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Hello,

### **COURT DISMISSES OWNER'S LAWSUIT AGAINST SUBCONTRACTOR FOR BREACH OF CONTRACT**

*By Brandon J. Muller, Clark Hill PLC*

Can an owner sue a subcontractor for defective work even though the owner was not a party to the subcontract? According to a recent Michigan Court of Appeals decision, the answer is "usually no."

#### **BACKGROUND**

In *Kisiel v Holz*, Court of Appeals No. 267487 (August 29, 2006), the owner contracted with Holz Building Company to construct a residence. Holz then entered into an oral subcontract with GFA to provide excavation and concrete work. Shortly after the work was finished, cracks developed in the basement walls. The owner sued the subcontractor, GFA, as well as Holz, for the allegedly defective work. The owner claimed that while he was not a party to the Holz-GFA subcontract, he was entitled to enforce the agreement because the subcontract was formed for his ultimate benefit.

#### **"INTENDED" VERSUS "INCIDENTAL" BENEFICIARIES**

The trial court rejected the owner's theory and the Court of Appeals affirmed. The court explained that, as a general rule, a third-party owner may not recover damages under a subcontract merely because he would receive a benefit from its performance or would be injured by its breach. An exception to this rule is where the owner, though not a party to the subcontract, is an intended "third party beneficiary." To become a third party beneficiary, there must be an express promise by the performing party to act for the benefit of the third party. In the absence of such an express promise, a non-party to the contract may not sue to enforce the contract.

Turning to the facts before it, the *Kisiel* court determined that the contract *did not* contain an express promise to complete the work for the owner's benefit. Rather, it was entered into primarily for the benefit of the contracting parties. Moreover, while the parties to the subcontract knew that the construction would ultimately benefit the owner, he was merely an "incidental" beneficiary of the subcontract, and therefore not entitled to maintain a direct action against the subcontractor for breach of contract.

#### **CONCLUSION**

*Kisiel* is a reminder that contracting parties can unwittingly assume liability to third parties by inadvertent language reciting that the contract is for a specific end-user's benefit. In most cases, it is prudent to avoid using such language and to expressly provide that the contract is not intended for the benefit of non-parties.

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*registered civil engineer.*

### In Memoriam

The Clark Hill Construction Law Practice Group mourns the passing of Clark Hill attorney Pat Higdon who, along with his wife, Peggy, died unexpectedly while vacationing in Wisconsin. We are lucky to have had Pat as our colleague and we will honor his memory by emulating his exemplary client service, superb legal acumen, and professionalism.

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