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NEWSLETTERS

Georgia's Tort Apportionment Statute Does Not Abolish Contribution Claims By Contractor Against Architect

October 8, 2013 | Atlanta | Chicago | Columbus | Delaware | Elkhart | Fort Wayne | Grand Rapids | Indianapolis | Los Angeles | Minneapolis | South Bend

Note: This article appears in the October 2013 edition of Barnes & Thornburg LLP's *Construction Law Update* e-newsletter.

In *Zurich American Insurance Company, et al. v. Heard et al*., 321 Ga. App. 325; 740 S.E.2d 429 (2013), the Georgia Court of Appeals considered whether claims for contribution between a contractor and architect who have settled with the owner still exist following the enactment of Georgia's apportionment statute. In recognizing a claim for contribution, the court relied upon the plain language of OCGA § 51-12-33 which, in pertinent part, provides:

Where an action is brought against more than one person for injury to person or property, *the trier of fact*, in its determination of the total amount of damages to be awarded, if any, *shall ... apportion its award of damages* among the persons who are liable according to the percentage of fault of each person. *Damages apportioned by the trier of fact* as provided in this Code section *shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution*. (Court's emphasis.)

OCGA § 51-12-33(b). The Court of Appeals observed that under the plain wording of the statute, joint liability and the right of contribution no longer exists when damages have been apportioned by the trier of fact. In *Zurich*, however, damages were not apportioned by the trier of fact but settled amongst the parties. Accordingly, an action for contribution was recognized between the contractor and architect, both of whom settled with the owner.

In *Zurich*, the owners of a newly-constructed hotel discovered the presence of mildew and signs of moisture trapped in the building. In June of 2008, they filed a demand for arbitration against the project's architect and contractor. The owners requested that the award be made against the defendants "jointly and severally" based upon the contractor's negligent construction and the architect's negligent design. After the architect moved to sever the claims, it was dismissed and the owners continued arbitration against the contractor. The owners and contractor settled and agreed to a consent arbitration award whereby: (i) the owners' damages were $6.2 million; (ii) the contractor would pay $2.3 million; (iii) the owner would not seek any further recovery against the contractor; and (iv) the contractor's claims for contribution were preserved.

Shortly after settling with the contractor, the owners settled their state-court litigation with the architect for $100,000.00. The settlement agreement contained the following provision:

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The Releasors [the hotel owners] understand and acknowledge that the payment being made by the Releasees [architect] represents a full and final satisfaction of any and all claims, damages, or losses claimed by or that could be claimed by the Releasors allegedly arising from, caused by, or related to any architectural or engineering (including structural, mechanical, electrical, and plumbing) design services or construction contract administration services provided by the Releasees with respect to the Project. The Releasors also acknowledge that any payment previously received by the Releasors pursuant to any settlement agreement or release arising out of the claims asserted in the arbitration proceeding [against P & L] ... did not arise from or relate in any way to any architectural or engineering services provided by the Releasees with respect to the Project.

Just when the architect thought it had resolved its dispute with the owners and negotiated a favorable settlement, the contractor's insurer brought a subrogation action against the architect seeking to recover the amounts paid by the insurer on behalf of the contractor and to recover for the contractor's damages not covered by insurance through an assignment of claims. The trial court granted summary judgment in favor of the architect finding that the insurer's contribution claim failed because joint-tortfeasors can no longer assert contribution or non-contractual indemnity claims under OCGA § 51-12-33. The trial court's decision was appealed by the insurer and ultimately reversed by the Court of Appeals. In reaching its decision, the Georgia Court of Appeals took a narrow view of the apportionment statute stating:

Based upon the plain language of subsection (b), joint liability and the right of contribution no longer exist when damages have been apportioned by the *trier of fact* under this subsection. Based upon this plain language, it cannot be interpreted to abolish the right of contribution between settling joint tortfeasors when there has been no apportionment of damages by a trier of fact.

Id. at 330. In addition, the Court of Appeals determined that the trial court erred in ruling that the contractor and architect were not joint-tortfeasors as a matter of law. According to the Court of Appeals, "[t]he test for determining joint-tortfeasors is whether the separate and independent acts of negligence of two or more persons or corporations combine naturally and directly to produce a single indivisible injury . . ." *quoting Zimmerman's, Inc. v. McDonough Construction Co*., 240 Ga. 317, 320; 240 S.E.2d 864, 866 (1977). The court rejected the parties' attempt to disavow joint and several liability in their respective settlement agreements stating "[t]he issue is whether a single indivisible injury results from the negligence of [the contractor and architect], not how the different entities involved conducted legal proceedings or described payments made in settlement." *Id*. at 331 (Court's emphasis.) Finally, the appeals court also rejected the trial court's finding that the settlement payments were "voluntary" payments such that contribution and indemnity claims were not permitted. Instead, the court concluded that the insurer paid for property damage claims resulting from structural defects and water intrusion, as well as loss of use resulted from covered property damage.

For more information about this topic and the issues raised in this article, please contact Scott R. Murphy in our Grand Rapids office at (616) 742-3930 or smurphy@btlaw.com.