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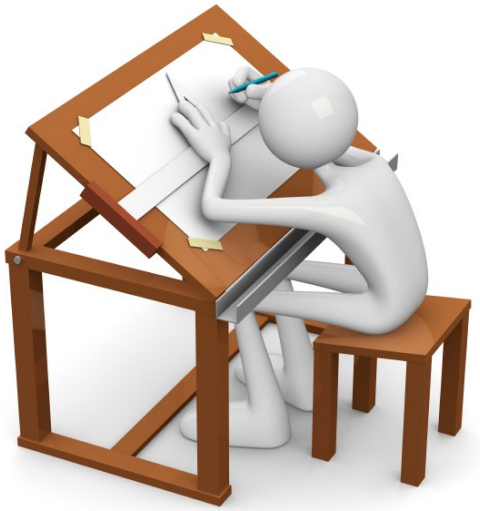
Construction Law

THE BEST LAID PLANS OF MICE AND MEN OFTEN GO AWRY

By: Keith A. Langley

When plans and specifications on a construction project in Texas do not work, be aware, neither does a negligent misrepresentation lawsuit against the design professional. Think contract instead. Think contract principles—privity, assignment, subrogation to position of a party in privity.



LAN/STV v. Martin K. Eby Construction Co., 435 S.W.3d 234 (Tex. 2014)

Contractors cannot recover economic loss damages under a theory of "negligent misrepresentation" against design professionals, with whom the contractors had not contracted, resulting from alleged errors in the architect's plans and specifications.

In October of 2000, the Dallas Area Rapid Transit System (DART) entered into a contract with the architect, LAN/STV, requiring it to prepare plans, drawings, and specifications for the construction of a portion of DART's light rail system in Dallas. As is typical on construction projects, these plans, drawings, and specifications were incorporated into bid documents that general contractors used in submitting bids to DART. General contractor Martin K. Eby Construction Company was awarded the contract based on its bid. After construction commenced, Eby suffered numerous delays and increased costs, which it attributed to errors in the plans and specifications. Eby sued DART in Federal District Court for breach of contract and negligent misrepresentations arising out of the design documents, and ultimately settled with DART for $4,700,000. After that settlement, Eby sued LAN/STV for negligent misrepresentation, alleging that the plans and specifications contained errors that caused Eby to suffer significant economic damages.

The jury found that LAN/STV had made negligent misrepresentations, and that Eby had suffered $5,000,000 in damages. (This amount was later reduced to $2,250,000 by the trial court). On appeal, LAN/STV argued that Eby was barred from recovering under a negligent misrepresentation theory by Texas's "economic loss rule," which generally precludes recovery of purely economic damages under certain tort theories—including negligence actions. The Dallas Court of Appeals rejected this argument, holding that negligent misrepresentation was an exception to the economic loss rule, and allowed Eby to recover its "out-of-pocket" damages resulting from alleged negligent misrepresentations in the design. The Court of Appeals relied, in part, on Restatement (Second) of Torts § 552, which authorizes recovery of some economic damages for negligent misrepresentations.

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To "Go Green", our firm uses recyclable paper or ceramic cups and no longer uses Styrofoam cups. In addition, we have adopted a less-paper office environment.

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Well done is better than well said.

- Benjamin Franklin

The Texas Supreme Court reversed, and held that a general contractor was precluded "from recovering delay damages from the owner's architect." Chief Justice Hecht explained:

> Construction projects operate by agreements among the participants. Typically, those agreements are vertical: the owner contracts with an architect and with a general contractor, the general contractor contracts with subcontractors, a subcontractor may contract with a sub-subcontractor, and so on. The architect does not contract with the general contractor, and the subcontractors do not contract with the architect, the owner, or each other.

The Texas Supreme Court reversed, and held that a general contractor was precluded "from recovering delay damages from the owner's architect." Chief Justice Hecht explained:

> We think it beyond argument that one participant on a construction project cannot recover from another – setting aside the architect for the moment – for economic loss caused by negligence.

Chief Justice Hecht wrote that the economic loss rule "should not apply differently" where a general contractor couches his claims against the architect in terms of ordinary negligence or "an action for negligent misrepresentations," and held that the general contractor should look instead to the party with whom it has contracted (e.g. the owner) for its remedies.

This case may influence how an entity which suffers damage approaches salvage against third-parties, e.g. architects for negligent inspection. One way to pursue such claims despite the Texas Supreme Court's holding in *Eby* may be through subrogation. Subrogation is an entity's right to stand in the shoes of another. 4A Bruner & O'Connor Construction Law § 12:100 (2015 ed.) The owner/obligee is generally in contractual privity with design professionals. Thus, despite the *Eby* decision, the surety should be able to pursue claims against design professionals and other third parties through subrogation. *Lyndon Property Ins. Co. v. Duke Levy and Associates, LLC*, 475 F.3d 268 (5th Cir. 2007) (holding that a performance bond surety was subrogated to the rights of the obligee against an engineer, and rejecting the engineer's defenses based on an exculpatory clause in its contract and on the economic loss doctrine).

To a Mouse, on Turning Her Up in Her Nest with the Plough

But little mouse, you are not alone,

Improving foresight may be vain;

The best laid schemes of mice and men

Go often askew,

And leave us nothing but grief and pain,

For promised joy

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