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MIND OF A LAWYER. HEART OF A CONTRACTOR.

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## **Oregon Supreme Court Affirms Abraham And Dances With Economic Loss Rule**

Over the past six months, we've posted about an Oregon case making its way up the court's tiers: [Abraham v. T. Henry Construction, Inc.](#)

The case is important because it carved an exception to the economic loss rule, which typically prohibits a tort claim between contracting parties when the claims arises out of a failure to perform contractual obligations. In Abraham, a plaintiff in a construction defect case was allowed to sue its builder for negligence for failing to comply with the building codes. This despite the builder's contractual obligation to comply with the building codes.

The Oregon Supreme Court accepted review at the Abraham decision at the dawn of this year, and just last week issued an opinion affirming it. An interesting quote explains the court's conclusion:

[W]e agree with plaintiffs that...earlier cases support the conclusion that common law negligence principles apply -- notwithstanding a contractual relationship -- as long as the property damage for which the plaintiff seeks recovery was a reasonably foreseeable result of the defendant's conduct. Thus, a negligence claim for personal injury or property damage that would exist in the absence of a contract will continue to exist unless the parties define their respective obligations and remedies in the contract to limit or foreclose such a claim. Parties may limit tort remedies by defining their obligations in such a way that the common-law standard of care has been supplanted...or, in some circumstances, by contractually limiting or specifying available remedies

Does this undermine the distinction between contract and tort and permit every breach of contract to be brought as a tort claim? Or in other words, completely undermine the economic loss rule? The Oregon Supreme Court

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digresses here with an example of why its decision is limited and does not undermine the ELR:

An example will help demonstrate the difference between actions taken in the performance of a contract that can be the basis for a contract claim only, and those that may also provide a basis for a tort claim. If an individual and a contractor enter into a contract to build a house, which provides that the contractor will install only copper pipe, but the contractor installs PVC pipe instead (assuming both kinds of pipe comply with the building code and the use of either would be consistent with the standard of care expected of contractors), that failure would be a breach of contract only. That is so because the contract defined the contractor's obligation to use a particular material (and no other), which the contractor then failed to do...If the failure to install the copper pipe caused a reduction in the value of the house, the plaintiff would be able to recover that amount in an action for breach of contract. That would be a claim that, as this court stated in Georgetown, "is based solely on a breach of a provision in the contract[.]"

On the other hand, if the contractor installed the PVC pipe in a defective manner and those pipes therefore leaked, causing property damage to the house, the homeowner would have claims in both contract and tort. The homeowner could recover in contract both for the failure to install copper pipe and for the failure to perform the contract in a reasonably skillful manner. The homeowner also would have a tort claim for property damage to the house caused by the leaking pipes if the homeowner could prove that the contractor's failure to meet the standard of care caused the property damage. In those circumstances, the obligation to install copper instead of PVC pipe is purely contractual; the manner of installing the pipe, however, implicates both contract and tort because of the foreseeable risk of property damage that can result from improperly installed pipes.

[Read the Oregon Supreme Court's full opinion online by clicking here.](#)