



Contractors Beware: Apportionment of Damages Among Subtrades May Not Limit an Owner’s Total Damages for Construction Defects

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In the case of *Waverly City School District Board of Education, et al. v. Triad AR, Inc, et al.*, the Fourth Appellate District Court found that recovery is not limited to the amount of damages claimed; rather, the owner is entitled to recover damages on each contract, apart from any recovery on the other separate and distinct contracts. **This means that an owner may recover damages in excess of the total damages identified for each responsible subtrade.** Upstream contractors should take care in their subcontracts to ensure that their total liability for the defective work of their subtrades – irrespective of apportioned responsibility – be covered under the subtrade’s indemnity obligations.

The Waverly school construction project involved the building of a campus of four separate schools at an original cost of \$50 million. Rather than having a general contractor performing all construction, there were separate contracts with four prime contractors (masonry/concrete, roofing, general trades/floor slabs, and site preparation). There were also additional contracts with an architect for design and oversight, with a construction manager for oversight/quality control, and with a geotechnical firm. After Waverly took occupancy of the building, it experienced major water intrusion problems at all four buildings and concrete floor slab heaving in the gymnasium and adjacent classrooms.

The owner’s expert prepared a damage matrix that (among other things) lists the parties responsible for each construction defect. Almost every defect identified in the damages matrix lists at least two contractors as the responsible party. The experts who created the damages matrix testified that it was impossible to allocate responsibility for the damages between the contractors listed in the damages matrix for each specific defect and remediation cost.

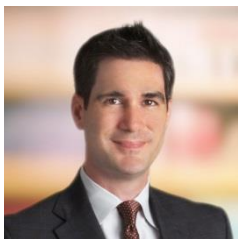
During the litigation, the owner reached settlement with certain of the defendant contractors. Prior to reaching a settlement with all of the defendant contractors, the total amount of the settlement payments received by the owner exceeded the total amount of damages claimed by the owner. The Trial Court granted the non-settling defendant contractors summary judgment on the basis that: (1) the amounts received from the settling co-defendants exceeded the damages incurred on the Project, and thus the owner was made whole; and (2) the owner could not identify with reasonable certainty which alleged breach caused what amount of damages, thereby requiring the trier of fact to speculate. The owner appealed, and the Appellate Court reversed the judgment of the trial court on these issues. In doing so, the Appellate Court ruled:

1. No Limit on Recovery. Owners are entitled to recover damages on each contract, apart from any recovery on other separate and distinct contracts. Put simply, it is an error to lump the settlement proceeds together when each defendant contractor held a separate contract with a separate scope of work. The owner can recover additional damages under the separate contracts even after the Owner's claimed loss has been recovered from the other defendant contractors.
2. No Need to Segregate Damages. In contract cases, if the defendant's breach was a "substantial factor" in causing the injury, the defendant may be held responsible for the *full extent of the damages*, even if there were other contributing causes. A breach of contract is a "substantial factor" in causing a plaintiff's damages if it is the predominating, primary, real, main, or chief causal factor. When a defendant's breach is a "substantial factor" in causing the injury, the defendant may be held responsible for the full extent of the damages and the issue of proportionate fault among other contributing factors is not germane to the owner's recovery from defendants. In other words, the trier of fact need not "speculate" on any allocation between multiple parties who may have contributed to the same damage.



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