

Repair Costs Can Be Consequential Damages: Understanding The Keystone Court's Departure From The "Typical" Definition Of Consequential Damages

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"The consequential nature of loss . . . is not based on the damages being unforeseeable by the parties. What makes a loss consequential is that it stems from relationships with third parties, while still reasonably foreseeable at the time of contracting."

Every construction practitioner knows the words – monitor, inspect, and observe – terms that often impose broad responsibilities and implicate extensive liability. The First District Court of Appeal's recent opinion in *Keystone Airpark Authority vs Pipeline Contractors, Inc. et al.*, illuminates just how important those contract terms and liability waivers are.¹ In *Keystone*, the court held the costs to repair and replace defective construction were consequential, rather than direct, damages. A key component of the court's holding was the engineering firm's contract wherein the owner expressly waived recovery of consequential damages against the firm, even though the firm was responsible for determining the suitability of materials to be used for the project, as well as inspecting and monitoring the progression of the work on a part-time basis.

General, Special, and Consequential Damages in Florida

Keystone adds a wrinkle to the damages analysis each practitioner typically employs. One may immediately associate lost profits with consequential damages; however, lost profits are not always consequential.² Repair costs are not always direct damages.³ The *Keystone* case and other recent Florida decisions illuminate just how blurred the lines can be.

A brief overview of general, special, and consequential damages will help with understanding the importance of *Keystone*. First, general damages are those damages "which the law presumes actually and necessarily result from the alleged breach or wrong."⁴ Some think of general damages as damages which occur in the regular course of events.⁵ Unlike general damages, "special damages are damages that do not follow by implication of law merely upon proof of the breach."⁶ Special damages do not occur in the usual course of events.⁷ Finally, consequential damages "do not necessarily result from the injury."⁸ "[C]onsequential damages do not arise within the scope of the immediate buyer-seller transaction, but rather

stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of contracting."⁹

For example, AIA form A-201 General Conditions (2017) includes a mutual waiver of consequential damages and defines such damages as:

1. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
2. damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.¹⁰

The Keystone Airpark Project

Keystone Airpark Authority ("Keystone") retained Passero Associates, LLC ("Passero") and Pipeline Contractors, Inc. ("Pipeline") to design and construct a ten-unit T-hangar and a four-unit corporate hangar at the Keystone Airpark (the "Project").¹¹ Keystone contracted with Pipeline to perform construction services and separately contracted with Passero to perform engineering services which included part-time construction inspection services, material testing, and material approval.¹² The Keystone-Passero contract included the following significant provisions:

Observe the work to determine conformance to the contract documents and to ascertain the need for correction or rejection of the work.

Arrange for, conduct, or witness field, laboratory or shop tests of construction materials as required by the plans and specifications.

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Determine the suitability of materials on the site, and brought to the site, to be used in construction.

Interpret the contract plans and specifications and monitor the construction activities to maintain compliance with the intent.

Prepare and submit inspection reports of construction activity and problems encountered.

[M]onitor[] periodic construction activities on the project and document[] their observations in a formal project record.¹³

During construction, the concrete slabs underneath the hangar buildings and the pavement began deteriorating and cracking.¹⁴ Pipeline allegedly used an inadequate material to stabilize the base of the hangar buildings, aprons, and taxiways.¹⁵ Keystone alleged Passero failed to evaluate the suitability of the stabilization base product and failed to identify the resulting deficiencies in Pipeline's work.¹⁶ Keystone asserted Passero had breached its contractual duty to inspect and sued both Pipeline and Passero.¹⁷

The Trial Court

Keystone sued Passero for breach of contract and professional malpractice.¹⁸ Notably, the Keystone-Passero contract contained a limitation of liability provision which provided:

"Passero shall have no liability for indirect, special, incidental, punitive, or consequential damages of any kind."¹⁹

At the trial court, Keystone sought to recover costs for removing, replacing, and repairing the hangars, taxiways, and subgrade. They alleged such costs were direct damages; however, Passero argued the repair, removal, and replacement costs were consequential damages and therefore barred by the limitation of liability provision in the contract.²⁰ The trial court deemed the costs consequential damages, and thus barred by the terms of the contract, and granted Passero's motion for partial final summary judgment on damages.²¹

First District Court of Appeals

On appeal, the court affirmed the grant of partial final summary judgment to Passero and held the costs for removal, repair, and replacement of the hangars and taxiways were indeed consequential damages.²² The appellate court dismissed Keystone's argument that the damages were general because it was foreseeable to Passero that its failure to perform could result in damages; foreseeability is only part of the analysis.²³

In distinguishing Keystone's damages from general or special damages, the court embarked on a detailed analysis of general, special, and consequential damages.²⁴ The court reasoned that the removal, repair, and replacement costs were not general damages because the damages were not a "direct or necessary consequence" of Passero's failure to perform, as Pipeline could have constructed the Project correctly without Passero's work.²⁵ "[T]he need for repair did not arise within the scope of the immediate transaction between Passero and [Keystone]."²⁶

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The court reasoned that the removal, repair, and replacement costs were not special damages because the damages were not “particular” to Keystone.²⁷ Similar parties in similar circumstances with similar contracts could incur these same types of damages.²⁸ Other Florida courts have recognized “knowledge is a prerequisite for liability for special damages,” meaning the damaged party must give actual notice to the other party regarding the potential for injury, which is usually satisfied through a well-pled request for special damages in a pleading.²⁹ The appellate court determined that the costs for removal, repair, and replacement constituted consequential damages.³⁰ Rather than employing a pure foreseeability analysis, the *Keystone* court highlighted that the repairs were necessitated by Keystone’s interactions with Pipeline – a third party to the Keystone-Passero transaction.³¹ The appellate court noted “[t]he consequential nature of loss . . . is not based on the damages being unforeseeable by the parties. What makes a loss consequential is that it stems from relationships with third parties, while still reasonably foreseeable at the time of contracting.”³² The appellate court analogized the facts in *Keystone* to those cases where consequential damages were assessed as a result of a party’s failure to properly inspect – ranging from costs to repair termite damage,³³ costs for reconditioning soil after inaccurate soil testing,³⁴ and costs for correction of roof leaks following a designer’s defective plans.³⁵

The appellate court noted the circumstances constituted a matter of first impression, since, unlike other construction inspection cases, *Keystone* involved a contract provision which expressly imposed inspection duties upon Passero.³⁶ As such, the First District Court of Appeals certified a question of great public importance to the Florida Supreme Court:

WHERE A CONTRACT EXPRESSLY REQUIRES A PARTY TO INSPECT, MONITOR, AND OBSERVE CONSTRUCTION WORK AND TO DETERMINE THE SUITABILITY OF MATERIALS USED IN THE CONSTRUCTION, BUT THE PARTY FAILS TO DO SO AND INFERIOR MATERIALS ARE USED, ARE THE COSTS TO REPAIR DAMAGE CAUSED BY THE USE OF THE IMPROPER MATERIALS GENERAL, SPECIAL, OR CONSEQUENTIAL DAMAGES?³⁷

On March 27, 2019, the Florida Supreme Court declined the First District Court of Appeal’s invitation for review as a matter of great public importance.³⁸ The Florida Supreme Court’s decision means *Keystone* is binding upon the courts in the First District Court of Appeal.

Considerations for Practitioners

Keystone challenges what attorneys typically consider consequential damages to be. While practitioners should continue to conduct an in-depth evaluation of the construction contract and scope of work, they should also note two “wrinkles” the decision presents. First, the court emphasized the importance of the contractual provision that imposed

inspection and monitoring duties upon the engineer. A major component of the decision, and what made the case one of first impression, was that the contract at issue expressly set out the engineer’s inspection duties. A client’s contract may not impose the same responsibilities, so attorneys should consider whether *Keystone* is applicable. Second, it is also important to note that Passero was contracted to perform inspection duties for Keystone on a *part-time* basis. If Passero was expected to inspect and monitor the work full time, would the assessment of damages be the same? Perhaps. Construction attorneys – for owners, design professionals, and contractors – should closely examine the proposed scope of work to determine exactly what is expected. Practitioners should consider how sweeping inspection responsibilities in a contract should, or should not, be accompanied by a consequential damages waiver or other limitation of liability provision. Since architects, engineers, and other design professionals can be responsible, to some extent, for the inspection and monitoring of construction, and in light of the decision in *Keystone*, it is especially important to provide advice and counsel regarding the broad range of liability that can flow from such duties, and from the owner’s perspective, the effect of a contractual waiver of consequential damages. ■



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Ms. Yello is a litigation attorney with the construction law practice group in GrayRobinson’s Orlando office. She primarily represents property owners, contractors, and design professionals in residential and commercial construction disputes. She assists clients with resolving payment disputes, drafting and evaluating construction contracts, litigating mechanics liens, and navigating the Chapter 558 pre-suit process. Ms. Yello regularly defends contractors and design professionals in complex construction defect, professional malpractice, and tort cases. Ms. Yello also represents public and private employers with sexual harassment claims, discrimination claims, and retaliation claims.

Endnotes

- 1 266 So.3d 1219 (1st DCA 2019), *review denied*, SC19-314, 2019 WL 1371949 (Fla. Mar. 27, 2019).
- 2 *HCA Health Services of Florida, Inc. v. CyberKnife Ctr. of Treasure Coast, LLC*, 204 So. 3d 469, 471 n.2 (Fla. 4th DCA 2016) (“lost profits do not *always* constitute consequential damages as a matter of law . . . [l]ost profits are recoverable as general damages where they flow directly and immediately from the breach of a contract” (citations omitted) (emphasis in original)).
- 3 *Keystone*, 266 So. 3d at 1223.
- 4 *Augustine v. S. Bell Tel. & Tel. Co.*, 91 So. 2d 320, 323 (Fla. 1956); *Hardwick Properties, Inc. v. Newbern*, 711 So. 2d 35, 40 (Fla. 1st DCA 1998). See *Hutchison v. Tompkins*, 259 So. 2d 129, 132 (Fla. 1972); *Hector Martinez & Co. v. S. Pac. Transp. Co.*, 606 F.2d 106, 109 (5th Cir. 1979) (reasoning general damages “are awarded only if injury were foreseeable to a reasonable man . . . Damage is foreseeable by the carrier if it is the proximate and usual consequence of the carrier’s action”); *Gonzalez v. Barrenechea*, 170 So. 3d 13, 15 (Fla. 3d DCA 2015) (affirming that, in owner’s suit against designer for negligent design of air

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