BERGER SINGERMAN
FLORIDA'S BUSINESS LAW FIRM

TURNING OFF THE SPIGOT OF DAMAGES IN CONSTRUCTION CASES: THE DOCTRINE OF "AVOIDABLE CONSEQUENCES"

February 14, 2018

By: Jeffrey S. Wertman

"Damage control" is often associated with measures taken to offset or minimize damage to reputation, credibility, or public image caused by a controversial act, remark, or revelation. However, the concept of damage control has been and continues to be prevalent in construction cases.

The doctrine of "avoidable consequences", also sometimes referred to as the "duty to mitigate" damages, is an affirmative defense in construction cases and prevents a party from recovering those damages inflicted by a wrongdoer that the injured party could have reasonably avoided. Under the doctrine of avoidable consequences, a party must make reasonable efforts and exercise reasonable care to reduce the resulting damages as much as is practicable under the circumstances of the particular case or that party cannot recover damages flowing from consequence which reasonably could have avoided. However, a party need not make extraordinary efforts, including those which would require undue effort or expense.

A recent Florida case, Penton Business Media Holdings, LLC v. Orange County, Florida, Case No. 5D16–3935, 2018 WL 559684 (Fla. 5th DCA Jan. 26, 2018), illustrates why it is critical for a plaintiff seeking damages in a construction case to reasonably avoid the consequences of the damages caused by a wrongdoer.

The lawsuit in Penton arose out of an incident at the Orange County Convention Center (the "Convention Center"), which is owned by the plaintiff, Orange County. The defendant, Penton, leased several exhibit spaces from Orange County for a trade show at the Convention Center. Penton, in turn, leased one of the exhibit spaces to co-defendant, Ultratec. Penton advised exhibitors, including Ultratec, prior to the show that demonstration rooms (rooms for exhibitors to demonstrate or test their products) were also available for the show. Penton and Ultratec discussed the use of a demonstration room for a flame test display Ultratec wanted to conduct at the show. Thereafter, Ultratec hired co-defendant, Art F/X, to obtain a permit from Orange County, for the flame test. The permit was approved by Orange County and stated the flame test would involve the use of different theatrical flame effects.

Ultratec conducted its flame test and the display was monitored and supervised by the Orange County Fire Department. The sprinkler system became activated during Ultratec's flame test. Although Orange County was in control of the demonstration room and owned the Convention Center, it did not initially know how to turn off its sprinkler system. As a result, the sprinkler system ran for approximately 30 minutes causing substantial water damage. Orange County subsequently sued based on theories related to strict liability and negligence against the lessee, Penton; the entity that obtained the permit, Art F/X; and the exhibitor, Ultratec.

Penton alleged in one of its affirmative defenses, the doctrine of avoidable consequences – the County's damages to its property were created or enhanced by its failure to shut down or disengage the sprinkler system when reasonably possible. According to Penton, had the Convention Center shut off the sprinkler system when reasonably possible, its damages would be significantly less.

In its written opinion, the appellate court reversed part of the final summary judgment, which awarded damages to the County, concluding the County had not conclusively refuted Penton's affirmative defense that the County failed to exercise ordinary and reasonable care in disconnecting the sprinkler system and had it done so, the water damage could have been avoided.

The doctrine of avoidable consequences is sometimes confused with the doctrine of comparative negligence. Both doctrines are affirmative defenses in construction cases which must be alleged and proven by a defendant, however, the avoidable consequences doctrine pertains to a plaintiff's duty to prevent further injury and applies after a legal wrong has occurred. In contrast, the doctrine of comparative fault, which allows partial liability to be assigned to multiple parties, involves a party's duty not to contribute to causing the initial injury.

The doctrine of avoidable consequences can have a substantial impact limiting damages in construction cases. Construction participants, including owners, developers, contractors, and sureties, should be familiar with this important principle.

For more information, please contact the author Jeff Wertman on our Dispute Resolution Team.

Related Team Member(s)

Jeffrey S. Wertman

Topics

Construction Litigation

Dispute Resolution