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***Terracon Consultants W., Inc. v. Mandalay Resort Group*, 125 Nev. Adv. Op. No. 8 (March 26, 2009) (en banc)¹**

**COMMERCIAL LAW – PROFESSIONAL NEGLIGENCE –
ECONOMIC LOSS DOCTRINE**

Summary

Pursuant to Nevada Rule of Appellate Procedure 5², the United States District Court for the District of Nevada, hearing a breach of contract and professional negligence case, certified the following questions regarding the scope of Nevada’s economic loss doctrine:

[1] Does the economic loss doctrine apply to contractors who solely provide services in construction defect cases?

[2] Does the economic loss doctrine apply in construction defect cases to design professionals, such as engineers and architects, who solely provide services, regardless of whether the services are rendered before or during construction?

Disposition/Outcome

The Court accepted the referral but narrowed its focus to the particular types of professionals and claims involved in this case by reframing the certified questions into one: “Does the economic loss doctrine apply to preclude negligence-based claims against design professionals, such as engineers and architects, who provide services in the commercial property development or improvement process, when the plaintiffs seek to recover purely economic losses?” The Court answered in the affirmative.

Factual and Procedural History

Respondents Mandalay Resort Group, Mandalay Development, and Mandalay Corporation (hereinafter, “Mandalay”) contracted for Terracon Consultants Western, Inc., Terracon, Inc. (hereinafter “Terracon”) to “provide geotechnical engineering advice about the subsurface soil conditions and recommend[] a foundation design” for use in constructing the Mandalay Resort and Casino (hereinafter, “the resort”) in Las Vegas. Terracon’s duties under the contract were limited to professional engineering advice and did not include any involvement in the physical construction of the resort.

¹ By Ian Houston

² NEV. R. APP. P. 5 permits the Supreme Court of Nevada to answer certified questions when requested by United States federal courts “if there are involved in any proceeding before those courts questions of law of [the state of Nevada] which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of [Nevada].”

Terracon performed on the contract and Mandalay implemented Terracon's soil report and foundation design recommendations in erecting the resort. Mandalay alleges, however, that the actual soil settling underneath the foundation exceeded Terracon's projections and, as a result, Clark County required Mandalay to repair and reinforce the foundation before proceeding. Mandalay sued Terracon for damages in state court alleging, among other claims not addressed in this certification, that Terracon's deficient engineering advice caused the foundation problems. Mandalay seeks recovery under theories of breach of contract, breach of the covenant of good faith and fair dealing, and professional negligence.

Terracon removed the case to the United States District Court for the District of Nevada and moved for partial summary judgment arguing that the economic loss doctrine barred Mandalay's professional negligence claim. Mandalay opposed the motion arguing instead that "the economic loss doctrine did not apply to negligence claims against design professionals or contractors who solely provide services." Terracon also filed a third party complaint against Klai-Juba, Ltd. and Lochsa, LLC, two other subcontractors Mandalay hired to provide architectural and engineering services in designing parts of the resort.³ Terracon argued that if the economic loss doctrine did not bar Mandalay's negligence claim against it, then likewise its third party claims against the other subcontractors would not be barred. Klai-Juba and Lochsa moved for the Court to dismiss Terracon's third party complaint arguing that the economic loss doctrine applied.

The district court denied without prejudice Terracon's summary judgment motion and the motion to dismiss the third party complaint because Nevada law on the applicability of the economic loss doctrine under these circumstances is unclear. The district court referred the issue to the Nevada Supreme Court for certification. The Court accepted the referral noting the existence of "nuanced ambiguities" in Nevada case law on the economic loss doctrine.

Discussion

NRAP 5

In deciding whether to answer a certified question pursuant to NRAP 5, the Court looks to whether (1) the certified question's answer may be determinative of part of the federal case, (2) there is controlling Nevada precedent, and (3) the answer will help settle important questions of law.⁴ The Court, constraining itself to addressing the legal issues presented in the parties' pleadings, reframed the two certified questions into one and determined that the reframed question fit the criteria for certification. As such, the Court accepted the referral.

³ Like Terracon, neither Klai-Juba nor Lochsa had any involvement in the resort's physical construction.

⁴ *Volvo Cars of N. Am. v. Ricci*, 122 Nev. 746, 749, 137 P.3d 1161, 1164 (2006).

The Economic Loss Doctrine

The economic loss doctrine, subject to narrow exceptions, “bars unintentional tort actions when the plaintiff seeks to recover ‘purely economic losses.’”⁵ Ordinarily, the first step in an economic loss doctrine analysis is to ascertain whether damages are purely economic in nature. Because the district court determined that Mandalay’s losses were purely economic, the court moved beyond this step. The Court stated that the primary purpose of the doctrine is “to shield a defendant from unlimited liability for all of the economic consequences of a negligent act, particularly in a commercial or professional setting, and thus to keep the risk of liability reasonably calculable.”⁶ In remaining consistent with this purpose, the doctrine bars recovery in negligence for economic losses “unless there is personal injury or property damage.”⁷

Courts have made exceptions, allowing recovery for purely economic losses, in certain categories of cases.⁸ To determine if an exception should be made, the Court considers the policies underlying the doctrine and whether there are countervailing policy considerations that weigh in favor of imposing liability. The policy concerns underlying the economic loss doctrine include: 1) balancing economic activity incentives against providing compensation to negligence victims, 2) financial considerations, and 3) balancing the disproportion between liability and fault. The exceptions made by other courts exist in categories of cases in which “the policy concerns about administrative costs and a disproportionate balance between liability and fault are insignificant, or other countervailing considerations weigh in favor of liability.” Those courts that have made exceptions to allow recovery for purely economic loss on tort-based claims against design professionals have reasoned that: 1) the doctrine does not apply to bar tort claims grounded on negligently rendered *services*, 2) recovery is permissible when design professionals owe duties beyond the terms of the contract, or 3) that such claims are foreseeable and therefore justify imposing liability.

The Economic Loss Doctrine Applies to Preclude Mandalay's Professional Negligence Claim

After considering the countervailing interests, the Court declined the opportunity to make an exception to the economic loss doctrine that would allow recovery for purely economic loss on professional negligence claims against design professionals who have provided services in commercial property construction or development. The Court concluded that the doctrine’s bar should apply because this is a category of commercial activity for which contract law is better suited to resolve professional negligence claims. This legal line between contract and tort liability promotes useful commercial economic activity, while still allowing tort recovery when personal injury or property damage are present. Further, as in this case, contracting parties often address the issue of economic

⁵ Local Joint Exec. Bd. v. Stern, 98 Nev. 409, 411, 651 P.2d 637, 638 (1982).

⁶ *Id.*

⁷ *Id.* at 410-11.

⁸ Courts have made exceptions for certain categories of cases such as “negligent misrepresentation and professional negligence actions against attorneys, accountants, real estate professionals, and insurance brokers.”

losses in contract provisions. The Court could find no policy distinction for imposing liability on design professionals in commercial property development but not against contractors and subcontractors involved in physically constructing the projects.

Because the economic loss doctrine applies to professional negligence actions against design professionals in commercial property construction defect actions and Mandalay seeks recovery for purely economic loss and alleges no personal injury or property damage, its claim is barred.

Conclusion

The economic loss doctrine bars recovery in commercial property construction defect actions where plaintiffs allege negligence-based claims seeking recovery for purely economic losses against design professionals who have provided professional services in the commercial property development or improvement process.