

## **Fraud, Construction Contracts and Change Orders- A Roundup**



Musings will be leaving the "green" reservation for a bit and discussing more mundane, though no less relevant, issues that arise in the construction world.

One interesting note is that the Virginia Storm Water Regulations were [recently updated](#) and are open to public comment. If you are affected by these regulations, be sure to make your voice heard.

On the construction law front, the Virginia courts are busy as always. Two recent cases stand out to me. The first is a Virginia Supreme Court case, [Dunn Construction Company, Inc. et. al. v. Cloney](#). In *Dunn Construction*, the home builder admittedly failed to meet the plans and specifications when constructing the home, in particular the foundation wall. The contractor then "repaired" the wall and claimed openly that it had filled the repaired wall with rebar and reinforced the "cells" with concrete. After this representation (that turned out to be false), Mr. Cloney got a structural engineer to inspect the wall and determined that the contractor did not do what he said he'd done. Of course, litigation ensued. Along with the compensatory damages for breach of contract, the trial court granted Mr. Cloney punitive damages for the fraud of the contractor. The Virginia Supreme Court reversed the punitive award, and restated its long standing position that where a duty comes from a contract, no common law tort action can go forward.

What makes this case interesting is it's extension of the so called "economic loss rule" to a case of a representation that is seemingly outside of the contract itself. *Dunn Construction* represented, *after the contract was supposedly complete*, that it had performed certain remedial measures that were not readily apparent from a visual inspection. Despite this fact, the Court found the duty to repair and honestly state the extent of the repairs arose from the contract, i. e. without the contract, the representation never would have occurred, and therefore a tort action for fraud could not go forward and punitive damages were unavailable.

The second case of note is [Abacus Construction Company, Inc. v. Milestone Construction Services, Inc.](#) Without going into the major details of each and every claim and back charge involved in *Abacus*, suffice it to say that both sides had "change orders" that constituted a majority of the claims in the case. The Court went through each claim, compared it to the contract language *and* the scope of work outlined in the contract before determining if the additional charges were allowable. Much of *Abacus'* claim was disallowed because "change orders" either were not in writing or described work that fell

within the original scope of the contract. Additionally, the terms of the contract at issue allowed Milestone to recover 10% overhead on their back charges and its attorney fees.

The takeaway from these two cases? The *Dunn Construction* and *Abacus Construction* cases show just how serious the Virginia courts are about contracts. Your contracts are essentially the "law" for your project. As a contractor or subcontractor, the contract is the road map for all of your remedies and risks, so they need to be taken seriously and drafted carefully. Musings has [discussed](#) the importance of contracts on numerous occasions, and the Virginia courts consistently re-emphasize this importance. To make sure that these contracts are drafted properly and used correctly, get the assistance of an experienced [construction attorney](#).

Please check out my [Construction Law Musings Blog](#) for more on Virginia construction law and other topics.