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CONSTRUCTION LAW

Implied Warranties — Tort v. Contract

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Other than the strategy of the Jones family in managing the football operations of the Dallas Cowboys, one of the more confusing things in Texas is the line of demarcation between contract and tort. Courts up and down the chain in Texas have struggled with this concept for at least 40 years, and the economic loss rule has seemingly been swallowed by more exceptions than one would think is possible.

Recently, the intersection of tort and contract came up yet again – this time in connection with the issue of the implied warranty of good and workmanlike performance. As the name indicates, this is a warranty that has developed in the common law over time and generally encompasses the idea that apart from any contractual obligation, a party has a duty (i.e., tort obligation) to perform its work well.

Creative attorneys have long attempted to try and shoehorn tort claims into breach of contract disputes for a variety of reasons. Most revolve around the thought of increasing the damage model or perhaps getting around certain contractual provisions that limit the scope of liability. Such provisions include a mutual waiver of consequential damages and contractual damage caps. Additionally, tort claims can sometimes give rise to treble damages under consumer protection statutes, as well as the possibility of punitive damages for willful and/or intentional conduct.

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Against that backdrop, the appellate court in Dallas was recently presented the question of whether a claim for an implied warranty for good and workmanlike performance necessarily requires the lack of any other remedies. Basically, whether an implied warranty can be a tagalong to a primary breach of contract claim covering the same scope of work.

In finding that an implied warranty claim could only survive in the absence of any other remedies (meaning no ability to bring a breach of contract claim), the court relied on previous Texas authority that reached the same conclusion in connection with a Deceptive Trade Practices Act claim. The appeals court saw no reason to limit the rationale to only DTPA claims. Thus, in the same way that a party typically is precluded from seeking a quantum meruit claim when there is an existing contract, the same is true with respect to this implied warranty claim.

This is a positive decision, as it helps to set the boundary between tort and contract. While we still expect for construction disputes to involve a litany of causes of action with the strategy of seeing what might stick on the proverbial wall, this case and the line of authority in support helps establish that when there is a contract, its provisions should control and define not only the scope of liability, but also any damages that might flow.

Now, if only the same Texas appellate court could let me know what's going on with the Cowboys and free agency – stay tuned for updates.

The case is *Benge Gen. Contracting, LLC v. Hertz Elec., LLC*, No. 05-19-01506-CV, 2021 WL 5317840 (Tex. App.—Dallas Nov. 16, 2021, no pet.).

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