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Supreme Court Upholds Doctrine Favorably Impacting Contractors' Liability

By Carrie L. Christie and Courtney M. Norton

Contractors in Georgia received good news from the state's highest court on February 9, 2009. The Supreme Court of Georgia upheld the 100-year-old acceptance doctrine, which shields contractors from liability to injured third parties, where the contractor has completed its work, turned it over to the owner and the owner accepted the work.

The case reached the Supreme Court after Oxford Construction Company, represented by the Atlanta law firm of Rutherford & Christie, was granted summary judgment in two separate lawsuits filed by plaintiffs Kenneth and Francesca Bragg. The Braggs sued Oxford Construction after Mrs. Bragg was involved in a car accident on County Line Road in Dougherty County, which seriously injured both her and their two-year-old child, and resulted in the stillbirth of their six-month-old fetus.

Dougherty County had solicited bids on a contract to repave and overlay asphalt spot patches in areas on County Line Road specified by the County, and ultimately selected Oxford to perform the work.

The County directed Oxford where to place the patches and supervised the work daily. Following completion of the scope of work, wet subsurface conditions caused "movement" in the final pavement, but the County accepted the work despite notice of these conditions. Every witness testified that Oxford completed its work in accordance with the directions, specifications and orders of the County. Herman Hill, the plaintiffs' expert, testified that the overlay, allegedly, created a height variance between the existing pavement surface and the patch, which collected water and caused the at fault driver to hydroplane.

The Braggs alleged the accident, which occurred more than seven months after acceptance of the work, was caused by the pavement variance. Oxford defended on the basis that all work was properly performed, was completed and accepted by the owner prior to the accident, and the proximate cause of the plaintiffs' injuries was the negligence of the other driver, who was driving too fast for conditions.

The Superior Court granted summary judgment to Oxford based on Georgia's acceptance doctrine. The Georgia Court of Appeals affirmed the decision and the Braggs petitioned the Supreme Court to overturn the acceptance doctrine. Frank Lowrey, of the law firm of Bondurant, Mixson & Elmore, argued on behalf of Oxford that completion and acceptance of a contractor's work means he loses all control over it, including the ability to monitor and maintain the safety of it. The acceptance doctrine allocates liability to the party responsible for control of the property and completion of the work. Because a contractor is bound by his contract and does not own the property, the

contractor does not control the scope or nature of the work performed on the property. Therefore, once the contractor's work is completed and accepted by the owner, the contractor would not be liable unless certain exceptions listed within the doctrine apply.

Oxford was not responsible for, nor did it hold itself out as an expert in, road design and had followed the plans, specifications and contract terms. The Supreme Court found, "Under such circumstances, liability, if any, should rest with the entity that hired Oxford."

Justice Harold D. Melton, writing the majority opinion, stated the application of the acceptance doctrine to the facts of this case "makes perfect sense." As the Court pointed out, "[I]f Oxford had somehow been negligent in the performance of the requested work such that its work fell within one of the exceptions to the acceptance doctrine, it could still have been subjected to liability under Georgia law regardless of whether or not the County accepted its work."

The Court also declined "to propose [an] ad hoc invention of a new legal doctrine" finding that it was not the Court's role to "formulate new law in the abstract." The majority – four of the seven Supreme Court justices – was not persuaded by the fact that courts in other states have rejected the acceptance doctrine. Rather, the majority cited to the acceptance doctrine's long-standing existence and the likely presumption that contractors have come to rely on this doctrine. Based on the fact that Georgia's legislature had not changed Georgia's acceptance doctrine, the Court held that it must be left intact ... at least, for now.

As the Supreme Court majority opinion makes clear, the facts of this case were a key factor in the decision to uphold the acceptance doctrine. It remains unclear, therefore, whether future cases, with facts not as compelling, will one day sway the Court to abolish the doctrine. Accordingly, whenever possible, motions for summary judgment filed on behalf of Georgia contractors should argue that the contractor is not liable because it followed the instructions and directions of the owner, without regard to the timing of acceptance and payment for the work performed. Additionally, Georgia contractors should be cautious of entering into contractual agreements that require the contractor to retain sole liability for all negligence, which could be construed as a waiver of the acceptance doctrine. While obligations to defend, indemnify, or hold harmless an owner or government entity are standard, Georgia contractors should limit such obligations to defend, indemnify and hold harmless the owner if the owner is sued.

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