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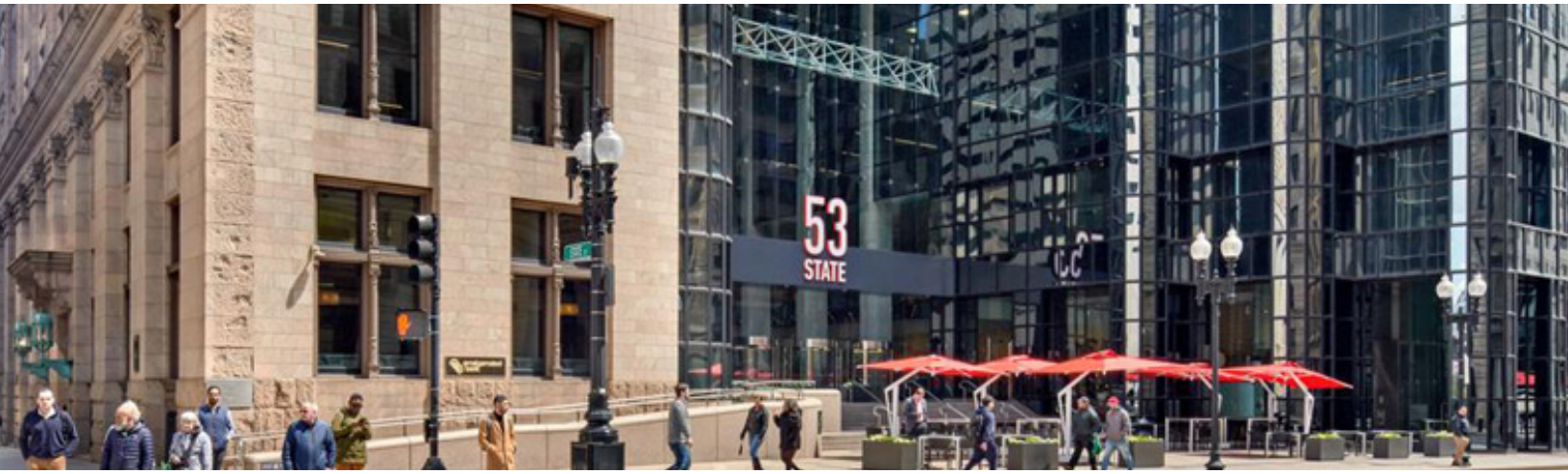

Design and Construction Management Professional Reporter

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In This Issue:

Note from the Editor

As Spring has turned into Summer 2024, we continue to look forward to new opportunities as the design and construction industry continues to surge. US Census data shows annual construction spending (as of April 20) at over $2 trillion. As a consequence, design professionals remain in high demand. However, we face a decline in student enrollment in architectural programs. In addition, the Bureau of Labor Statistics data indicates that demand for engineering skills will grow by about 13% from 2023 to 2031. Design professionals should expect to remain very busy for the foreseeable future.

Our most recent D&C Reporter addressed emerging changes in the industry in the form of AI and its influence on design professionals. Since then, Donovan Hatem has collaborated on an article entitled, “Seven Questions on Artificial Intelligence and its Use by AEC Design Professionals.” Our Spring Roundtable was also focused on AI, “AI and the Design Professional: Mitigating Risks, Best Practices and Other Considerations.” If these are of interest to you, please visit our website (www.donovanhatem.com) for more information and follow us on LinkedIn for other articles and presentations.

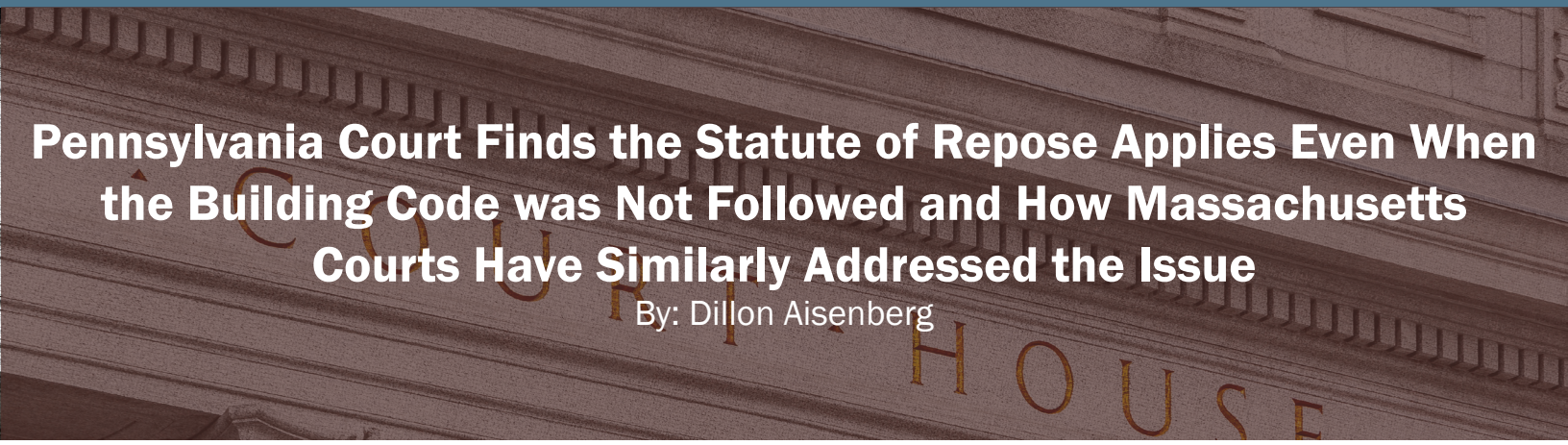
In this edition of the D&C Reporter, we return to some of the more traditional issues impacting the industry. We discuss the Pennsylvania and Massachusetts statutes of repose, a Louisiana case on contract terms, and Tennessee’s limitation of the economic loss doctrine. Although these issues pre-date AI, they nevertheless remain most relevant to the industry in every State and impact how services are rendered.

We hope that you will find these articles informative and helpful.

If you have any questions or wish to discuss these issues or any issue impacting the design and construction industry, please reach out to us. Also, if there are topics on which you would like to know more, we would be happy to prepare an article or presentation.

Best regards,

Stephen F. Willig



Pennsylvania Court Finds the Statute of Repose Applies Even When the Building Code was Not Followed and How Massachusetts Courts Have Similarly Addressed the Issue

By: Dillon Aisenberg

The statute of repose is an important protection for design professionals that provides an end point beyond which claims cannot be brought. Many jurisdictions have adopted variations of the statute of repose. The basic premise in construction law is that a statute of repose will bar any claims that relate to negligence for the construction of a property after a certain period of time has passed since the completion of building such property. The purpose of this statute is to protect design builders from the potential of endless claims that may not come to light until many years after the design professional has completed the services. It is important for design professionals, and other construction professionals, to be aware of their state's specific statute of repose, as the time limitations vary widely from state to state.

Recently, a Pennsylvania court found in Johnson v. Toll Brothers., Inc., 302 A.3d 1231 (Pa. Super. Ct. 2023), that the Pennsylvania statute of repose applies even if a contractor does not follow the applicable building code. In this case, the defendants were the contractors hired to construct a house. The defendants failed to follow applicable building codes during the installation of door frames, brick facades, and windows, which caused significant water damage to the property. The home was completed on October 18, 2004, and suit was not brought until 2018. Pennsylvania, has a 12-year statute of repose.[1]

The Johnson Court, in finding for the defendants, held that the Pennsylvania statute of repose bars the plaintiff's claim since it was brought after 12 years. Furthermore, the Court found that even though the defendants did not follow the applicable building code, the time limitations would not be extended. The Court cites the plain meaning of the statute and the intent of the legislature to protect the scope of liability for construction professionals. In the alternative, the plaintiffs argued that because the water damage was persistent it should extend the time limitations of the statute of repose. The Court also rejected this argument. While Pennsylvania does have an exception if the injury occurs in between the 10th and 12th year, this was not applicable, as the water damage had occurred well before then. As a result, the Court ruled in favor of the defendants.

As an example of how other states apply the statute of repose, Massachusetts is even stricter than the comparable Pennsylvania law. The Massachusetts statute of repose is applicable after 6 years from the date of the completion of a project.[2] In the case of Bridgwood v. A.J. Wood Construction Inc., 480 Mass. 349, 357 (2018), the Massachusetts Supreme Judicial Court stated that a design professional who did not follow applicable building code and state law, would not extend the tolling period of the statute of repose. In the case, the defendants, who were the general contractor and subcontractor for the building of a house, failed to obtain any permit or have any inspection for the light fixtures and electrical wires as

[1] 42 Pa. Stat. and Cons. Stat. § 5536
[2] Mass. Gen. Laws Ch. 260, §2B

required by law. The house was completed in 2001 and in 2014 suffered extensive damage due to faulty electrical wiring. The action, commenced in 2016, was well past the six-year limitation. The Court, similar to the Pennsylvania Court, cites the plain meaning of the Massachusetts statute of repose, and followed the legislative intent of creating an absolute time bar limitation.

Indeed, Massachusetts Courts have a strict interpretation when it comes to the limitation of the statute of repose and do not allow a tolling exception even when the injury does not become noticeable until well after the time limitation has expired. In Stearns v. Metro. Life Ins. Co., 481 Mass. 529, 537 (2019), the Massachusetts Supreme Judicial Court did not extend the statute of repose when a plaintiff suffered from a disease with an extended latency period. The plaintiff in the case was a pipe inspector who was exposed to asbestos during the construction of two nuclear power plants in the 1970s and was diagnosed with mesothelioma in 2015. The plaintiff commenced action in 2015 against General Electric who designed the steam turbine generators, which contained insulation material with asbestos. The Court found that the plaintiff's action against General Electric was barred because construction for the power plants had been completed for well over 20 years and therefore was well past the six-year time limitations of the statute of repose.

Louisiana Court Holds Parties to Construction Contract Are on Equal Footing and Owner not Under Duress in Agreeing to Change Order in Order to Complete Project on Time and Begin Revenue Stream

By: Matthew Gendreau

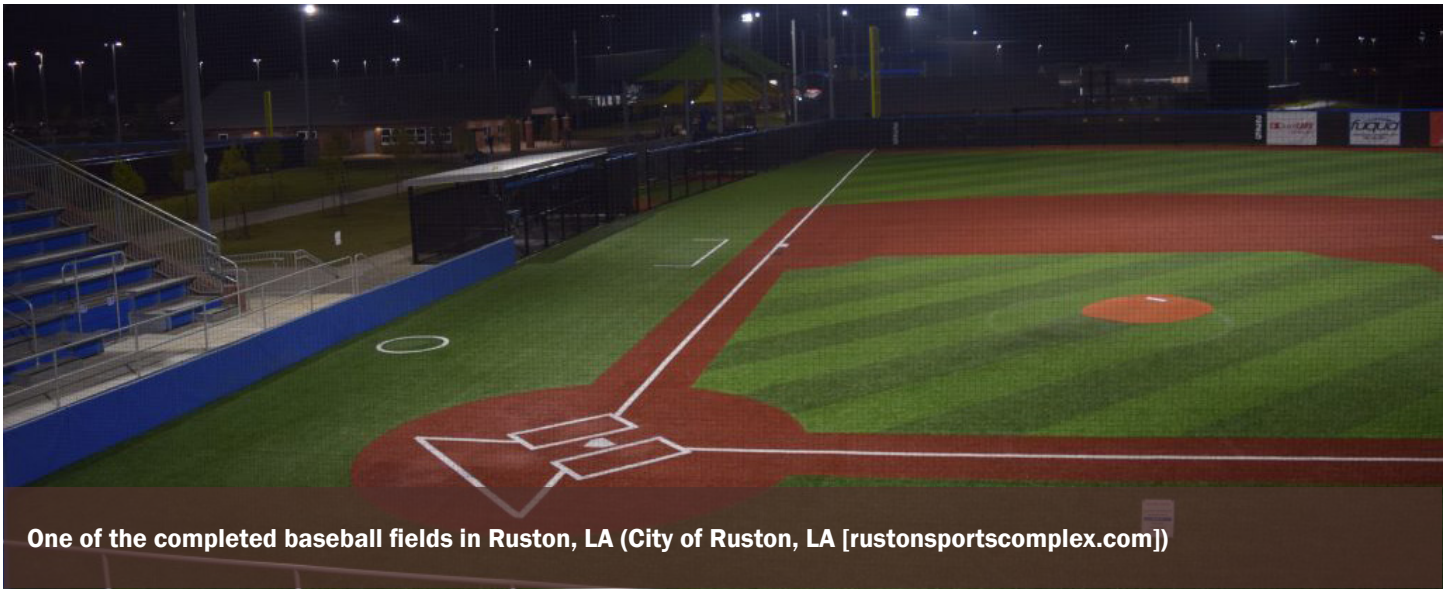
In City of Ruston v. Womack & Sons Construction Group, Inc., 374 So. 3d 311 (2023), a Louisiana appeals court was confronted with a thorny problem facing the City of Ruston, Louisiana. Should it do what was best for it economically, or legally? In this case, Ruston chose the former, leading to its defeat in the latter.

Ruston's problems began with a contract it entered into with Womack & Son's Construction Group, Inc. ("Womack") on August 31, 2017. Ruston paid $35,000,000.00 for Womack to construct 16 baseball fields for the 2019 Dixie World Series, a youth baseball event. This event was expected to produce $6,000,000 in income for Ruston, thus compelling a 425-day deadline for completion of the project. The architect was Yeager, Watson & Associates ("YWA").

The contract allowed for changes to be made during the project. Yet, Subparagraph 7.2.2 of the Supplementary Conditions to the contract stipulated that if the parties agreed on a change order, it "...shall constitute a final settlement of all matters relating to the change in the [w]ork....including, but not limited to all direct and indirect costs associated with such change..."

Womack hired a subcontractor, GeoSurfaces (Geo), to install a subsurface to the turf baseball fields as spelled out in the contract. This subsurface consisted of compacted dirt topped with a geomembrane liner, a drainage pad, and rock. In November 2018, Geo and Womack discussed that five of the sixteen fields had leaks in their geomembrane liners from rain. Womack wrote in an email, "I do not want any inspectors noticing and causing a problem…" In January 2019, months after discovering the leaks, Womack informed YMA of the problem and that the turf could not be laid over the subsurface. YMA informed Ruston, who was left with two choices: 1) peel back the liner and let the foundation dry, allowing for the turf to be installed thereafter, but jeopardizing the completion date and Ruston's ability to host the Dixie World Series; or 2) install a concrete base over the foundation already in place, allowing for installation of the turf on time, but at added cost to Ruston.

While Ruston was presented with two options in regard to the construction of the baseball fields, they had several avenues to seek legal recourse. The contract allowed Ruston to demand Womack correct the work at its own expense. They could have sued Womack for breach of contract for faulty workmanship. Or, they could have agreed to the change order, while reserving its rights to file suit to recover damages later. However, with the Dixie World Series scheduled to begin in just six months, Ruston agreed to install a concrete base over the foundation of the damaged fields, executing the change order on February 5, 2019 and paying $1,779,682.33 in additional cost to complete that work. No reservation of rights was made by Ruston.



One of the completed baseball fields in Ruston, LA (City of Ruston, LA [rustonsportscomplex.com])

Ruston was able to host the Dixie World Series on time. However, Ruston felt aggrieved at the drastic change in design compelling the additional cost it paid. Thus, on October 8, 2021, Ruston filed suit against Womack on a theory of breach of contract, claiming $1,779,682.33 in damages. At the District Court level, Womack moved the Court for summary judgment, which was granted. Ruston appealed, arguing the lower Court made five errors.

First, Ruston argued there were still material issues of fact the Court needed to consider, specifically regarding the intent of the parties. They wished to introduce parole evidence, including a deposition and affidavit from Womack and a letter from YMA to Womack, to show what the intent of the parties truly was. The Appellate Court declined to entertain this, citing Louisiana statutory law that no search for the parties' intent in a contract is necessary if the words are clear, explicit, and lead to no absurd consequences. La. C.C. art. 2046. The Court ruled this contract was not ambiguous, with the terms of Section 7.2.2. being clear, explicit, and not leading to absurd consequences.

Second, Ruston contended several other portions of the contract were rendered null and void by Section 7.2.2, thereby violating the "Cardinal Rule" in contract interpretation that all provisions be interpreted in light of the intention of the contract as a whole. The Court rejected this contention, citing that the "other provisions" raised by Ruston would have allowed them to take action against Womack for any allegedly poor workmanship. Instead, Ruston renegotiated the contract and pursued a new construction option for the baseball fields. This was a conscious decision Ruston made that did not render the remainder of the contract meaningless.

Third, Ruston asserted Womack caused the problem that led to the change order, and that the lower court impermissibly placed the burden of paying for that mistake on Ruston. They argued the enforcement of Section 7.2.2 would be an absurd result. The Court, again, rejected this argument, citing case law[3] that one party making a "bad deal" was not such an absurd result as to render a contract provision null and void. The Court maintained the lower court's findings that the parties disputed who was to blame for the need for repairs, and that this dispute was known to the parties before they made the change order. The Court refused to bend the terms of a clear and unambiguous contract to fit a certain intention asserted by Ruston.

Fourth, Ruston argued that the change order they signed was entered into without their valid consent because their decision was corrupted by errors, fraud and duress, all allegedly caused by Womack. They contended the change order should not have been enforced due to this lack of consent. The Court found no error that would have vitiated or corrupted Ruston's consent to enter into the change order. As to fraud, Ruston claimed that Womack defrauded them by failing to accurately disclose the state of the subsurface fields. They claimed this led to their entering into a change order that was based upon misrepresentation. The Court, again, disagreed with Ruston, relying on Louisiana case law that fraud cannot be found when the truth could have been discovered without difficulty, inconvenience, or special skill.[4] The Court found Ruston had several meetings with Womack and YWA, and that they were fully aware of the condition of the fields when the change order was made. This negated any possible fraud argument Ruston had.

Finally, as to duress, Ruston argued they had no other choice but to enter into the change order due to the pending Dixie World Series. They claimed this duress vitiated any consent they had to enter into the change order. Ruston cited a Louisiana Supreme Court case, Wolf v. Fair Grounds Corp., 545 So. 2d 976 (La. 1989), where the court invalidated waivers signed by thoroughbred jockeys to not sue the racetrack at which they raced due to the duress the racers were under to sign them. The Court there held the superior bargaining power of the racetrack compared to the economic need of the jockeys created the duress that invalidated their consent. However, the Court in City of Ruston ruled there was no duress, as the parties were of equal economic standing and sophistication.

Fraud cannot be found when the truth could have been discovered without difficulty, inconvenience, or special skill.

Yet, one of the justices dissented on this point. Justice Robinson pointed out that Womack learned of the subsurface problem in the Fall of 2018 but did not notify Ruston until January 2019. Further, the dissent cited the e-mail from Womack suggesting they did not want inspectors noticing the leaks and causing a problem. The dissent also pointed out that by the time Ruston learned of the problem, they were so close to the Dixie World Series that they were under duress to institute the change to the field design.

[3] Gibbs Const. Co. v. Thomas, 500 So. 2d 764 (La. 1987); KCREW Invest., LLC v. Clark, 55,092 (La. App. 2 Cic. 5/10/23), 362 So. 3d 1288.
[4] Priority Hospital Group, Inc. v. Manning, 53,564 (La. App. 2 Cir. 9/23/20). 303 So. 3d 1106, writ denied, 20-01238 (La. 1/20/21).

While the Louisiana Appeals Court was divided over this case, its ruling is clear. When parties are sophisticated companies with equal footing in the worlds of business and industry, they are going to be held to the terms of their agreements. Ruston was held to the terms they agreed to here, and despite its difficult position in this case, it could not avoid paying for it.

Tennessee Limits the Application of Economic Loss Doctrine in Construction Cases

By: Michael Schaefer

In its recent decision Commercial Painting Company, Inc. v. The Weitz Company LLC, 676 SW.3d 527 (Tenn. 2023), the Tennessee Supreme Court held that the economic loss doctrine ("ELD") only applies to product liability cases. The ELD potentially prevents a party from pursuing tort claims – such as negligence or misrepresentation – when the alleged damage arises only from economic losses, or damage to the product or service provided. It preserves the distinction between contract and tort by preventing the "'tortification' of contract law." It can be an important defense for design professionals because available damages in contract claims may be more limited than in tort claims, thereby reducing potential defense exposure. However, the ELD is based on state law and applied differently in each state, as demonstrated by the Commercial Painting decision.

Commercial Painting dealt with an effort to expand the previously restrictive application of the ELD in Tennessee. Defendant Weitz was the general contractor on a multi-building retirement community, and Plaintiff Commercial Painting was its drywall subcontractor. The project was fraught with construction delays and schedule extensions, which Weitz allegedly failed to disclose to Commercial Painting at hiring.

Commercial Painting brought a lawsuit against Weitz, which ultimately stated claims for breach of contract and misrepresentation, among other claims. The jury awarded compensatory damages to Commercial Painting under both counts, as well as punitive damages. Weitz appealed, claiming the misrepresentation award was barred by the ELD and citing a 2021 Tennessee Supreme Court ruling that slightly expanded the ELD in certain instances. Prior to that 2021 ruling, the ELD in Tennessee had been strictly limited to product liability cases. Thus, the Tennessee Supreme Court had the opportunity to continue the nascent expansion of the ELD in Tennessee outside the products liability area. In its opinion in Commercial Painting, however, the Tennessee Supreme Court firmly slammed the door shut on further expansion. The Court observed that the ELD had become complex and riddled with exceptions in states with expanded ELDs, causing inconsistent application and confusion regarding the ELD's scope.

This Commercial Painting decision likely limits the ELD's usefulness in cases involving design and engineering professionals decided under Tennessee law. Nevertheless, the case shows the importance of having attorneys experienced in dealing with economic loss doctrine and its various permutations and exceptions when handling a professional liability case.