OACTA Ohio Association of Civil Trial Attorneys
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The UPDATE
News & Practice Pointers from OACTA

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PRESIDENT'S MESSAGE

By Anne Marie Sferra
2014 OACTA President

As the year comes to a close, many thanks to all who contributed to OACTA's success in 2014. I would like to acknowledge the officers, the committee chairs, and all of the members who participated in programs and activities throughout the year. And a special thanks to all who planned the outstanding program and participated in the 2014 Annual Meeting, including the many sponsors who continue to provide support! (See below - there is a list of all of them). OACTA recognized many outstanding leaders in the legal profession at the Annual Meeting. Be sure to read about the awards that were presented in this Newsletter.

Most of all, thank you for giving me the privilege to serve as OACTA's president! It was truly an honor.

Wishing you all a happy healthy and prosperous New Year!

Anne Marie Sferra

The 2014 OACTA Annual Meeting

Thank you to all the Exhibitors and Sponsors of the 2014 OACTA Annual Meeting:

CED Technologies, Inc.
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THE ECONOMIC LOSS DOCTRINE – WHAT DOES IT MEAN TO YOUR CLAIM OR LAWSUIT?

By Andrew L. Smith, Esq.

The economic loss doctrine is a misunderstood creature, an enigma of the law. If properly utilized, the economic loss doctrine is one of the most powerful defenses of any tort case, and especially appropriate in the realm of construction law.

Under the economic loss doctrine, privity of contract, or alternatively, a nexus sufficient to establish a substitute for parties entering into an actual contract, is required where a plaintiff sues a defendant for *purely* economic loss. Courts hold that recovery for economic loss is solely the subject for contract negotiation and breach of contract suits. The economic loss doctrine is a powerful tool to limit and eliminate damages in any tort lawsuit where privity of contract between the parties is lacking.

"Economic loss" in tort claims is generally defined as meaning any of the following: (1) wages, salaries, or other compensation lost as a result of an injury or loss to person or property; (2) medical expenses resulting from an injury or loss; or (3) any other expenses as a result of an injury or loss, other than attorney fees. *See, e.g.*, R.C. 2315.18 (3)(a)-(c).

The Power of Privity

The seminal case on point, *Corporex Dev. & Constr. Mgmt. v. Shook, Inc.*, 106 Ohio St. 3d 412, 414, 2005-Ohio-5409, 835 N.E.2d 701, provided the following rationale for the rule:

> *The well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable. This rule stems from the recognition of a balance between tort law, designed to redress losses suffered by breach of a duty imposed by law to protect societal interests, and contract law, which holds that parties to a commercial transaction should remain free to govern their own affairs. Tort law is not designed to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. That type of compensation necessitates an analysis of the damages which were within the*

contemplation of the parties when framing their agreement. It remains the particular province of the law of contracts.

A commonplace application of the economic loss doctrine occurred in the case of *Floor Craft Floor Covering, Inc. v. Parma Community General Hosp. Assn.*, 54 Ohio St. 3d 1, 560 N.E.2d 206 (1990), involving alleged tort liability for purely economic loss against design professionals responsible for drafting defective plans and specifications for a construction project.

In that case, Floor Craft, a flooring installation contractor, entered into a construction contract with Parma Hospital for the installation of vinyl floor covering in a renovation project. Braun & Spice, an architectural firm, prepared plans and specifications for the project. After Floor Craft completed installation of the flooring, bubbles of varying size began to appear on the floor. Floor Craft subsequently brought a negligence suit against Parma Hospital and Braun & Spice to recover damages caused by the flooring defects.

Floor Craft alleged Braun & Spice negligently specified flooring and sealant incompatible with the construction project. Because Parma Hospital also asserted claims against Floor Craft stemming from the project defects claiming damages in excess of $100,000.00, Floor Craft asserted a claim of indemnity and contribution against Braun & Spice for replacement of the failed flooring.

Ultimately, the Ohio Supreme Court reasoned there was no direct contractual relationship between Floor Craft (the contractor) and Braun & Spice (the architect). Instead, Floor Craft contracted directly with the owner, Parma Hospital. Since there was no privity of contract between Floor Craft and Braun & Spice, the claims for economic loss asserted against Braun & Spice were dismissed, leaving Floor Craft liable for damages caused by the flooring defects claimed by Parma Hospital.

What Amounts to a Substitute for Privity?

The determination of whether a "sufficient nexus" is present in the absence of privity of contract to invoke the economic loss doctrine is subject to a case-by-case, fact-intensive inquiry, and correspondingly, remains a topic of great debate. The following illustrative cases offer helpful guidance.

- Subcontractor limited knowledge of project = insufficient nexus: "Mere knowledge by a subcontractor of the identity of the project owner, without more, does not create a nexus sufficient to establish privity or its substitute for a tort claim in a breach of contract dispute." *Corporex Dev. & Constr. Mgmt. v. Shook, Inc*., 106 Ohio St. 3d 412, 2005-Ohio-5409, 835 N.E.2d 701.

- Subcontractor ability to make minor changes to plans = insufficient nexus: The role as intermediary in a construction project three days a week and the ability to make minor changes in the building plans was not a sufficient nexus to avoid the economic loss doctrine. *Mosser Constr., Inc. v. W. Waterproofing Co.*, 2006 Ohio App. LEXIS 3546 (Lucas County July 14, 2006).

- Subcontractor attendance at meetings = insufficient nexus: A sufficient nexus was not present where an engineering firm did not exercise direct control over the contractor, but instead simply attended meetings, conducted inspections, and certified completion of various levels of the project. *Ohio Plaza Associates, Inc. v. Hillsboro Associates*, Highland App. No. 96CA898, App. LEXIS 2977 (4th Dist. 1998).

- Subcontractor giving orders and exercising substantial authority = sufficient nexus: Where an engineering company that designed a sewer tunnel exercised a substantial amount of control over the project, a sufficient nexus was established to substitute for contractual privity and avoid the economic loss doctrine. In particular, the engineering company's engineers were present at the construction site and gave orders about the project, including ordering the removal of concrete segments and the application of additional grouting. *Clevecon, Inc. v. Northeast Ohio Regional Sewer Dist*. 90 Ohio App.3d 215, 628 N.E.2d 143 (1993) ("The power of the architect to stop the work is tantamount to a power of economic life or death over the contractor. It is only just that such authority, exercised in such a relationship, carry commensurate legal responsibility.").

- Subcontractor power to stop project = sufficient nexus: A design professional is not liable for third-party economic damages when he or she does not participate in the project or interact with the contractor and signs a standard contract providing the design professional no role in construction means, methods, techniques or procedures. However, a design professional who exercises "excessive control over the contractor" through the power to stop the work and give orders about the project is liable for such

economic damages. *Nicholson v. Turner/Cargile*, 107 Ohio App. 3d 797, 669 N.E.2d 529 (1995).

Overall, in the absence of direct contractual privity between the parties, the focus of Ohio courts is on the degree of control and power the defendant has over the overall construction project. The more power and control, the more likely the court will find a "sufficient nexus" to avoid application of the economic loss doctrine.

Points to Remember

The economic loss doctrine is a powerful tool to limit and eliminate damages in any tort lawsuit where privity of contract between the parties is lacking, and is especially commonplace in the world of construction law. When evaluating application of the doctrine, it is important to consider the following:

- *Is there a written contract between the parties? If so, the doctrine is inapplicable, and recovery of purely economic loss is available.*

- *If not, is there a sufficient nexus between the parties to substitute for the lack of a written contract? Pay particular attention to the specific facts and degree of control and power of the defendant over the project.*

- *If there is neither a written contract nor a sufficient nexus, the economic loss doctrine is applicable, and may bar any claims for purely economic loss.*

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