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Summary of Olson v. Aztech Plastering Co., 120 Nev. Adv. Op. 28

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***Olson v. Aztech Plastering Co.*, 120 Nev. Adv. Op. 28 (May 12, 2004)¹**

TORTS – CONSTRUCTION DEFECTS

Summary

This case was an appeal from an order denying a new trial on a construction defects case brought under Chapter 40 of Nevada Revised Statutes. The district court held that under *Calloway v. City of Reno*,² a plaintiff cannot bring a negligence action for economic loss arising from a construction defects claim.

Disposition/Outcome

Reversed. The Nevada Supreme Court found that negligence claims properly can be brought pursuant to Nevada Revised Statutes, Chapter 40.

Factual & Procedural History

The appellants, James and Candace Olson (“the Olsons”), contracted with a general contractor to construct a custom home for them. The general contractor contracted with a sub-contractor, Aztech Plastering Company (“Aztech”), to apply the stucco. The Olsons expressed several concerns with the stucco application both during and after the application. One of their main concerns was that the stucco fell off from the house in several areas and that water seeped into the home when it rained.

The Olsons hired an expert to investigate the seepage. The expert determined the seepage occurred because the stucco had been applied over the home’s weep holes.³ Additionally, the expert stated that the stucco application was inferior and caused the water seepage.

The Olsons made a Chapter 40 demand on the general contractor and copied the letter to Aztech. When the Olsons received no response, they filed suit against the general contractor and Aztech under common law and Chapter 40 of Nevada Revised Statutes. They alleged negligence, breach of contract, breach of warranty, breach of the duty of good faith and fair dealing, and negligent misrepresentation.

At trial, Aztech filed a motion to dismiss the negligence claim under *Calloway v. City of Reno*.⁴ The district court granted the motion. The jury returned a verdict in favor of Aztech on the remaining claims and the Olsons filed a motion for a new trial or for judgment notwithstanding the verdict. The district court denied the motion and the Olsons appealed the dismissal of the negligence claim and the denial of the motion for new trial to the Nevada Supreme Court.

¹ By Angela Morrison.

² 993 P.2d 1259 (Nev. 2000).

³ Weepholes are small holes in the window frames of homes that allow moisture to escape.

⁴ 939 P.2d 1259.

Discussion

In *Calloway*, the Nevada Supreme Court ruled that the economic loss doctrine barred a plaintiff from bringing negligence claims for economic loss in construction defect actions.⁵ Despite this holding, the court held that the economic loss doctrine does not apply to construction defect claims brought under Chapter 40 of Nevada Revised Statutes. The court reasoned that: (1) nothing in the statutory language “limits a homeowner’s recovery to construction defects covered by contract or warranty;”⁶ and (2) prior to *Calloway*, the court did not favor applying the economic loss doctrine. Hence, the court remanded and reversed the district court’s decision to bar the negligence claim. Regarding the district court’s denial of the Olson’s motion for a new trial, the court concluded that the district court had not abused its discretion.

Becker, J., Dissenting

Justice Becker disagreed with the majority. She believed that the majority erred when it found that the legislature intended to allow a negligence claim in construction defects suits. Justice Becker argued that the language of the statute, when read in context, reiterated existing law. She also argued that the court is bound by the precedent set in *Calloway*, and cannot reconsider the application of the doctrine. Additionally, Justice Becker stated that “had the legislature intended to exempt residential construction defect cases from the economic loss doctrine, it would have done so.”⁷ Further, she argued, the when the legislature enacted Chapter 40 it did not “create or eliminate a cause of action.”⁸ The legislature, she maintained, left it up to the judiciary, which decided it in *Calloway*.⁹ Justice Becker also used the legislative history of the statute to support her conclusion, citing to the inclusion of the word negligence in an earlier draft and the failure of the legislature to change the wording after the court handed down the *Calloway* opinion. Finally, she argued that because other remedies – such as breach of contract and warranty – are available to homeowners, there is no need to “creatively” read the statute.

Conclusion

Under this holding, the economic loss doctrine does not apply to residential homeowners who bring suit under Chapter 40 of Nevada Revised Statutes. Therefore, many homeowners likely will bring suit pursuant to the statute rather than under common law doctrines. However, this opinion seems to beg the Nevada Legislature to take some course of action regarding this issue and make its intent clear.

⁵ 993 P.2d 1259.

⁶ Olson v. Aztech Plastering Co., 120 Nev. Adv. Op. 28, 5 (May 12, 2004).

⁷ *Id.* at 3 (Becker, J., dissenting).

⁸ *Id.* at 4 (Becker, J., dissenting).

⁹ 993 P.2 1259.