

## BUSINESS RESOURCES + TOOLS

## LEGAL PIPELINE

## No Contract Required

Subcontractors face liability to third parties without a contract.



BY STEVEN NUDELMAN

While many kinds of construction claims exist, two of the most popular ones are: breach of contract and negligence. Payment disputes, for example, are typically the subject of a breach of contract claim. Faulty workmanship typically comes under the guise of negligence, but may also form the basis of a breach of contract. These claims differ in scope as well as recoverable damages. They also differ in terms of the parties asserting them. In other words, the prospective plaintiffs may be different.

The plaintiff in a breach of contract case is usually a party to an agreement, whether it be written or oral. The plaintiff in a negligence case is someone to whom the defendant owes a legal duty — and that someone is not necessarily a party to a contract with the defendant. This distinction, which is important for a subcontractor to understand, was the focus of a relatively recent case out of the Supreme Court of Texas, *Chapman Custom Homes, Inc. v. Dallas Plumbing Co.*, 445 S.W.3d 716 (Tex. 2014).

#### The facts

The facts in Chapman are relatively straightforward. Chapman Custom Homes (Contractor) entered into a contract with M.B. Duncan Trust (Owner) to build a house. The Contractor entered into a subcontract with Dallas Plumbing Co. (Subcontractor) to install plumbing in the home. After construction was completed, the house sustained numerous plumbing leaks, causing property damage to the structure.

Both the Contractor and Owner sued the Subcontractor for damages, asserting claims for breach of contract, breach of express warranty and negligence. The Subcontractor denied liability and filed a motion for summary judgment. The trial court granted the Subcontractor's motion, dismissing the case, and the Texas Court of Appeals affirmed the dismissal.

According to the Court of Appeals, the Owner could not recover damages from the Subcontractor because the Owner was not a party to the plumbing subcontract. The Court also dismissed the Contractor's breach of contract claim, finding that the Contractor did not sustain any

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damages (since it did not own the leaky house).

#### Plaintiff's negligence claim

The Supreme Court of Texas disagreed with these holdings and reversed the Court of Appeals. First, the Supreme Court noted that the Owner asserted clear examples of defective workmanship in its Amended Petition. For example, the Amended Petition alleged that the Subcontractor failed to install the hot water heating system properly. The plaintiffs further alleged that this negligent conduct was a proximate and foreseeable cause of the water damage to the house. These allegations, according to the Supreme Court, do not only assert a "breach of Dallas Plumbing's contractual duty."

In *Montgomery Ward & Co. v. Scharrenbeck*, 204 S.W.2d 508, 510 (Tex. 1947), the Supreme Court of Texas noted that "a common law duty to perform with care and skill accompanies every contract and that the failure to meet this implied standard might provide a basis for recover in tort, contract, or both under appropriate circumstances."

In *Scharrenbeck*, the defendant had a contract to repair a heater in the plaintiff's home. The defendant performed its work so poorly that the house burned down. Although the defendant argued that it did not breach any duty to the plaintiff, the Court disagreed, finding the existence of a "duty by implication." The Court explained: "Having undertaken as an expert and for a consideration to repair and adjust the heater, [the repairman] owed [the homeowners] the duty, as a matter of course, not negligently to burn their house in the undertaking."

The Supreme Court of Texas found similar circumstances in Chapman: "Having undertaken to install a plumbing system in the house, the [Subcontractor] assumed an implied duty not to flood or otherwise damage the [Owner's] house while performing its contract with the [Contractor]."

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### Economic Loss Rule inapplicable

Notably, according to the Supreme Court, the Economic Loss Rule (ELR) does not apply here. This rule generally bars recovery in tort, such as negligence, resulting from a party's failure to perform under a contract, when the damages consist only of economic loss. In other words, if a plaintiff has a contract with defendant, plaintiff generally cannot sue the defendant for breach of contract and negligence if the only damages the plaintiff sustained are economic, contract damages. The plaintiff is limited to contract damages, and it may not recover tort damages (which often exceed the damages allowed for breach of contract).

As the Court noted in Chapman, the ELR "does not bar all tort claims arising out a contractual setting. As we have said, 'a party [cannot] avoid tort liability to the world simply by entering into a contract with one party [otherwise the ELR would] swallow all claims between contractual and commercial strangers.'"

The Owner in Chapman did not have a contract with the Subcontractor, so it could not maintain a breach of contract claim against the Subcontractor. However, for this very reason, the ELR does not preclude the Owner from asserting a tort (negligence) claim against the Subcontractor.

Similar to the defendant in Scharrenbeck, the plumber in Chapman owed a legal duty to the Owner. Since the Owner alleged that the subcontractor breached that duty and the breach was the proximate cause of the Owner's damages, the owner properly stated a claim for negligence.

Furthermore, the duty allegedly breached here is "independent of the contractual undertaking and the harm suffered is not merely the economic loss of a contractual benefit." As the Supreme Court of Texas concluded, "The plumber's duty not to flood or otherwise damage the house is independent of any obligation undertaken in its plumbing subcontract with the builder, and the damages allegedly caused by the breach of that duty extend beyond the economic loss of any anticipated benefit under the plumbing contract."

### Takeaways

The legal concepts in Chapman are not novel


and limited to Texas contractors. In fact, it is somewhat surprising that this case even made its way up to the Supreme Court of Texas. The conclusions reached by the Court are extremely important for contractors and subcontractors alike wherever they may be located.

The plumbing subcontractor needs to be mindful of the legal duty "to perform with skill and care" that it owes to the owners on a construction project. Defective or faulty workmanship may very well give rise to a breach of contract claim by a general contractor. However, it may also result in a tort or negligence claim brought by an owner. Such a tort claim is not barred by the ELR. The lack of a contract between the owner and the plumbing subcontractor is wholly irrelevant to the existence of a tort or negligence claim under these circumstances. ●


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**Null Point Icon**—All arrows point toward each other indicating the null point and the pipe location.




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