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Defenses in Construction Defense Cases

This article – submitted by IADC member Morgan Templeton, Esq., of Elmore & Wall, P.A., and authored by two of his colleagues – provides a brief overview of viable defenses in construction defect cases and demonstrates the application of those defenses through recent case law.

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Defenses in construction defect cases are as numerous as the available causes of action. Determining which defenses apply depends on several factors, including but not limited to the facts of the case; whether the client is a general contractor, owner, subcontractor, or surety; and the cause of action that is pled. This article provides a brief overview of viable defenses in construction defect cases. While this list is extensive, it is not exhaustive, and counsel should perform a thorough review of the cases and statutes in the specific jurisdiction to determine the defense that best fits the particular situation. After summarizing the defenses, this article demonstrates the application of those defenses through recent case law.

Absence of Duty

The duty to act or not act is essential to recovery in any negligence action. Therefore, demonstrating that a duty did not exist is always a defense to a negligence cause of action. In construction defect cases, a party can defend against a breach of contract claim by demonstrating that the contract did not create an express or implied duty.

In *Church v. Callanan Industries, Inc.*,[1] plaintiff motorist was injured in an automobile accident on a highway. Plaintiff sued the defendant subcontractor for negligence, alleging that defendant had been in charge of replacing the highway guardrail on a prior renovation contract and had installed a new guardrail a full one-third shorter than the length called for in the specifications. Plaintiff alleged that, had the new guardrail

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[*] This article is adapted with permission, from the American Bar Association Forum on the Construction Industry, from a previously published article in The Construction Lawyer, *Defenses in Construction Defect Cases*, 23:2 at 27 (Spring 2003).

[1] 285 A.D.2d 16 (N.Y. App. Div. 2001) *aff'd.*,752 N.Y.S.2d 254 (N.Y. 2002). For further discussion of this case, *see* 22 CONSTR. LITIG. REP. 490 (Dec. 2001).

been installed properly, her injuries would have been diminished greatly.

New York follows the "modern rule" that owner acceptance does not, in and of itself, bar a contractor's liability to a third party. Nonetheless, the appellate court concluded that the defendant as a matter of law did not owe the plaintiff a duty of due care. Whether or not a duty exists involves consideration of a number of factors, including whether the defect giving rise to plaintiff's injury was open and obvious; whether plaintiff is of a well-defined and limited class, or instead a class of indefinite and indeterminate number; the temporal proximity between the negligence and injury; and whether plaintiff detrimentally relied on defendant's performance of its contractual obligation to others.

The majority concluded that "every one of the identified considerations militates strongly against imposing a duty of care in this case." The missing guardrail was an open and obvious defect. Plaintiff was a member of a limitless class: all motorists traveling on the highway. The accident occurred five years after the renovation work ended. Finally, the plaintiff did not rely on defendant's performance. "In our view, to impose a duty of care in this case would threaten to expose defendant and similarly situated highway contractors to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. As a matter of public policy, we are unwilling to establish such a rule of law."

In *Vogel v. Foth & Van Dyke Associates, Inc.*,[2] the defendant engineering firm included a site adjacent to the plaintiff Vogel's property in its recommendation to the local solid waste management agency. The Vogels intended to convert its property to a residential subdivision and claimed that the property was devalued by Foth & Van Dyke's negligence.

The Eighth Circuit found that the Vogels' claim was "properly considered within the tort of negligently supplying information for the guidance of others" as set out in Section 552 of the *Restatement of Torts*. The court noted that a plaintiff is entitled to recover damages from someone who, in the course of his or her business, profession, or employment, supplies false information for the guidance of others in their business transactions. The court noted, however, that Section 552's duty is narrowly limited to "the person or one of a limited group of persons for whose benefit and guidance [the firm] intends to supply the information. It does not matter if the plaintiff's involvement is foreseeable; rather, the plaintiff must be someone for whom the representation was intended." The Vogels neither directly nor indirectly received from Foth & Van Dyke the information that it supplied to the local waste management authority. Indeed, the firm never supplied this information to the Vogels in any form, much less for their benefit or guidance.

The Vogels, therefore, did not fit within the class of persons protected by Section 552. Further, the Vogels failed to allege that they relied on the information supplied, "an express requirement" of recovery under the Restatement. The court concluded that even though

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[2] 266 F.3d 838 (8th Cir. 2001). For further discussion of this case, *see* NEAL J. SWEENEY, 2002 CONSTRUCTION LAW UPDATE § 15.04[B], 473-74 (Aspen 2002).

the Vogels may have been harmed by the announcement that the site adjacent to their property was a finalist for the landfill site, and the engineers may in fact have been negligent in supplying the information to the solid waste agency, the engineers nevertheless were not liable to the Vogels. The court concluded that recognizing a duty under these circumstances would subject businesses that provide information to "liability in an indeterminate amount for an indeterminate time to an indeterminate class."

Assumption of Risk

Under the doctrine of assumption of risk, one who voluntarily exposes himself or herself or his or her property to a known and appreciated danger due to the negligence of another may not recover from injuries sustained by such exposure.[3] The term "assumption of risk" is often raised as an affirmative defense and in many instances is merely a rewording of the doctrine of contributory negligence.[4] Although closely related, they are nonetheless distinct concepts. The key to the defense of assumption of risk is "voluntary nature," while that of contributory negligence is "unreasonable conduct."[5] Assumption of risk involves a choice made, more or less deliberately, and negates liability without considering the fact that the plaintiff may have acted with due care. Conversely, the defense of contributory negligence implies a failure of the plaintiff to exercise due care.[6]

Contributory and Comparative Negligence

The defense of contributory negligence is based on the premise that the plaintiff is partially responsible for the action or inaction that caused the construction defect, thereby barring recovery (or in the case of comparative negligence, apportioning liability, and in some cases recovery between the parties). Originally, the rule was that if the injured party in some way contributed to the injury, then it had no right to recover any compensation from the other wrongdoer.[7] The contributory negligence defense, however, has been undermined and many jurisdictions now apply some form of a comparative negligence rule. Under comparative negligence, the respective wrongdoing of the various parties is weighed. Based on that comparison, liability is decided and damages awarded.

Today's application of the defense does not necessarily absolve the defendant of all responsibility. It may lessen the resulting damages by demonstrating that the plaintiff in fact contributed to the breach that is alleged to have occurred. For example, in a negligence action, a contractor may argue that the owner's action relating to the conditions of work contributed to the breach.

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3 65 C.J.S. *Negligence* § 360.
4 See MICHAEL S. SIMON, CONSTRUCTION CLAIMS AND LIABILITY (Wiley 1989).
5 *See e.g., District of Columbia v. Mitchell*, 533 A.2d 629 (D.C. 1987).
6 65 C.J.S. *Negligence* § 365.
7 *Id.*

A plaintiff is considered contributorily negligent if:

(1) The plaintiff fails to protect himself or herself from injury;
(2) The plaintiff's conduct concurs and cooperates with the defendant's actionable negligence; and
(3) The plaintiff's conduct contributes to the plaintiff's injuries as a proximate cause.[8]

Waiver

Waiver is an equitable principle defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed. [9] Practically stated, parties through their actions or inactions may inadvertently waive their right to a cause of action. Unless a party closely follows the contract or statutory procedure for filing its notice of claim, protest documents, and reservation of rights, it may ultimately lose the ability to recover for the alleged breach.

Waiver by a party may occur in several different situations during the construction process. If, for example, a dispute arises during the construction process, which the parties subsequently resolve through settlement, then depending on the terms of the settlement document and the circumstances, one may be able to argue that later disputes are barred by the previous settlement and release. It is also possible to waive claims and defenses that are granted in the construction contract.

The waiver defense also may apply when known defective work is accepted by the owner. The owner's acceptance of nonconforming work ordinarily constitutes a waiver of the right to reject defective work, material, equipment, unless claims for those defects are reserved or the defects are not readily discoverable. [10] Similarly, the owner's failure to object to defects within a reasonable time after it knows or has reason to know of any defects also may constitute an acceptance. This type of acceptance is regarded as a constructive waiver.

One major exception to the waiver defense arises where the defects are latent and unknown to the owner at the time of acceptance. In such cases, acceptance by the owner will not constitute a waiver.

In *Travelers Indemnity Co. of Conn. v. The Losco Group, Inc.*,[11] an architect and a

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[8] *Id*. at *226.
[9] 31 C.J.S. *Estoppel and Waiver* § 67.
[10] *See* ROBERT F. CUSHMAN, CRAIG M. JACOBSEN & P.J. TRIMBLE, PROVING AND PRICING CONSTRUCTION CLAIMS (Wiley 2d ed. 1996).
[11] 136 F.Supp.2d 253 (S.D.N.Y. 2001). For further discussion of this case, *see* Author unknown, *School's Waiver of Claims Against Architect Precludes Breach of Contract Claim-Gross Negligence Claim May Proceed*, 25 CONSTR. CONT. L. REP. 363 (Nov. 30, 2001).

school district entered into an agreement for the design of a gymnasium using a standard AIA form contract. Under the agreement, the architect was responsible for (1) providing the design; (2) providing the drawings and specifications; (3) inspection; (4) protecting the school against deficiencies in construction of the project; (5) assuring that construction of the project was in accordance with the drawings and specifications; (6) reviewing the contractor's shop drawings; and (7) ensuring that necessary testing and inspection services were provided for the project. The agreement also contained a provision under which the parties waived all rights between them for damages that were covered by property insurance during the construction. Consequently, the school secured a builder's risk insurance policy.

During construction, the roof of the gymnasium collapsed bringing tons of partially installed concrete panels with it thereby injuring two workers. The insurer paid over $800,000 to the school for the loss. The insurer, as subrogee, filed a complaint against the architect, alleging gross negligence and breach of contract. Under New York law, a subrogee "stands in the shoes of the subrogor and is entitled to all of latter's rights, benefits, and remedies."[12] Therefore, the insurer, as subrogee, was only entitled to the rights that the school would have against the architect. Due to the waiver provision in the contract between the architect and the school, the insurer had no negligence cause of action against the architect.

The architect, however, could not escape liability through the contractual waiver clause where the damages were caused by gross negligence. In the court's view, the insurer alleged sufficient facts to state a claim for gross negligence. Accordingly, the court denied

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[12] *Id.* at 256. (*quoting Spier v. Erber*, 759 F. Supp. 1024, 1027 (S.D.N.Y. 1991)).

the architect's motion to dismiss the insurer's gross negligence claim.

In *R.P. Richards Construction Co. v. United States*,[13] the United States Navy (Navy) awarded a unit-priced contract to R.P. Richards Construction Co. (Richards) to patch two sections of road at the Camp Pendleton Marine Corps Base. The contract called for Richards to cut and remove an estimated 401,846 square feet of deteriorated asphalt patches and replace them with new patches.

As the work progressed, the Navy realized there was more deterioration in one section of the project than anticipated. In order to address its most critical needs, the Navy deleted work from other sections and added that square footage to the acute area, maintaining the original contract square footage. This had the effect of forcing the contractor to replace a greater number of smaller, nonsymmetrical patches.

Richards submitted a request for an increase in the unit price due to the "change in character of the work." The parties eventually negotiated a no-cost bilateral contract modification which referred to the deletion of a quantity of patching from other sections for the project and the addition of that same quantity to the acute section. The modification, which made no mention of a change in the character of the patching work, contained standard waiver and release language and was signed by Richards. Richards later filed a claim for a unit price increase as a result of the change in the nature of the patching work. Richards argued that the modification applied only to quantity adjustments from other sections of the project to the acute section and made no mention of the altered character of the work that was the basis for the contractor's claim.

The court found that the language of the modification was ambiguous. The testimony established that at the time the parties negotiated the modification, both parties were fully aware of the altered character of the patching work. The modification described the physical area where the patching had been performed. In addition, the broad waiver and release language applied to any increased costs associated with the modification. In effect, Richards had released its claim. While the case dealt with contract change order claims and not defects, it is nonetheless illustrative of the effect broad waiver and release language can have on subsequent claims.

Estoppel

Estoppel arises when a person, intentionally or through culpable negligence, induces another to believe certain facts to exist by his acts, representations, or admissions or by his silence when he has a duty to speak.[14] If the other party rightfully relies and acts on the representations to its prejudice and the former is permitted to deny the existence of those

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[13] 51 Fed. Cl. 116 (2001). For further discussion of this case, *see* Author unknown, *Release Covered Character of Work as Well as Quantity*, 24 CONSTR. CLAIMS MONTHLY 6 (Mar. 2002).

[14] 31 C.J.S. *Estoppel and Waiver* § 58.

facts, then the principle of estoppels may operate to prohibit that denial.[15] Stated differently, where a person having a claim sees another doing an act inconsistent with known facts and stands by in such a manner as to induce the person doing the act, who might otherwise have abstained from it, to believe that he consents to its doing; he cannot afterward be heard to complain of it.[16] Many jurisdictions require the following four-prong test to be met before estoppel can be applied:

(1) The action induced amounts to a substantial change of position;
(2) It was either actually foreseen or reasonably foreseeable by the promisor;
(3) An actual promise was made and itself induced the action or forbearance in reliance thereon; and
(4) Enforcement is necessary in the interest of justice.[17]

To constitute estoppel, it is necessary that the party against whom it is claimed be aware of its rights; that there is a duty to speak or to disclose or assert the claim, as well as an opportunity to do so; and that the adverse party has been misled, adversely affected or disadvantaged, or induced injuriously to alter its position.[18]

Statute of Limitations

If a lawsuit or arbitration proceeding is not commenced within the statutory time, the cause of action will be barred. The statutory periods for commencing actions for breach of contract, negligence, warranty, and fraud differ from state to state. Generally, statutes of limitations for actions based in contract are longer than those for actions based in tort.[19] Because most actions for construction defects include causes of action in tort and separate causes of action based on breach of contract, both statutes may apply. Where a reviewing court is faced with a choice between a statute of limitations in a breach of contract action and a statute of limitations in a tort action; the cases generally hold that the longer contract statute applies.[20] Notwithstanding this general rule, if the action is only in tort, a court will apply the limitation applicable to tort claims.[21]

In determining the period within which to bring an action, a party also must determine when the cause of action accrued. In most jurisdictions, this date is determined by

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15 *Id.*
16 *Id.* at § 110.
17 *Skanchy v. Calcados Ortope SA*, 952 P.2d 1071, 1076 (Utah 1998) (*quoting Tolboe Const. Co. v. Staker Paving & Const. Co.*, 682 P.2d 843, 845-46 (Utah 1984)).
18 31 C.J.S. *Estoppel and Waiver* § 110.
19 *See* ROBERT F. CUSHMAN, CONSTR. LITIG.: REPRESENTING THE CONTRACTOR (Wiley 1986).
20 *See* E.L. Kellett, Annotation, *What statute of limitations governs action by contractee for defective or improper performance of work by private building contractor*, 1 A.L.R.3d 916 (1965).
21 *See* CUSHMAN, *supra* note 19.

the application of the "discovery rule." According to the discovery rule, the statute of limitations runs from the date the injured party either knows or should have known by the "exercise of reasonable diligence" that a cause of action arises from the wrongful conduct. Courts have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist.[22] Whether an injured party may not comprehend the full extent of the damage has been deemed immaterial.[23]

Some states, however, do not apply the discovery rule. In those states, the statute of limitations begins to run when the plaintiff is damaged, even if the plaintiff had no knowledge or reason to know of the breach of negligence.[24]

In dealing with cases brought by state governments, the practitioner should be aware that some jurisdictions hold that the statute of limitations is not a defense to an action brought by the state. For example, in *Bellevue School District No. 405 v. Brazier Construction Co.*,[25] the Supreme Court of Washington ruled that a public school district was not barred from filing an action for breach of a construction contract even though the six-year statutory time had expired. The court found that the public school, being a subdivision of the state, was not limited by a statute of limitations.

In determining whether the aggrieved party knew or should have known of the existence of a construction defect for purposes of triggering the applicable statute of limitations, the court, in Performing Arts Center Authority v. Clark Construction Group, Inc.,[26] held that a party is not on notice until the defect is manifestly obvious. The

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22 *Dean v Ruscon Corp.*, 468 S.E.2d 645 (S.C. 1996).
23 *Id.* at 647.
24 *See, e.g.*, VA. CODE ANN. § 8.01-230 (Michie 2002) (limitations period begins to run on "the date the injury is sustained in the case of injury to the person or damage to the property, when the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered . . . .).
25 675 P.2d 232 (1984) *aff'd.*, 691 P.2d 178 (1984).
26 789 So. 2d 392 (Fla. Dist. Ct. App. 2001). For further discussion of this case, *see* SWEENEY, *supra* note 2, at § 10.07, 358-59.

Broward County Center for the Performing Arts was completed in 1991. In February 1995, well after the owner had taken custody of the building and made final payment to the general contractor, a diagnostic inspection revealed that the stucco wall system, which was leaking profusely, had been defectively designed and constructed. In 1999, the owner sued the general contractor and the subcontractor for breach of contract. The trial court dismissed the suit, finding that Florida's four-year statute of limitations began to run in February of 1995 (when the owner first noticed the leaks).

The appellate court reversed and held that the Performing Arts Center was not on notice of a construction deficiency associated with the roof leak the instant it discovered any leak in any building, but only when the leak or leaks became so pervasive, obvious, and apparent that someone was at fault. The court reasoned that it is only when "there is an obvious manifestation of a defect, that notice will be inferred at the time of the manifestation regardless of whether the plaintiff has knowledge of the exact nature of the defect…." Where the manifestation is not obvious, but could be due to causes other than an actionable defect, notice as a matter of law may not be inferred. The court held that unless a latent defect is systemic and obvious, a plaintiff is not on notice of its existence, and the applicable statute of limitations does not begin to run. The statute is triggered only at the point where the defect is manifestly obvious.

In *Faye Lumsden v. Design Tech Builders, Inc.*,[27] a group of homeowners in a Maryland subdivision noticed that their driveways were peeling and scaling in March 1994. When the owners complained to the developer, the developer attributed the problem to the use of de-icing chemicals that had been applied to the driveway surfaces. In August 1994, the owners conducted their own investigation of the problem and discovered that a faulty concrete mixture may have caused the problem. In April 1996, the owners brought suit against the developer alleging breach of an implied statutory warranty. The trial court granted summary judgment in favor of the developer on the ground that the owners' suit was precluded by the two-year statute of limitations set forth in Maryland Code, Real Property section 10-203.

On appeal, the court noted that section 10-204(d) mandates that the two-year period of limitations, for a construction-related cause of action of this type, commences when the cause of action was discovered or should have been discovered. A claimant reasonably should know of a wrong if the claimant had "knowledge of circumstances which would put a person of ordinary prudence on inquiry [thus charging the individual] with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued."

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[27] 749 A.2d 796 (Md. 2000). For further discussion of this case, *see* Author Unknown, *Statute of Limitations Began to Run When Owners First Noticed Their Driveways Were Defective Rather Than When Cause of Problem Was Discovered*, 25 CONSTR. CONT. L. REP. 43 (Feb. 23, 2001).

The court held that the developer must prove that for more than two years before filing the lawsuit, (1) the owners knew of facts sufficient to cause a reasonable person to investigate further and (2) a diligent investigation would have revealed that the owners were victims of wrongful conduct. The court explained that the statute of limitations begins to run when a claimant gains knowledge sufficient to put it on inquiry notice and that commencement of the statute of limitations is not delayed until the conclusion of the diligent investigation.

Application of those principles to the case before it led the court of appeals to conclude that the owners knew immediately on seeing the damage done to their driveways that a defect existed for which someone was responsible. In the court's view, a reasonable person would have been put on inquiry notice in March 1994. The court noted that the owners almost immediately began an investigation of their own into the driveway deterioration problem. Therefore, the owner's suit was time-barred and could not proceed.

Statute of Repose

In addition to the statute of limitations, which sets forth the period within which an action must be brought after a claim has accrued, legislatures in many jurisdictions have also enacted statutes that establish outside limitations on when such actions may be brought.[28] Unlike statutes of limitations, statutes of repose may eliminate substantive rights that have not yet accrued. The rationale behind the statutes is to cut off liability for contractors, material suppliers, architects, and engineers so that such parties do not face liability extending in perpetuity.[29]

Statutes of repose for design and construction claims usually take one of two forms. The majority of the statutes set a maximum time after substantial and/or final completion of the project beyond which no claims may be brought that relate to the design and/or construction of the project.[30] The second type of statute sets a maximum time after project completion for bringing a claim; however, these statutes also specify a shorter time after the cause of action accrues within which such action must be brought.[31]

In Ocean Winds Corp. of Johns Island v. Lane, a homeowners association sued the condominium developer for water damage.[32] The developer brought a third-party complaint against the manufacturer and supplier of the project's windows. The windows were installed by December 1986, but the various condominium units were not completed until

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[28] *See* ROBERT F. CUSHMAN, CONSTR. LITIG.: REPRESENTING THE OWNER (Wiley 1990); Allen Holt Gwyn, *Statutes of Repose*, 12 CONSTR. LAW. 36 (Nov. 1992); Gary H. Ritchey, *Statutes of Repose for Construction Defects*, 8:3 CONSTR. LAW. 5 (Aug. 1988).
[29] *Id.*
[30] *See* NEAL J. SWEENEY, SMITH, CURRIE & HANCOCK'S COMMON SENSE CONSTR. LAW (Wiley 1997).
[31] *Id.*
[32] 556 S.E.2d 377 (S.C. 2001).

May 1991. The third-party lawsuit was filed in February 2000, more than thirteen years after the windows were installed. Even so, the lawsuit was filed less than thirteen years after certificates of occupancy were issued for the entire project.

The South Carolina Supreme Court ruled that the third-party complaint was barred by the statute of repose, which bars claims arising out of an improvement to real property brought more than thirteen years after substantial completion of such improvement.[33] "Substantial completion" is defined in S.C. Code Ann. § 15-3-630 as "that degree of completion of a project, improvement, or a specified area or portion thereof…upon attainment of which the owner can use the same for the purpose for which it was intended…." The court determined that the windows were a specified area or portion of the condominium project and that the statute of repose began to run against the window manufacturer and supplier when the windows were installed. Once installed, the windows functioned for the purpose for which they were intended. The court found that to rule otherwise would delay commencement of the statute of repose until the entire project was completed which would undermine the purpose of the statute.

Contractual Limitations on Liability and Damages

Exculpatory and Indemnity Clauses

Exculpatory or indemnity clauses that expressly disclaim liability are almost universally disfavored because they affect ultimate liability for claims brought by third parties. The clauses are generally effective only if they "clearly [state] that [they] release the party from liability from [its] own negligence."[34]

No Damage for Delay Clauses

These clauses deny the recovery of damages to the non-breaching party as a result of delay. These clauses may not be an absolute bar to recovery if the delays are not within the contemplation of the parties at the time of entering into the agreement; the delays arise from the wrongful conduct of the breaching party; or the delays are based on fraud, bad faith, and direct or active interference in the work of the non-breaching party.[35]

Limitation of Consequential Damages Clause

These clauses limit consequential damages resulting from a breach of the

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[33] *See* S.C. CODE ANN. § 15-3-640 (Supp. 2000)

[34] *Valhal Corp. v. Sullivan Assocs.*, 44 F.3d 195, 204 (3d Cir. 1995).

[35] *See* Cheri Turnage Gatlin, *Contractual Limitations on the Right to Recover Delay Damages and Judicial Enforcement of Those Limitations*, 22 CONSTR. LAW. 32 (Fall 2002).

construction agreement. In *Eldor Contracting Corp. v. County of Nassau*,[36] a supplier's standard form terms and conditions, which became part of the contract by the prime contractor's acquiescence, included a waiver of "special, incidental, exemplary or consequential damages" that barred contractor's effort to pass owner's delay damages through the supplier.

Economic Loss Rule

The economic loss rule prevents a party from suing in tort to recover purely economic damages caused by the breach of a contractual duty.[37] The rationale underlying the economic loss rule is that parties should not be allowed to avoid contractually determined remedies or limitations on liability merely by recharacterizing their breach of contract claim as one sounding in tort. This doctrine is well established, although a few jurisdictions allow plaintiff to elect to sue in either tort or contract for the breach of contractual duties.[38] Some jurisdictions reject the economic loss rule outright, reasoning that a person should not have to suffer personal injury or property damage in order to recover for damage caused by another's wrongful acts. Still other courts allow an exception to the rule based on the general premise that a breach of contract is not to be considered a tort where a legal duty independent of the contract itself has been violated.

In *Northwest Arkansas Masonry, Inc. v. Summit Specialty Products, Inc.*,[39] the Kansas Court of Appeals held that the economic loss doctrine prevented a subcontractor from recovering the costs of tearing down and rebuilding a wall built with mortar containing defective cement. The plaintiff, a masonry subcontractor on the project, sued the manufacturer of a premixed cement powder. The mortar produced using this cement powder failed to harden properly, and as a result, the plaintiff was forced to tear down and rebuild walls. Plaintiff sought reimbursement for its costs under a theory of strict products liability. The trial court set aside a jury verdict in favor of the plaintiff and entered judgment for the defendant, holding that the economic loss doctrine prevented the plaintiff from recovering on its claims.

On appeal, the subcontractor argued that the damages caused by the defective cement were to "other property," not to the defective cement itself, and the economic loss doctrine did not apply. The court disagreed. The court first looked to the Kansas City Product Liability Act,[40] under which the "harm" for which a products liability claim may be brought does not include "direct or consequential economic loss."[41] Because the legislation

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[36] 708 N.Y.S.2d 447 (N.Y. App. Div. 2000) Andrew D. Ness and Roy S. Mitchell, *Delays*, THE WEST GROUP CONSTRUCTION CONTRACTS YEAR IN REVIEW CONFERENCE 2-4 (West 2001).

[37] *See* CUSHMAN ET AL., *supra* note 10; Steven B. Lesser, *Economic Loss Doctrine and Its Impact Upon Construction Claims*, 12 CONSTR. LAW. 17 (Nov. 1992).

[38] *See, e.g.,Consolidated Edison Co. v. Westinghouse Elec. Corp.*, 567 F. Supp. 358, 364 (S.D.N.Y. 1983).

[39] 31 P.3d 982 (Kan. Ct. App. 2001); SWEENEY, *supra* note 30, at § 15.05[E] 487-88.

[40] *See* KAN. STAT. ANN. §§ 60-3301 *et seq.*

[41] *Id.* at § 60-3301(d).

does not define such terms, the court sought guidance in considering direct or consequential economic loss. The court determined that economic loss includes damages for inadequate value, costs of repair, replacement costs, and loss of use of the defective product. As noted by the court, economic loss is generally a result of the failure of the product to perform to the level expected by the buyer, which is the core concern of traditional contract law.[42]

The court concluded that plaintiff was seeking repair and/or replacement costs rather than, as the plaintiff claimed at trial, damage to "other property." Recognizing the difficulty in distinguishing between the two types of harm, the court adopted the *Third Restatement*'s "integrated system" approach. In applying the rule, the court found that the masonry wall was an integrated system composed of several component materials that were indistinguishable parts of the final product. Harm caused by the defective cement was harm to the final product, the wall itself.[43] Finally, the court reasoned that policy considerations supported application of the economic loss doctrine to bar the plaintiff's recovery: The masonry subcontractor was in the best position to avoid the economic loss by assessing the risk and insuring against it.

Intervening and Superseding Causes

Two or more intervening forces not acting in concert may combine to create a superseding cause of a plaintiff's injuries. The existence of intervening and superseding causes of injury can be defenses to actions brought under the theories of negligence and strict liability.[44] "If a third person's negligence is determined to be a superseding cause of plaintiff's injury, that negligence, rather than negligence of party attempting to invoke doctrine of superseding cause, is said to be the sole proximate cause of the injury.[45] For a second tort to be a superseding cause of the plaintiff's injury and a defense to the original tortfeasor, it must so entirely supersede the operation of the original tortfeasor's negligence that it alone produces the injury.[46]

While there is no per se rule, the following factors have been considered in determining whether an intervening force rises to the level of a superseding cause:

(1) The intervening force causes harm different in kind from that which would otherwise have resulted from the actor's negligence;
(2) The intervening force's operation or the consequences of it appear after the

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42 *Northwest Arkansas Masonry*, 31 P.3d at 987.
43 *Id*. at 988.
44 65 C.J.S. *Negligence* § 202.
45 *See Wagner v. Clark Equipment Co., Inc.*, 700 A.2d 38 (1997).
46 *See Coles v. Jenkins*, 34 F. Supp. 2d 381 (W.D. Va. 1998).

event to be extraordinary rather than normal in view of the circumstances existing at the time of the force's operation;

(3) The intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;

(4) The operation of the intervening force is due to a third person's act or to his failure to act;

(5) The intervening force is due to an act of a third person that is wrongful toward the other and as such subjects the third person to liability to him or her;

(6) The degree of culpability of a wrongful act of a third person sets the intervening force in motion.[47]

Compliance with Plans and Specifications

For this defense, the defendant maintains that performance was in accordance with the plans and specifications and that any defects in the final product resulted from defects in the plans and specifications themselves. The defense is based on the principle that owners impliedly warrant that their plans and specifications are complete and accurate.[48] Therefore, a contractor cannot be held responsible for the consequences of the defects that exist in the plans and specifications.

There are several exceptions to the rule. If the plans and specifications describe only the performance to be achieved, the contractor may not rely on any implied warranty of plans and specifications for that portion of the work.[49] The owner's implied warranty applies only to design specifications. A second exception occurs when the contractor suggests changes to the design or otherwise assumes design responsibilities.[50] Finally, the contractor is liable if it knows of the defects in the plans and specifications and makes no objection before using them.[51]

Robins Maintenance, Inc. v. United States[52] held that a contractor who knew that the specifications were incorrect could not claim an equitable adjustment for extra work under the implied warranty of design, because it was not misled by the specifications. Robins Maintenance, Inc. (RMI), had been the grounds maintenance contractor at an Air Force base in Georgia for ten years when renewal of the contract came up for bidding. In reviewing the bid documents, RMI's principals discovered that the specified size of the grounds to be maintained was about half the actual amount. When it brought this to the

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[47] *See Russo v. Baxter Healthcare Corp.*, 140 F.3d 6 (1st Cir. 1998); 65 C.J.S. *Negligence* § 203.
[48] *See United States v. Spearin*, 248 U.S. 132 (1918).
[49] *See Blake Constr. v. United States*, 987 F.2d 743, 745 (Fed. Cir. 1993).
[50] *See* CUSHMAN, *supra* note 28.
[51] *See* CUSHMAN ET AL., *supra* note 10.
[52] 265 F.3d 1254 (Fed. Cir. 2001); 23 CONSTR. LITIG. REP. 93 (Mar. 2002).

attention of the contracting officer (CO) at a pre-proposal conference, she reportedly told them not to "start any trouble" and to bid on the solicitation as it was writing. RMI bid based on the acreage amount contained in the contract and was awarded the contract.

For two years, RMI performed the contract without seeking an equitable adjustment. The Air Force issued a modification to correct the acreage error. The modification, however, did not include an adjustment in the contract price, so RMI filed a claim, asserting that the incorrect acreage was a violation of the government's implied warranty of design. The Court of Federal Claims entered summary judgment in favor of the government, ruling that RMI could not avail itself of the *Spearin* doctrine because it knew the specifications were inaccurate.

The Federal Circuit affirmed. The test for recovery based on inaccurate specifications is whether the contractor was misled by those errors in the specifications. As the Spearin Court stated, "the contractor should be relieved, if he was misled by erroneous statements in the specifications."[53] It follows that a contractor who was not misled may not seek an equitable adjustment.

In *White v. Edsall Const. Co., Inc.*,[54] the contractor sponsored the claim of its subcontractor, Uni-Systems (USI), relating to its Army contract for construction of an aviation support facility. The Army's design for the hangar included written specifications for four tilt-up canopy doors, each weighing 21,000 pounds. The design for the doors showed three "pick," or lift points, which evenly distributed the weight of the door. A drawing contained a note that required the contractor to verify the door detail and include the cost of any necessary changes in the bid price.

During performance, USI discovered that the three "pick" design was "completely unworkable" because it risked collapsing the building if one of the cables failed. USI designed and proposed a four "pick" design that would alleviate this danger. Although the government admitted that it never verified the three "pick" design, the contracting officer denied USI's claims due to USI's failure to bring the problem to the government's attention during the bid process.

The court disagreed. It held that the performance specifications for the door and the relevant drawings for the door provided "significant design characteristics." The court rejected the government's reliance on the disclaimer in the drawing note. The court found instead that the government warranted the design of the door and risk of the defect in the design did not shift to the contractor. The board noted a contractor is not obligated to inspect government drawings to verify their accuracy and ferret out errors and ambiguities.

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[53] *Spearin* 248 U.S. at 136.

[54] *See White v. Edsall Const. Co., Inc.*, 296 F.3d 1081 (Fed. Cir. 2002). For further discussion of this case, *see*, Geoffrey T. Keating, *Defective Specifications*, THE WEST GROUP CONSTRUCTION CONTRACTS YEAR IN REVIEW CONFERENCE 4-1 (West 2001).

Government disclaimers of design specifications are highly disfavored, particularly when the government failed to verify the validity of the design. Because the implied warranty protects contractors who fully comply with the design specifications, the contractors are not responsible for the consequences of defects in the specified designs.

Failure to Mitigate Damages

Damages are not recoverable for losses that the injured party could have avoided without undue risk, burden, or humiliation.[55] This principle is the basis for the defense of mitigation, which is an extension of the doctrine of avoidable consequences. While not a total bar to recovery, failing to mitigate may reduce the recovery of the injured party. Under this doctrine, the injured party is obligated to avoid incurring additional and unreasonable damages that reasonable efforts could have avoided.

The burden of proof, to show that the injured party has not used reasonable effort within its control to minimize damages, is clearly upon the party who asserts the defense.[56] Expenditures made in attempting to mitigate damages are recoverable.

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[55] 22 Am. Jur. 2d *Damages* § 507.
[56] *See* SIMON, *supra* note 4.

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