decision referenced above:

> The doctrine is also harmful because it weakens the deterrent effect of tort law on negligent builders. By insulating contractors from liability, the completion and acceptance doctrine increases the public's exposure to injuries caused by negligent design and construction of improvements to real property and undermines the deterrent effect of tort law.

The Doctrine's Limits

The upshot of the *Lamb* decision is that North Carolina has bucked the modern trend of abandoning the completed and accepted work doctrine, and that means the doctrine remains in place to shield contractors from negligence liability to third parties going forward. That being said, it is important to bear in mind some limitations to the doctrine's reach:

Important Exceptions. As stated above, it is well-established that "imminently dangerous" work can provide a basis for circumventing the doctrine. That means contractors and subcontractors should not interpret the *Lamb* decision as providing carte blanche for performing and covering up shoddy work. On the right set of facts, an injured third party could conceivably prevail in proving this exception, and so I caution builders not to read more into the *Lamb* decision than is actually there. By way of analogy, our State's statute of repose normally shields contractors from construction defect liability six years after substantial completion of a project, but willful and wanton contractor misconduct can destroy that protection.

GC's and subs should not interpret the Lamb *decision as providing carte blanche for performing and covering up shoddy work.*

Further, where the contractor's work constitutes negligence *per se* (i.e., a violation of a safety statute or regulation), the doctrine may not apply.

Limited Scope. The completed and accepted work doctrine only applies to third-party actions for negligence; it does not apply to latent defect claims by contractees. That means contractors remain liable for breach of contract actions if they fail to install their work in accordance with applicable plans and specifications.

Contractual Risk Mitigation. The *Lamb* decision is somewhat unusual in that it involves a sub-sub's assertion of the defense; the more typical fact pattern involves a general contractor's assertion of the doctrine after a person having no relationship to the construction project is injured on the improvement post-completion. To avoid being the sole source of a personal injury plaintiff's potential recovery, project owners can seek to protect themselves in several ways.

First and foremost, owners should negotiate contract clauses that carefully define what constitutes "acceptance," especially as that term relates to the payment process and the owner's pre-completion occupancy of a portion of the improvement. Next, owners should seek to include in their contracts a carefully drafted indemnity clause that shifts post-completion, third-party injury liability to contractors without running afoul of North Carolina's anti-indemnification statute (N.C. Gen. Stat. § 22B-1). A good construction attorney can certainly assist with these two steps.

Finally, owners should seek to ensure that their premises liability coverage applies to latent construction defects throughout the six-year statute of repose period.

This article is adapted from a post originally published on Matt Bouchard's blog, "N.C. Construction Law, Policy & News," which can be found at www.nc-construction-law.com.

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