IN THE IOWA DISTRICT COURT FOR DUBUQUE COUNTY

WAREHOUSE TRUST, LLC, Plaintiff, v. EARL THOMPSON MASONRY, INC., Defendant.	Case No. LACV106102 **RULING AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Warehouse Trust, LLC ("Warehouse Trust") filed its Petition at Law against Defendant Earl Thompson Masonry ("ETM") seeking recovery for losses associated with the expiration of time-sensitive state and federal tax credits, increased financial pressure, lost income, and related expenses. The Petition, filed on April 25, 2017, recounts Plaintiff's renovation of the Novelty Iron Works Building in Dubuque's Historic Millwork District and the associated restoration work performed by Defendant. In brief, Plaintiff asserts that Defendant breached its contractual warranties and seeks recovery under the terms of these agreements. Plaintiff also brings its complaint in tort, alleging that Defendant negligently failed to take proper precautions when using harsh masonry cleaning agents, damaging the building's windows. Plaintiff contends that construction delays following the damage caused Plaintiff to incur thousands of dollars in financial charges and resulted in the expiration of millions of dollars of historic tax credits. Defendant filed a Motion for Summary Judgment on October 20, 2017, seeking judgment as a matter of law on both claims asserted by Plaintiff. Plaintiff responded by filing its Resistance on November 9, 2017, to which Defendant filed its Reply on November 17, 2017. The Court heard oral argument on this matter on December 21, 2017. The Court, having

considered the Motion for Summary Judgment, Plaintiff's Resistance, Defendant's Reply, and having considered the arguments of counsel, issues the following Ruling:

Factual Background and Proceedings

Warehouse Trust is the owner of the Novelty Iron Works Building, a 260,000 square-foot warehouse building located in the Historic Millwork District of Dubuque, Iowa. On January 22, 2014, Warehouse Trust hired Russell Construction Co., Inc. ("Russell") as the Construction Manager to undertake and complete a renovation project on the warehouse to convert it into residential real estate. Warehouse Trust applied for, and received, a variety of state and federal historic tax credits to finance the renovation of the Novelty Iron Works building as part of the larger restoration effort surrounding Dubuque's Historic Millwork District. Pet. ¶ 22.

The construction agreement between Warehouse Trust and Russell—the "Prime Contract"—was reduced to writing and governs the duties and obligations owed by the parties. Def.'s Statement of Undisputed Material Facts ("SUMF") ¶ 3; Def.'s Ex. A. This agreement also allocates the risk of loss and liability between Warehouse Trust, as owner of the building, and Russell, as general contractor for the restoration project. Pursuant to the terms of the Prime Contract, Russell agreed to indemnify Warehouse Trust for claims of damage, loss, or expense arising from performance of the restoration work performed on the Novelty Iron Works Building by Russell or any of its subcontractors under further subcontracting agreements. Def.'s Ex. A § 3.18.1 ("Contractor Indemnification"). The Prime Contract asserts a measure of control over Russell's future subcontracting agreements for those crews working on the Novelty Iron Works project, requiring Russell to bind all subcontractors to Russell in the same manner which Russell bound itself to Warehouse Trust in the Prime Contract. *See* Def.'s Ex. A § 5.3 ("Subcontractual Relations"). The Prime Contract also contains a mutual waiver of consequential damages,

allocating the risk of loss and liability whereby each party agreed to assume responsibility for its own intangible and pecuniary losses resulting from a breach of the agreement. Def.'s Ex. A § 15.1.6 ("Claims for Consequential Damages").

Russell hired ETM as a subcontractor to perform specific masonry work to restore the brick walls of the Novelty Iron Works Building pursuant to a written agreement dated March 31, 2014 (the "Subcontract"). *See* SUMF ¶ 4; Def.'s Ex. B. Under the Subcontract, ETM was tasked with restoring the building's brick masonry on both the interior and exterior of the building. To do so, ETM used a powerful acidic cleaning agent that requires very particular safety precautions and application instructions to avoid personal injury and property damage. Consistent with the mandate of the Prime Contract, the Subcontract requires ETM to indemnify Russell—and all parties Russell in turn agreed to indemnify—for claims of damage resulting from the subcontractor's masonry work on the Novelty Iron Works project. Def.'s Ex. B § 15.1; *see also id.* § 1.6.

On April 28, 2015, it came to the attention of the Russell construction managers that windows on the building's Washington Street façade were severely damaged. The damage to the windows was later determined to be irreparable, and ninety-eight windows had to be replaced. SUMF ¶ 5. After a thorough investigation, Russell concluded that the damage resulted from ETM's application of the Diedrich's cleaning agent. *See* Def.'s SUMF ¶ 5; Pl.'s Ex. 1 & 2.[1] In sum, Warehouse Trust alleges that ETM negligently applied the chemical agent to the exterior masonry of the building because it did not follow the specific application instructs and ignored the clear warnings that it would damage glass and aluminum surfaces if not applied correctly. Pet. ¶¶ 12–15. Specifically, Warehouse Trust alleges that ETM did not use sufficient protective

[1] ETM has denied this allegation and others contained in paragraphs 11–18 of the Petition. These allegations remain disputed for purposes of the present Motion for Summary Judgment.

sheets around the windows and failed to follow the cleaner's directions to rinse off the cleaner two to five minutes after its application. *Id.* ¶¶ 14–15. The "hard costs" associated with replacing the windows totaled $353,188.87 and have been satisfied by ETM; the immediate physical damage to the Novelty Iron Works Building is not the subject of the present lawsuit.

Warehouse Trust does not limit its losses to the physical damage to the building, however. Warehouse Trust asserts that replacing the damaged windows required the construction crews to delay the project's renovation schedule and, accordingly, its completion date. Consequentially, several millions of dollars of tax credits relied on by Warehouse Trust were allegedly delayed. Pet. ¶ 23. In order to continue financing the renovation project and maintain a viable cash flow for its business, Warehouse Trust claims it was required to obtain bridge loans from institutional lenders and incur substantial interest and finance charges. *Id.* ¶ 24. Subsequent delay in "Phase Two" of the renovation project ensued; Warehouse Trust submits that, as a result, millions of the delayed tax credit dollars expired. *See Id.* ¶ 26–28. Warehouse Trust also alleges that the delay in the construction timeline caused it to lose substantial rental income from both commercial and residential tenants. *Id.* ¶ 25.

Through this action, Warehouse Trust seeks to recover these "soft costs," or "consequential damages," from ETM. Warehouse Trust demands compensation from ETM including, but not limited to, the interest, finance charges, lost rental income, expired tax credits and expenses incurred as a result of the delay of the construction schedule caused by ETM's work on the project. Pet. ¶ 30; Pl.'s Ex. A.

Prior to bringing the present lawsuit, Russell assigned its rights under the Subcontract to Warehouse Trust. *See* SUMF ¶ 8; Def.'s Ex. C. Warehouse Trust brings its breach of contract claim alleging a violation of its rights under the Subcontract as both an assignee of Russell's

rights and as a third-party beneficiary of that agreement Russell and ETM. Russell is not a party to the present litigation.

Applicable Law and Analysis

I. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). The moving party bears the burden of proving an absence of disputed fact and demonstrating that it is entitled to summary judgment. *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 806 N.W.2d 282, 286 (Iowa 2011); *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002). "If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists." *Id.* However, speculation and mere allegations are not material facts. *Hlubek v. Pelecky*, 701 N.W.2d 93, 95–96 (Iowa 2005) (citations omitted).

"It is axiomatic that the determination of whether a party is entitled to judgment as a matter of law is a legal question, not a matter of factual resolution." *Bellach v. IMT Ins. Co.*, 573 N.W.2d 903, 905 (Iowa 1998). Indeed, summary disposition of a case is appropriate "when the record reveals only the legal consequences of undisputed facts are in issue." *Homan v. Branstad*, 887 N.W.2d 153, 164 (Iowa 2016) (citing *City of Fairfield v. Harper Drilling Co.*, 692 N.W.2d 681, 683 (Iowa 2005)); *see also Wallace v. Des Moines Indep. Sch. Dist. Bd. of Directors*, 754 N.W.2d 854, 857 (Iowa 2008). Where the uncontroverted facts could not lead to a verdict for the nonmoving party, there is no "genuine issue for trial" and judgment as a matter of law is proper. *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 300 (Iowa 1996).

In ruling on a motion for summary judgment, the facts must be viewed in a light most favorable to the non-moving party. Iowa R. Civ. P. 1. 981(5); *see also Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 454 (Iowa 1989). Thus, the Court "consider[s] on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record." *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717–18 (Iowa 2001) (citations omitted).

II. Count One: Breach of Contract and Warranties and the Bargained-For Exchange in a Chain of Contracts

The first issue before the Court is whether Warehouse Trust is entitled to recover consequential damages from ETM under the terms of the Subcontract, should it prevail on its breach of contract claim. ETM has already compensated Warehouse Trust for the physical damage done to the exterior windows inflicted by the masonry cleaning agent. Warehouse Trust now argues that, as either an assignee of Russell's rights under the Subcontract or an intended third-party beneficiary of that agreement, it is entitled to recover the consequential losses associated with the delay of the Novelty Iron Works renovation project.[2] At a minimum, Warehouse Trust maintains, genuine issues of material fact exist to preclude summary judgment on its breach of contract and warranties claim.

For the reasons discussed below, the Court finds that the operation of the Prime Contract and Subcontract effectively waives recovery of consequential damages against all parties governed by the chain of contracts in the present case. As either an assignee enforcing Russell's rights under the Subcontract or a third-party beneficiary staking its own claim, Warehouse Trust cannot circumvent the legal construction of the contractual scheme it freely bargained for. The Court will begin with the text of both agreements and determine the proper construction for the

[2] On November 9, 2017, Warehouse Trust moved to amend its first cause of action to include recovery based on its assertion of rights as an intended third-party beneficiary of the Subcontract between Russell and ETM. This Court granted that motion in an order dated November 28, 2017.

contractual scheme governing the parties. The Court will then consider this construction in relation to Warehouse Trust's position as assignee and third-party beneficiary under the Subcontract.

A. Legal Operation of the Prime Contract and Subcontract: The Contractual Scheme Contemplates "Pass-Through Indemnity" From Owner to Subcontractor.

Resolution of Warehouse Trust's breach of contract claim first requires the Court to apply principles of contract interpretation and construction to both the Prime Contract and Subcontract and determine the legal effect of the agreements as they operate in tandem. "Interpretation involves ascertaining the meaning of contractual words; construction refers to deciding their legal effect." *Fashion Fabrics of Iowa, Inc. v. Retail Inv'rs Corp.*, 266 N.W.2d 22, 25 (Iowa 1978). "The cardinal rule of contract interpretation is to determine what the intent of the parties was at the time they entered into the contract." *Pillsbury Co., Inc. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 436 (Iowa 2008). Where there is no ambiguity in the text of the agreement, the contractual language controls. *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991) ("When a contract is not ambiguous, it will be enforced as written."); *cf. Tom Riley Law Firm, P.C. v. Tang*, 521 N.W.2d 758, 759 (Iowa Ct. App. 1994) ("The words in the contract are given their plain and ordinary meaning."). Courts review the interpretation and construction of unambiguous written contracts as a matter of law, *Pillsbury*, 752 N.W.2d at 435–36; *Fashion Fabrics*, 266 N.W.2d at 759, and give effect to the language of the entire agreement as a whole. *Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 797 (Iowa 1999). Furthermore, a contract is not ambiguous simply because the parties disagree over its meaning or effect. *Hartig*, 602 N.W.2d at 797.

Warehouse Trust argues that, even though it waived the right to recover consequential damages from Russell, it did not do so with ETM because it never entered into a contract directly with ETM; it contends that ETM cannot avail itself to the waiver clause in the Prime Contract because ETM is not a party to that agreement. Warehouse Trust also argues that the contractual scheme between the parties does not contemplate a universal waiver of consequential damages and does not forfeit the right to recover such damages against ETM because the text of the Prime Contract limits the contractual language of that agreement—including the waiver of consequential damages—as between only Warehouse Trust and Russell.

The Court disagrees. The Prime Contract and Subcontract reflect a contractual scheme that operates as a top-down indemnification model and passes liability through to the responsible party. Section 3.18.1of the Prime contract requires Russell to indemnify and hold harmless Warehouse Trust

> [f]rom and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor [or] a Subcontractor, . . . regardless of whether or not such claim, damage, loss or expense is caused in party by a party indemnified hereunder.

Def.'s Ex. A § 3.18.1. This indemnification clause holds Russell generally responsible for work completed on the Novelty Iron Works restoration project and establishes broad liability to Warehouse Trust for any claims brought against it or obligations to third parties arising out of the work performed by Russell or any subcontractor.

To soften this broad liability, the Prime Contract calls for Russell to require its individual subcontractors to indemnify Russell for such claims to the extent that they result from the performance of that subcontractor, like ETM:

> By appropriate agreement, . . . the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Contractor, by these Documents, assumes toward the Owner []. *Each subcontract agreement shall preserve and protect the rights of the Owner [] under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights*, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies, and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner.

Def.'s Ex. A § 5.3 ("Subcontractual Relations") (emphasis added). This provision in the Prime Contract reflects an effort by the parties to the Prime Contract—Warehouse Trust and Russell—to control the terms that were to govern the rights and duties of the parties in subsequent sub-contractual agreements. In turn, the Subcontract governs ETM's indemnification responsibilities and subjects ETM to liability for damage caused by its performance under the Subcontract by requiring it to

> *defend, indemnify and hold harmless* Contractor, Owner, . . . and all persons indemnified by Contractor pursuant to the Prime Contract . . . from and against any and all claims, liabilities, liens, costs, damages, citations, penalties, fines, attorneys' fees losses, and expenses of whatever nature (the "Indemnified Claim") arising out of or resulting from Subcontractor's performance of or failure to perform the Scope of Work or Subcontractor's obligations under the Subcontract, including loss of use of any property resulting therefrom, but only to the extent cause by negligent acts or omissions of Subcontractor . . . .

Def.'s Ex. B § 15.1 (emphasis added).

These contractual provisions are not ambiguous. Nor do the parties argue that they are subject to two interpretations. What the parties dispute, rather, is the construction of the way the Prime Contract and Subcontract operate together within the contractual scheme entered into by Warehouse Trust, Russell, and ETM, allocating the risk of loss among them. Under these two agreements, ETM agreed to be liable to Russell to the extent that Russell agreed to be liable to

Warehouse Trust for any damage caused by ETM's performance. Yet the Prime Contract further narrows the scope of liability Russell owes to Warehouse Trust by specifically excluding "consequential damages":

> The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes 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.

Def.'s Ex. A § 15.1.6.1.

As a matter of construction, the rights and obligations conferred in the Subcontract must be read consistently with the Prime Contract as a coherent part of the contractual scheme entered into among the parties. The fact that Warehouse Trust never contracted directly with ETM does not alter the legal import of the Prime Contract and Subcontract. By its terms, the Subcontract holds ETM liable to Russell for any damages that Russell is liable to Warehouse Trust for as the owner of the property. Def.'s Ex. B § 15.1. In effect, ETM promised to indemnify Russell for any liability Russell owed to Warehouse Trust as a result of its own deficient performance. It follows that under the contractual scheme embodied in the Prime Contract and Subcontract ETM can only be liable to Warehouse Trust to the extent Russell would be liable to Warehouse Trust.

Warehouse Trust argues to the contrary, submitting that the Subcontract language providing for indemnification of "any and all claims" encompasses the consequential damages that it seeks to recover in the present action.[3] The Court is not convinced by the construction advanced by Warehouse Trust. Because Russell cannot be liable to Warehouse Trust for consequential damages, neither can ETM be obligated to Russell to pay such damages resulting

[3] Warehouse Trust seeks to recover "interest, finance charges, lost rent, expired tax credits, and time and expense" it claims it suffered as a result of ETM's allegedly faulty restoration work. Pet. ¶ 30; SUMF ¶ 13. All such "soft costs" fall squarely within the definition of "consequential damages" as contemplated by the Prime Contract. *See* Def.'s Ex. A ¶ 15.1.6(1).

from its conduct under the legal operation of the chain of contracts involved here. The language in the Subcontract relied on by Warehouse Trust, that ETM will indemnify Russell for "any and all" claims, must be read within the scope of the claims for which Russell itself would actually be liable to Warehouse Trust. Because consequential damages are not a class of claims for which Russell is liable to Warehouse Trust, they are likewise not within the class of "any and all claims" for which Russell has a right of recovery against ETM under the Subcontract. Were Warehouse Trust to have sued Russell instead of ETM, there would be nothing for ETM to indemnify Russell for because Russell owes no liability to Warehouse Trust for consequential damages. *Cf. Iowa Fuel*, 471 N.W.2d at 864 (stating the rule of construction that where an agreement "contains both general and specific provisions on a particular issue, the specific provisions are controlling").[4]

This analysis is the most reasonable construction of the parties' contractual relationship as it is consistent with other relevant terms of the Subcontract. Specifically, the Subcontract incorporates the Prime Contract by reference and explicitly notes the relational nature of liability among the parties to this contractual scheme:

> Subcontractor binds itself to Contractor and is obligated to Contractor in the same manner and to the same extent that Contractor is bound and obligated to Owner under the Prime Contract. All rights which Owner may exercise and enforce against Contractor may be exercised and enforced by Contractor against Subcontractor.

Def.'s Ex. B § 1.6; *see also id.* § 1.1 ("The Prime Contract is incorporated herein by reference and made an integral part of the Subcontract."). Restated, the Subcontract purports to hold ETM

[4] Warehouse Trust also argues that it is entitled to recover consequential damages from ETM under the contractual arrangement because the Subcontract's language that ETM indemnify itself and Russell for "any and all claims" and losses arising out of ETM's performance is more stringent than the Prime Contract's waiver of consequential damages. Pl.'s Resistance, at 13 (citing Def.'s Ex. B § 1.1 ("In the case of conflict between any of the contract documents, the more stringent of the two shall prevail.")). Warehouse Trust's argument is not persuasive because this matter does not concern conflicting contractual terms. Rather, the present case pertains to the construction and legal import of the Prime Contract and Subcontract as they operate to govern the rights of the parties as a contractual scheme.

liable to Russell to the same extent as contemplated by Russell's liability to Warehouse Trust under the Prime Contract. As noted above, this explicitly excluded consequential damages. *See* Def.'s Ex. A §15.1.6.[5]

Warehouse Trust seizes upon the language of section 1.1.2 of the Prime Contract, claiming that the Prime Contract does not create a contractual relationship except as between Warehouse Trust and Russell—that ETM has no basis upon which to rely on the waiver of consequential damages clause in that agreement. *See* Def.'s Ex. A § 1.1.2 ("The Contract Documents shall not be construed to create a contractual relationship of any kind . . . (2) between the Owner and a Subcontractor or Sub-subcontractor . . . ."). In spite of this language in the Prime Contract, however, is the incorporation of the Prime Contract into the Subcontract by reference in sections 1.1 and 1.6 of the Subcontract. Section 5.3 of the Prime Contract likewise reinforces the relational nature of rights under the Subcontract by allowing ETM "the benefit of all rights, remedies, and redress" that Russell enjoys against Warehouse Trust under that agreement. In contrast to the arguments made by Warehouse Trust, these provisions purport to carry all the rights and duties between Warehouse Trust and Russell to the Subcontract. As explained above, one of the rights carried over to the Subcontract is the release of liability for consequential damages. Thus, the manner and extent to which Russell is obligated to Warehouse Trust—excluding claims for consequential damages—is "in the same manner and to the same extent" that ETM is obligated to Russell, excluding claims for consequential damages. In this instance, ETM is not asserting a right under the Prime Contract so much as it is seeking to enforce the legal scheme that it bargained for.

[5] Warehouse Trust, knowing that Russell would be further indemnified by its subcontractors for any claim arising from that subcontractor's performance, could have explicitly waived consequential damages only as it pertained to Russell while reserving the right to recover economic losses from Russell's subcontractors. It did not.

B. Warehouse Trust Cannot Recover Consequential Damages From ETM as Either Assignee or Third-Party Beneficiary.

Nor is this outcome different under the theories advanced by Warehouse Trust. Even if it cannot do so through Russell, Warehouse Trust argues, it may recover consequential damages directly from ETM by asserting Russell's interest as an assignee or as an intended third-party beneficiary of the Subcontract.

But just as Warehouse Trust cannot recover consequential damages from ETM through Russell, it cannot skirt around the consequential damages waiver in the Prime Contract by virtue of suing ETM directly. An assignee of a contract inherits only a limited bundle of rights, standing in the shoes of the assignor for purposes of enforcing the contractual rights that it received. *Ostrem v. Prideco Secure Loan Fund, LP*, 841 N.W.2d 882, 899 (Iowa 2014). "The assignee assumes the assignor's rights, remedies, and benefits of the assignor." *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 533 (Iowa 1995). So too does a third-party beneficiary "stand in the shoes of the promisee," inheriting only those claims and defenses bargained for by the promisee. *Audio Odyssey, Ltd. v. United States*, 243 F. Supp. 2d 951, 969 (S.D. Iowa 2003). Indeed, "the rights of a third-party beneficiary are controlled by the terms of the contract" and likewise are limited to the agreement relied on. *Osmic v. Nationwide Agribusiness Ins. Co.*, 841 N.W.2d 853, 860 (Iowa 2014); *see also Olney v. Hutt*, 105 N.W.2d 515, 518 (Iowa 1960) (citing Restatement (Second) of Contracts § 309 cmt. *b*, at 459 (Am. Law Inst. 1981) and stating the rule that the rights of a third-party beneficiary "can rise no higher than those of the promisee").

Whether asserting the status of assignee or third-party beneficiary, Warehouse Trust is limited to asserting only those rights against ETM that Russell has the right to enforce under the Subcontract. Because consequential damages are not claims for which Russell is liable to Warehouse Trust, they are likewise not within the category of "any and all claims" that Russell

has a right of recovery against ETM for under the Subcontract. Thus, Warehouse Trust, standing in Russell's shoes, cannot itself maintain a claim for consequential damages as assignee of Russell's rights for the same reason that they are not provided for in this construction of the Subcontract.

Moreover, the language purporting to confer the right upon which Warehouse Trust relies does not support Warehouse Trust's bid for consequential damages. ETM agreed that it would "defend, *indemnify*, and hold harmless" Russell as general contractor of the project and Warehouse Trust as owner of the building. Def.'s Ex. B § 15.1. This language, "to indemnify," generally refers to the promise of one party to guarantee or reimburse loss or expense incurred by another for which the promising party is responsible. *See* Black's Law Dictionary (defining "indemnify" as "to save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him"). By contrast, section 15.1 does not contemplate direct compensation for damage caused by ETM's performance—this would simply be a breach of contract claim alleging the failure of ETM to live up to its end of the bargain. Indeed, nothing in this provision provides for anything more than for ETM to *reimburse* other parties for liability to others that they incur for ETM's own negligence.[6]

Finally, Warehouse Trust's argument that there are issues of material fact pertaining to its breach of contract claim is unavailing. As discussed above, the construction of a contract is a legal question for the Court to decide, and the effect of the Prime Contract and Subcontract operates to waive consequential damages as to all parties in the contractual scheme. Warehouse Trust's assertion at oral argument that the Prime Contract and Subcontract are not interrelated—

[6] For instance, if the City of Dubuque were to sue Warehouse Trust alleging that runoff from its property contaminated the city's water supply, ETM would be required to reimburse Warehouse Trust for costs associated with defending the lawsuit or any damages it might owe the city if the contamination was caused by ETM's work on the property under the Subcontract.

that section 1.6 of the Subcontract is merely a "flow up" provision common to the construction industry and was not intended to pass on its waiver of consequential damages as to ETM—stands in contrast to the clear, unambiguous language of the written documents. Even if an ambiguity exists, which this Court finds there is not, Warehouse Trust has not submitted a single affidavit to advance its position, and the argument that this is "just the way it works" is not supported by Iowa law. The Court finds this line of reasoning unpersuasive considering the clear language providing otherwise. *See Iowa Fuel*, 471 N.W.2d at 863 ("When a contract is not ambiguous, it will be enforced as written."). The documents speak for themselves.

The question of whether or not Warehouse Trust intended to waive the right to recover consequential damages from ETM does not generate a dispute of material fact due to the explicit language of the Prime Contract. *See* Pl.'s Statement of Disputed Material Facts ("SDMF") ¶ 4; Pl.'s Resistance, at 12. Whether a waiver of rights has occurred is *generally* a fact question. When "the evidence is undisputed, however, the issue [of waiver] is one of law for the Court." *Terra Indus., Inc. v. Commonwealth Ins. Co. of America*, 981 F.Supp. 581, 601–02 (N.D. Iowa 1997) (quoting *Scheetz v. IMT Ins. Co.*, 324 N.W.2d 302, 304 (Iowa 1982)). And because the Court finds that the contractual scheme carries an explicit waiver of consequential damages through the entire chain of contracts, Warehouse Trust's intent is immaterial. Further, whether or not ETM actually breached the Subcontract is not a dispute material to the resolution of the legal issue before the Court today. *See* SDMF ¶ 6. Warehouse Trust chose to forego the right to pursue the pecuniary damages it seeks to recover under the Subcontract, rendering the question of whether ETM actually breached the agreement irrelevant.

In conclusion, Warehouse Trust may not bootstrap its claim for consequential damages around its express waiver of those rights in the Prime Contract simply by virtue of assignment

around that provision; nor can Warehouse Trust avoid the limiting nature of the indemnification clauses incorporated into the Subcontract as a third-party beneficiary. To the contrary, allowing Warehouse Trust to recover under the guise of assignee or third-party beneficiary would effectively allow Warehouse Trust to re-write the Prime Contract and circumvent its waiver of consequential damages, *post-hoc*, against the terms it bargained for.

III. Count Two: Negligence and the "Tortification" of Contract Law

Warehouse Trust next seeks recovery in tort. Warehouse Trust alleges that ETM negligently applied the masonry cleaner by failing to follow application instructions and safety precautions. As a result, Warehouse Trust suffered both physical damage to the building's windows and economic damage in the form of lost tax credits, lost income, and financial expenses. ETM argues, however, that Warehouse Trust cannot recover purely economic "consequential" damages as a matter of law because Warehouse Trust's tort claim is barred by the economic loss doctrine.

In general terms, the economic loss doctrine bars recovery in tort where the plaintiff has suffered only economic loss. *Annett Holdings, Inc. v. Kum & Go, L.C.* 801 N.W.2d 499, 503 (Iowa 2011) (citing *Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 126 (Iowa 1984)); *see also Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309 (1927). "The well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable." *Neb. Innkeepers*, 345 N.W.2d at 126.

When two parties have a contractual relationship, the contractual economic loss doctrine prevents one party from recovering in tort over that party's defeated expectations if the type of harm was within the scope of harm contemplated by the parties. *Annett Holdings*, 801 N.W.2d at

503 (citing Dan B. Dobbs, *An Introduction to Non-Statutory Economic Loss Claims*, 48 Ariz. L. Rev. 713, 723 (2006)). Parties to a written agreement are presumed to have bargained for a particular allocation of risk of loss in negotiating the contract; thus, the general policy is that where such a document exists, that agreement should control the rights and duties of the parties. *Id.*; *Determan v. Johnson*, 613 N.W.2d 259, 262–63 (Iowa 2000); *Nelson v. Todd's Ltd.*, 426 N.W.2d 120, 125 (Iowa 1988); *see also* Paul M. Coltoff et al., 65 C.S.J. *Negligence* § 65 ("The economic loss rule prevents recovery for negligence when the duty breached is a contractual duty and the harm incurred is the result of the failure of purpose of contract."). The economic loss doctrine seeks to prevent the "tortification" of contract law; the rule functions to protect private parties' freedom to contract by maintaining the terms of the agreement they bargained for and insulate the terms of the agreed-upon document from intrusion by tort law. *See St. Malachy Roman Catholic Congregation of Geneseo v. Ingram*, 841 N.W.2d 338, 351–52 (Iowa 2013) (citing *Annett Holdings*, 801 N.W.2d at 503). Indeed, "[t]he purpose of the economic loss rule is not to leave injured persons remediless for economic losses but to ensure respect for private ordering by relegating a plaintiff to contract remedies in cases where there is an agreement between the parties allocating economic risks." Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 Wash & Lee L. Rev. 523, 555 (2009).

Warehouse Trust first argues that its financial losses arise directly from physical damage and are not barred by the economic loss doctrine. Warehouse Trust relies on the Tentative Draft of the Third Restatement of Torts in asserting that pecuniary loss is not barred where it accompanies "even minor injury to the plaintiff's person or property." Because its pecuniary loss from the delayed construction schedule arises as a direct consequence from the physical damage to the exterior windows of the Novelty Iron Works Building, Warehouse Trust argues, the

damages it seeks do not even fall within the definition of "economic loss." *See* Pl.'s Resistance, at 6 (quoting Restatement (Third) of Torts, *Liability for Economic Harm* § 2 (Am. Law Inst. TD No. 1, 2012).

Iowa has not adopted this section of the Third Restatement of Torts in full. Rather, the pertinent legal question is whether an actor's duty of care arises solely from the contractual bargaining of the parties or is derived from some other, independent duty. *Annett Holdings*, 801 N.W.2d at 503; *cf.* Johnson, *supra*, at 571 ("If tort law recognizes an independent source of duty that affords protection to the plaintiff for purely economic losses, the plaintiff should be entitled to relief for a breach of that duty unless, by entering into a contract with the defendant, the plaintiff effectively waived that protection."). Under current law, the primary question is whether or not the type of harm suffered by the complaining party falls within the subject matter of the contract bargained for between the parties. *Annett Holdings*, 801 N.W.2d at 503; *Richards v. Midland Brick Sales Co., Inc.,* 551 N.W.2d 649 (Iowa Ct. App. 1996) (Cady, J.) (citing *Nelson*, 426 N.W.2d at 123, *Neb. Innkeepers*, 345 N.W.2d at 126). The role of this Court is to defer to existing legal principals. *See Village at White Birch Town Homeowners Ass'n v. Goodman Assoc., Inc.*, No. 11-1842, 2012 WL 5356045, at *6 (Iowa Ct. App. Oct. 31, 2012) *aff'd by an equally divided court* No. 11-1842, 2014 WL 1351058 (Iowa 2014) (declining to extend exceptions to the economic loss doctrine to losses that were "contractual in nature"); *see also Healy v. Carr*, 449 N.W.2d 883, 883 (Iowa Ct. App. 1989) (noting the Supreme Court's admonition in *State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) that "[i]f our previous holdings are to be overruled, we [the Supreme Court] should ordinarily prefer to do it ourselves").

Iowa courts employ a three-factored test to determine whether a plaintiff may recover in tort when a written agreement dominates the relationship between the parties: (1) the nature of

the defect; (2) the type of risk; (3) and the manner in which the injury arose. *Determan*, 613 N.W.2d at 262.[7] The application of these factors determines whether the "safety-insurance policy of tort law" or the "expectation-bargain protection policy of warranty law" controls the disposition of a particular claim. *Nelson*, 426 N.W.2d at 124–25. At a minimum, the damage for which recovery is sought must extend beyond the subject matter of the contract itself. *Determan*, 613 N.W.2d at 262; *see also Richards*, 551 N.W.2d at 651 ("[W]e ultimately look to the policies behind tort law and contract law to determine whether a loss is compensable in tort or in contract.").

In the present case, the Court finds that the *Determan/Nelson* factors favor the application of the economic loss doctrine to bar Warehouse Trust's tort claim. Though Warehouse Trust brings suit only for financial loss, the Court notes that it did in fact suffer physical damage to the windows of the Novelty Iron Works Building, which delayed the project and resulted in the pecuniary harm it complains of. Were it not for the physical damage to the building's windows, the renovation project would not have been delayed; were it not for the delay, the historic tax credits would not have expired and Warehouse Trust would not have required additional financing and lost rental income. Further, had ETM not replaced the windows at its cost prior to this litigation, Warehouse Trust would presumably be seeking recovery of this injury in the present tort action as well.

Yet the risk of loss involved here is purely economic. The injury claimed by Warehouse Trust is solely financial harm occurring as a consequence of an alleged breach of contractual duty by ETM and the nature of the loss arises from performance of obligations under the

[7] The Iowa Supreme Court has noted that "[i]t is not clear to us that the *Determan/Nelson* factors are relevant when the claim is for negligence resulting only in financial harm." *Annett Holdings*, 801 N.W.2d at 506. Nevertheless, the Court went on to apply these factors to conclude that the economic loss doctrine barred the plaintiff's tort claim for purely financial loss. *Id.*

Subcontract.[8] The risk of loss in the form of "interest, finance charges, lost rent, expired tax credits, and time and expense" was certainly contemplated by Warehouse Trust when entering into the contractual scheme governing the parties—Warehouse Trust waived recovery of such losses and specifically bargained to be responsible for its own "consequential damages." *See* Part II.A, *supra*; Def.'s Ex. A § 15.1.6.1. Warehouse Trust, though not in direct contractual privity with ETM, knew that Russell would be engaging in subcontracts and nevertheless it assumed the risk of financial loss. *See Annett Holdings*, 801 N.W.2d at 505 ("Here Annett agreed with Comdata that it would be 'fully responsible' for the fraudulent or unauthorized use of credit cards. Annett knew that Comdata would be entering into agreements with service centers, that Comdata would be reimbursing service centers for charges made to the credit cards, and that Comdata would in turn expect reimbursement from Annett. . . . It is difficult to see why a tort remedy is needed here. Annett contracted to assume certain risks of financial loss and had the ability to minimize those risks.").

Moreover, the Court is not convinced that Warehouse Trust could even recover the physical damage to the windows in tort. The physical damage inflicted by the masonry cleaning agent is an injury to the Novelty Iron Works Building itself—the very subject matter of the Prime Contract and Subcontract. *Cf. Determan*, 613 N.W.2d at 263–64 (holding that the plaintiff suffered only harm contemplated by the parties' transaction and could not recover in tort because the plaintiff's injury did not occur to "other property"); *Nelson*, 426 N.W.2d at 125 (holding that the injury to the plaintiff was anticipated by the buy-sell agreement of the parties and was not a "hazard peripheral to the sale," precluding tort recovery). Despite Warehouse Trust's arguments

[8] Moreover, the harm alleged by Warehouse Trust does not resemble that of a tort. Rather than a "sudden or dangerous occurrence," let alone one that "frequently involv[es] some violence or collision with external objects," the corrosive damage to the Novelty Iron Works Building windows took weeks, if not months, to manifest. *See Annett Holdings*, 801 N.W.2d at 509; *Nelson*, 426. N.W.2d at 125.

to the contrary, it is not just the scope of the Subcontract—masonry cleaning of the building's brick exterior—that is the subject of the Court's inquiry under the economic loss doctrine. The Court must instead look to the network of agreements together and the analyze the entire contractual scheme governing the renovation project in order to ascertain the scope and subject matter of the parties' bargaining and determine whether Warehouse Trust is merely suing on its disappointed expectations. Although Warehouse Trust insists that the only relevant agreement defining the scope of the relationship between Warehouse Trust and ETM is the Subcontract, Iowa courts have consistently looked to the entire network of contracts between the parties to ascertain the subject matter contemplated by the agreement and the scope of the parties' bargaining. *See Annett Holdings*, 801 N.W.2d at 504–05 (holding that the economic loss doctrine barred a plaintiff's tort claim because although the plaintiff had no direct contractual relationship with the defendant, it had contracted with an intermediate third-party knowing that it would enter into downstream contracts; the plaintiff agreed to be "fully responsible" for financial loss when it had the opportunity and ability to minimize that risk); *Richards*, 551 N.W.2d at 651 (holding that the economic loss rule barred tort recovery of damage to her home where a homeowner had contracted with a builder to construct an entire house, who had in turn contracted with a brick supplier specifically to supply the brick exterior); *see also Lipps v. Hjelmeland Builders, Inc.*, No. 07-1410, 2008 WL 4877458, at *2 (looking to the entire network of construction contracts between the owner-plaintiff, general contractor, and subcontractor-defendant to hold that the owner's recovery for damage to the interior of the building was barred in tort even though the subcontractor was hired to work only on the exterior of the building because the damage did not occur to "other property" besides the building contemplated by the entire chain of contracts); *Village at White Birch*, 2012 WL 5356045, at *5 (concluding that the chain of contracts entered

into between the owner-plaintiff, general contractor, and subcontractor-defendant encompassed the entire building as a whole, not merely the subcontractor's individually-isolated scope of work on the project).[9] The Court declines to limit its review to the content of the Subcontract.

Here the subject matter of the contractual scheme between the parties was the Novelty Iron Works Building to be renovated according to specifications at a certain price by a certain time. It is ultimately defeated expectations under this arrangement upon which Warehouse Trust brings suit. Iowa law supports the application of the economic loss doctrine to Warehouse Trust's tort claim and the expectation-bargain protection policy of contract law should determine the arrangement between the parties. As the type of loss at issue here is consistent with the express language of the Prime Contract and falls within the scope of the contractual scheme, the Court concludes that Warehouse Trust's claim lies in contract, not in tort. Indeed, "[n]egligent breach of contract is still breach of contract and the contract controls . . . To permit the tort claim would be to deny the validity of the contract." Dobbs, *supra*, at 723.

Next, Warehouse Trust argues that the principals of the economic loss doctrine are inapplicable to its contractual arrangement because it is not in contractual privity with ETM. Much like its breach of contract argument, Warehouse Trust claims that ETM cannot seek protection under this defense because Warehouse Trust never directly contracted with ETM. Accordingly, Warehouse Trust argues that the policy rationale of protecting the private ordering of contractual rights is not implicated.

But the Iowa Supreme Court has made clear that the economic loss doctrine—and its supporting rationale—is not limited to instances where the parties are in direct contractual privity: "When parties enter into a chain of contracts, even if the two parties at issue have not

[9] Though not authoritative, the Court finds these unpublished decisions persuasive as they are consistent with the legal doctrine set forth by the Supreme Court in *Annett Holdings* and *Richards* and promote the policies established in *Determan* and *Nelson*.

actually entered into an agreement with each other, courts have applied the 'contractual economic loss rule' to bar tort claims for economic loss, on the theory that tort law should not supplant a consensual network of contracts." *Annett Holdings*, 801 N.W.2d. at 504 (citing Dobbs, *supra*, at 726). Especially where the parties have entered into a comprehensive contractual scheme, the economic loss rule bars tort claims on the theory of avoiding disrupting the parties' allocation of risk because the plaintiff could have bargained for protection from injury. *Id.* at 504-05 & n.2 (citing Mark P. Gergen, *The Ambit of Negligence Liability for Pure Economic Loss*, 48 Ariz. L. Rev. 749, 763–65 (2006)); *see also Richards*, 551 N.W.2d at 650–52. Only where there is no contractual relationship between the parties at all is the intrusion into bargained-for rights by tort law appropriate because there was no opportunity for the parties to allocate the risk of loss among them. *See* Johnson, *supra*, at 546–47; 572–73 (stating that a party effectively waives tort law protection from purely economic losses where that party enters into a contract evidencing the intent to waive those rights); *cf. Annett Holdings*, 801 N.W.2d at 513 (Wiggins, J., dissenting) (agreeing that "the economic loss rule should preclude recovery when the parties are in privity with the attendant opportunity to allocate the risk of loss, and no independent duty is established, because any damages incurred could have been covered by an agreement negotiated between the parties.").

In contrast to *Annett Holdings*, where the plaintiff shared no contractual relationship with the defendant in the chain of contracts yet was still barred by the economic loss doctrine, here Warehouse Trust had the ability to bring suit against ETM for breach of contract. It in fact did so as both an assignee and third-party beneficiary. In fact, Warehouse Trust had more than simply the *opportunity* to allocate the risk of loss of economic "consequential" damages to the negligent subcontractor; as the owner of the property, it *bargained* for that allocation itself and *voluntarily*

assumed that risk under the contractual scheme provided in the Prime Contract and Subcontract. Moreover, Warehouse Trust further invested itself down the line of contracts by the language of the Prime Contract specifically requiring Russell to provide for indemnification in its Subcontract agreements. Everything sought by Warehouse Trust in tort is fully contemplated by the contractual terms of the Prime Contract and Subcontract.

The Court is unaware of any Iowa law that recognizes an independent tort duty for subcontractors in this instance. Iowa courts have already concluded that the implied warranty of workmanlike construction does not apply to subcontractors. *Kirk v. Ridgway*, 373 N.W.2d 491, 496 (Iowa 1985) (adopting the rule that the implied warranty of workmanlike construction applied only to "builder-vendors" and that this "necessarily exclude[es] merchants, material men, artisans, laborers, subcontractors, and employees of a general contractor"). Because there is no common law or statutory duty independent of that contemplated by the bargaining parties and within the scope of their contractual scheme, the Court finds that the economic loss doctrine bars tort recovery by Warehouse Trust against ETM for the consequential damages it specifically contracted away.

Finally, Warehouse Trust urges that, even if the economic loss doctrine applies, it is taken outside the scope of the general rule by the principal-agent exception. Because ETM's duty of care arose from its agreement with Russell, Warehouse Trust argues that it is entitled to recover purely economic damages in tort.

The Court is not convinced. The duty of care sued upon by Warehouse Trust is not independent of the contractual obligations owed by operation of the linked indemnity provisions in the Prime Contract and Subcontract. Although it is true that an intended third-party beneficiary may sue a party acting on behalf of the agent in tort, *see St. Malachy Roman Catholic*

Congregation of Geneseo v. Ingram, 841 N.W.2d 338, 352 (Iowa 2013), the limiting principal of the contractual economic loss rule bars such claims where the beneficiary nevertheless had the opportunity to bargain for its rights under that agreement. *Annett Holdings*, 801 N.W.2d at 504–05 (stating that the purpose of the economic loss doctrine is to prevent tort law from supplanting a consensual network of contracts); *see also Village at White Birch*, 2012 WL 5356045(finding that the principal-agent exception did not preclude application of the economic loss doctrine where a homeowner sued a subcontractor for damages to their home).

Warehouse Trust's final argument that there are issues of material fact that preclude summary judgment on its negligence claim is without merit. The points raised by Warehouse Trust are not factual disputes; rather, they are legal conclusions. Stating that the parties dispute whether ETM was negligent posits the legal question but does not answer it with specific facts. *See* SDMF ¶ 5. Likewise, the issue of causation is a legal question for the Court to decide when the facts are uncontested. *See id.* ¶¶ 1, 3.

But the Court need not even reach these legal issues surrounding the tort liability of ETM. Because Warehouse Trust's claim is barred by the economic loss doctrine, it cannot recover in tort as a matter of law and Warehouse Trust's action fails. Thus, even the extent of Warehouse Trust's monetary damages is not a material factual dispute that precludes summary judgment. *See id.* ¶ 2. Accordingly, ETM is entitled to judgment as a matter of law on Warehouse Trust's negligence action.

RULING

In conclusion, Warehouse Trust is not entitled to recover consequential damages against ETM through its rights in the Prime Contract, or as either assignee or third-party beneficiary of the Subcontract. Furthermore, Warehouse Trust is barred from recovering against ETM in tort by

virtue of the economic loss doctrine. As such, Warehouse Trust cannot advance a viable basis of recovery on either its breach of contract claim or negligence claim as a matter of law, and ETM is entitled to summary judgment. Warehouse Trust's appeal that it must be permitted to recover through one claim or the other—in contract or in tort—posits a false choice. Recovery in tort is barred by the economic loss doctrine because the type of harm and type of damages are contemplated by the contractual scheme entered into by the parties to this lawsuit; recovery on the Subcontract is barred because Warehouse Trust waived any right of recovery for the type of damages it seeks.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant, Earl Thompson Masonry, Inc.'s Motion for Summary Judgment is GRANTED and Plaintiff's Amended Petition is dismissed at Plaintiff's cost.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACV106102	WAREHOUSE TRUST LLC V EARL THOMPSON MASONRY INC

So Ordered

John Telleen, District Court Judge,
Seventh Judicial District of Iowa