

OREGON LAW UPDATE

My Fault is Only Passive, so Pay My Defense Costs

case in point...

From the desk of Paul Sheely: A claim for common law indemnity is alleged by a general contractor against its subcontractors in virtually every construction defect case. To recover, the general contractor must prove, among other things, that as between the general contractor and the subcontractor, the subcontractor was primarily or “actively” at fault and the general contractor was secondary or “passively” at fault. In a recent decision by the Court of Appeals, a party that was found to be only 7% at fault, or “passive,” was not entitled to indemnity for its attorney fees and costs of litigation from the party “actively” at fault for damage to a third-party plaintiff. How can this be? Is this whole “active” versus “passive” concept gone?

Claims Pointer: When determining whether to award common law indemnity, a court will regard “active” versus “passive” fault as only one factor to consider in ultimately deciding the equitable (fair) outcome of the case.

Eclectic Inv., LLC v. Patterson, et al., 261 Or. App. 457 (2014)

Plaintiff Eclectic Investment, LLC (Eclectic) hired one of the defendants, McAllister, to perform some excavation work on its property as part of a plan to expand its parking lot. Co-defendant Jackson County (the County) inspected the work and issued a permit approving it. The excavation created a dirt bank that failed after a rainstorm and damaged Eclectic’s property. Eclectic brought a negligence action against McAllister for performing defective excavation work and against the County for approving it. The jury allocated fault as follows: 55 percent to Eclectic, 7 percent to the County, 4 percent to McAllister, and a total of 34 percent to two neighbors (co-defendants). Plaintiff Eclectic was found more than 50% at fault, so none of the defendants had to pay damages to the plaintiff but that does not mean that the case was over. The new issue: can one defendant recover attorney fees from another?

The County then sought common law indemnity for its litigation costs from McAllister, contending that the County’s negligence, if any, in issuing a permit for the construction project after having inspected it, was “passive or secondary,” while McAllister’s negligent construction was “active or primary.” The County argued that because the trial court found McAllister to be “minorly active” and the County only “barely passive” in terms of negligence, the County was entitled to common law indemnification. However, in its judgment in favor of McAllister, the trial court determined that the County had failed to satisfy the standards for establishing common law indemnity. The trial court noted that the jury’s allocation of fault did not determine whether the

parties were actively or passively negligent, but that it was “an important factor that should be taken into consideration when performing the analysis in an indemnity claim.” Finally, the trial court found that the question appears ultimately to be one of equity which asks whether the defendant should have discharged the obligation rather than the plaintiff.

The trial court concluded that, while McAllister clearly was more active in creating the harm, the County “was not completely passive because it inspected the excavation twice” and that the quality of the parties’ conduct did not “warrant burdening [McAllister] with the County’s cost of defense.” The trial court, in other words, regarded the “active” versus “passive” distinction as one factor to consider in ultimately deciding the case based on equitable (fair) concerns. The Court of Appeals agreed with that approach and noted that the distinction between active and passive was only one factor that the trial court considered. The Court found that the evidence of the County’s independent actions in issuing the permit provided a sufficient basis to conclude that common law indemnity was not proper.



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