

## Ohio Court Re-affirms Economic Loss Rule

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Before entering into a construction contract, companies must be sure to secure written contracts with all parties. This is particularly important when several related entities, all part of the same parent company, are each involved in the construction project. If companies fail to do so, they can be left without recourse against a subcontractor whose error delays the project.

The economic loss rule prevents tort actions for economic losses without physical damage, such as lost profits. Actions for purely economic losses may be maintained only by parties to the contract or contractual beneficiaries. In ***Federal Insurance Co., et. al. v. Fredricks, Inc.***, 2015 Ohio 694, an Ohio appellate court relied on this rule to hold that future tenants of an under-construction warehouse could not recover from a negligent subcontractor.

J.P. Holding Co. is the parent company of Carter Express, Inc., Carter Logistics, LLC and Pasco Enterprises. Pasco contracted to purchase land from the City of Vandalia, Ohio to build a Cross Dock facility where Carter Express and Carter Logistics would be tenants. Pasco hired a general contractor without a written agreement. The general contractor entered into a written contract with a subcontractor to erect a pre-engineered steel framework. The contract identified Pasco as the property owner; and, though aware Carter Express would be a tenant, the subcontractor believed the contract intended to benefit Pasco, as the property owner.

The subcontractor failed to use adequate bracing to secure the steel framework, causing it to collapse during a storm. Pasco, J.P. Holding, Carter Express and Carter Logistics all sued the subcontractor for damages caused by the delay in the project's completion due to the collapse. The trial court determined only Pasco could recover for economic damages as an intended beneficiary of the contract. The trial court also determined that J.P. Holding, Carter Express and Carter Logistics could not recover against the subcontractor because they lacked an ownership interest in the property.

By definition, economic losses are intangible, and thus recovery is permitted only in contract. As a result, non-parties to the subcontract generally may not bring suit. J. P. Holding, Carter Express and Carter Logistics sought to sue based on a narrow exception to this general rule, which allows a non-party suit if there is a sufficient nexus between the parties. Prior Ohio cases held that the degree of control exercised by the non-party can create such a sufficient nexus, but this court limited that rule to cases involving design professionals, and would not extend it to subcontractors. In this case, that prevented J.P. Holding, Carter Express and Carter Logistics from recovering against the

subcontractor.

Those entities also sought to recover as third-party beneficiaries to the subcontract. They argued that the subcontract was intended to benefit them, permitting them to sue as third-party beneficiaries to the contract. Under Ohio law, absent ambiguous language, the terms of the contract determine who is an intended beneficiary. Here, the court found no ambiguity. Pasco was identified as the property owner and none of the other entities were mentioned in the subcontract. The subcontract referenced documents naming the other entities, but that alone did not make the other entities intended beneficiaries. The court also focused on the subcontract's indemnification language, which extended only to Pasco as the owner.

Finally, J.P. Holding, Carter Express and Carter Logistics claimed that their indirect economic loss was caused by tangible property damage when the framework collapsed. Collectively, they argued that J.P. Holdings, as parent company, should be permitted to recover on behalf of the future tenants. Such a theory can permit recovery, but only when the party seeking recovery was the property owner. Here, Pasco was the property owner. Though all the entities are related, only Pasco had an ownership interest in the property. The purchase agreement with the City of Vandalia was signed by Carter Express, but specified that Pasco was buying the property, and that Pasco ensured the city revenue from employee's income taxes. The court would not disregard the separate identities of each corporate identity to permit entities other than Pasco to recover.

This case offers several important reminders for anyone engaging in large commercial projects in Ohio. First, the economic loss rule continues to bar suits in tort for purely economic damages in Ohio, such as lost profits. Second, written contracts are crucially important to preserve rights and allocate risk of loss. In this case, Pasco failed to insist on a written contract with the general contractor because of a longstanding relationship. As a result, the economic loss doctrine prevented recovery from the subcontractor. Finally, written contracts must be explicitly clear. The outcome of this case would have been different if, for example, the indemnification language named Pasco and all related entities as beneficiaries rather than simply indemnifying the owner of the property.

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