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Writing Sample

I. Introduction

This memo considers the rights of a contracting party with respect to third parties on whom it indirectly relies. Delaware cases have not produced uniform rules applicable to this situation. The existence of third-party claims may affect the ability of multiple parties interacting on a single project to allocate risks ahead of time through their respective contracts. *See* Steven M. Henderson, *Walking the Line between Contract and Tort in Construction Disputes: Assessing the Use of Negligent Misrepresentation to Recover Economic Loss after* Presnell, 95 Ky. L.J. 145, 165–68 (2006) (discussing similar issues under Kentucky law).

II. Facts

Performer contracts with Venue to rent space for a show. Venue separately contracts with Electrician. Performer's contract with Venue contains a limitation-on-liability clause limiting Venue's liability to return of rent paid; the Venue–Electrician contract contains no limitation. Although Electrician certifies the wiring as compliant, a fault is later discovered, forcing Performer to cancel the show and lose sales in excess of rent payments.

What are Performer's rights against Electrician?

III. Discussion

Performer's most likely claim is for negligent misrepresentation. The discussion below considers whether the elements of negligent misrepresentation are satisfied, whether the "economic

loss doctrine" precludes the claim, and whether the limitation on liability in the Performer–Venue contract affects Performer's rights against Electrician.

A. Negligent Misrepresentation

To make out a claim for negligent misrepresentation, a plaintiff must establish that "(1) the defendant had a pecuniary duty to provide accurate information, (2) the defendant supplied false information, (3) the defendant failed to exercise reasonable care in obtaining or communicating the information, and (4) the plaintiff suffered a pecuniary loss caused by justifiable reliance upon the false information." *PR Acquisitions, LLC v. Midland Funding LLC*, C.A. No. 2017-0465-TMR, 2018 WL 2041521, at *13 (Del. Ch. Apr. 30, 2018).

Falsity and lack of due care are satisfied by Electrician's conduct. Duty reliance are less clear. The indirect relationship between Performer and Electrician complicates the analysis. While it is clear Electrician owed a pecuniary duty to Venue, determining whether that duty extends to Performer presents a closer question.

The doctrine of privity does not supply the answer. While "[t]he Delaware case law is divided," authority tends toward the view that privity is not an "indispensable prerequisite" in negligent misrepresentation cases. *See Guardian Construction Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378, 1384, 1386 (Del. Super. Ct. 1990) (surveying cases). In *Guardian Construction*, the defendant design engineer supplied inaccurate plans to the non-party client, who in turn supplied them to the plaintiff construction company for preparation of a bid. *Id.* at 1380–81. The construction company sued the design engineer, claiming the inaccuracy caused it to underbid and lose money on the job. *Id.* at 1381. The Superior Court reasoned that because the design engineer "knew and intended that [the plans] would be specifically supplied to and relied upon by project

bidders," it "owed a legal duty to [the construction company], as [a] known and intended member[] of this limited class, to supply correct information." *Id.* at 1386.

Following *Guardian Construction*, indirect negligence claims have been allowed by a property owner against a subcontractor, *Arroyo v. Regal Builders, LLC*, C.A. No. K13C-12-028-RBY, 2016 WL 5210880, at *2 (Del. Super. Ct. Sept. 20, 2016), and by a seller against an accountant that prepared financial statements bearing on the purchaser's ability to pay, *Carello v. PricewaterhouseCoopers LLP*, C.A. No. 01C-10-219-RRC, 2002 WL 1454111, at *4–6 (Del. Super. Ct. July 3, 2002). But a federal district court declined to apply *Guardian Construction* to a nearly identical construction case, reasoning that *Guardian Construction*'s non-binding holding' had been "refined and narrowed" in the years since. *Kuhn Construction Co. v. Ocean & Coastal Consultants, Inc.*, 844 F. Supp. 2d 519, 529 (D. Del. 2012).

The lack of an "indispensable prerequisite" for privity does not imply that a duty is owed to all downstream parties anytime it is known the information may be relied upon. The law creates a duty only when "such a relationship exists between the parties that the community will impose a legal obligation upon one for the benefit of the other." *Naidu v. Laird*, 539 A.2d 1064, 1070 (Del. 1988) (quoting W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser & Keeton on Torts* § 37, at 236 (5th ed. 1984)). Electrician's inspection could be viewed as having only been performed only to assist Venue in satisfying its own contractual obligations to Performer. The Performer–Venue and Venue–Electrician contracts support this view, as Performer and Electrician allocated the risk of defects among themselves with no consideration for third parties. Accepting this view, Performer and Electrician do not have "such a relationship" that a duty will run from Electrician to Performer.

Reliance faces similar hurdles. While Performer would not have booked the venue had

it known of electrical problems, Venue's own assurances and reputation likely played a role, and Electrician has no control over these factors. A related issue is whether, if the quality of the physical premises is within the scope of the Performer–Venue contract, it would be justifiable for Performer to expect Electrician to uphold a different standard of care based on tort law.

Finally, this is not a situation where Performer had no opportunity to contract with Electrician. A tort duty running from Electrician to Performer is unnecessary to protect Performer's interests *ex ante*. It is only after Performer has agreed to a limitation on liability and suffered a loss that Performer wishes it had negotiated protections it never sought. "[I]t is not for [the court] to rewrite the parties' contract to change the allocation of a set of risks that the parties left unaddressed." *Pavik v. George & Lynch, Inc.*, 183 A.3d 1258, 1271 (Del. 2018).

In summary, while the state of the law is uncertain, the better view is that Performer has no negligent misrepresentation claim against Electrician in these circumstances.

B. Economic Loss Doctrine

Assuming the elements of negligent misrepresentation are otherwise satisfied, the question becomes whether the claim is nevertheless precluded by the "economic loss doctrine."

The economic loss doctrine "prevents a plaintiff from recovering in tort for losses that are solely economic in nature." *Commonwealth Construction Co. v. Endecon, Inc.*, No. C.A. No. 08C-01-266-RRC, 2009 WL 609426, at *4 (Del. Super. Ct. Mar. 9, 2009) (quotation marks omitted). But the doctrine is subject to certain exceptions, such that tort claims for pure economic loss are not categorically forbidden. *See id.*

Authority is inconsistent as to whether the economic loss doctrine is an exception to an otherwise valid tort claim or a factor to be considered in deciding whether to impose a tort duty in

the first place. *Compare Guardian Construction*, 583 A.2d at 1381 (discussing "whether . . . [the plaintiffs] may recover purely economic losses under their negligence claims . . . absent privity of contract" and concluding they could because the defendant "owed a legal duty"), *with Marcucilli v. Boardwalk Builders, Inc.*, C.A. No. 99C-02-007, 1999 WL 1568612, at *5 (Del. Super. Ct. Dec. 22, 1999) ("The economic loss doctrine did nothing to alter the duties that [the defendant] owed to others[;] it merely provided an exception to normal negligence principals of liability."). Thus the law is unclear as to whether, once it has been concluded that a tort duty exists, a separate analysis is required to determine whether the claim is nonetheless barred by the economic loss doctrine.

On the present facts, the issues of duty and economic loss present the same question: both ask whether the relationship between Performer and Electrician is such that Electrician should have to answer to Performer for its defective work. Accordingly, the analysis of the preceding section suggests that a tort claim should not exist, whether or not this is viewed as an application of the economic loss doctrine.

C. Effect of the Limitation on Liability

The final issue is whether Electrician may invoke the limitation on liability in the Performer–Venue contract.

"[T]o qualify as a third party beneficiary of a contract, (a) the contracting parties must have intended that the third party beneficiary benefit from the contract, (b) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (c) the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract." *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 196 (3d Cir. 2001). Because the limitation on liability by its terms applies only to

suits by Performer against Venue, the contract does not evidence an intent to benefit Electrician. For that reason, Electrician cannot invoke the provision as a defense to Performer's negligent misrepresentation claim.

In *Rob-Win, Inc. v. Lydia Sec. Monitoring, Inc.*, C.A. No. 04C-11-276-CLS, 2007 WL 3360036, at *4 (Del. Super. Ct. Apr. 30, 2007), the court dealt with two related but different situations. There, the contract between the plaintiff client and non-party intermediary contained a clause expressly applying the contract's terms to subcontractors; therefore, the client's tort claim against the subcontractor was subject to limitations in the contract. *Id.* at *3. The present facts are distinguished by an absence of such a term in the Performer–Venue contract. The second situation addressed in *Rob-Win* was that the subcontract *also* contained a limitation on liability. The subcontractor could not raise that limitation as a defense because the client was not a party to it. *Id.* at *4-5. That reasoning is also inapplicable here, as Performer is a party to the Performer–Venue contract.

It should be noted that both applying and not applying the limitation on liability would work a windfall to one party. If Performer's damages are not limited, Performer avoids the limitation it negotiated by the fortuity that the fault can be traced to a third party rather than one of Venue's employees. If Electrician prevails, it receives a protection it neither negotiated nor paid for. The existence of either reinforces the view, expressed earlier, that the tort of negligent misrepresentation should not extend to such indirect suits.

IV. Conclusion

The law is unclear, but Performer likely cannot satisfy the duty and reliance elements of a claim for negligent misrepresentation. To the extent those elements may be satisfied, the economic

loss rule and contractual limitation on liability are inapplicable.