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DIFFERENT WORKS



RLI DESIGN PROFESSIONALS
Design Professionals Learning Event

Dinged If You Don't Managing Third-Party Exposure

DPLE 198
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Guest Contributor

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Course Description

Hypothetical

You are hired to **design a home** with a balcony.
The subcontractor fails to construct the balcony in accordance with your design drawings.
Guests of the homeowners who visit the home are injured when the **balcony collapses**.
Are you liable to injured third parties?

This course will use case studies to assist design professionals in identifying their third party exposure and will arm design professionals with strategies to help them address potential problems and manage their liability.

Learning Objectives

Participants in this session will

- 1 Learn the legal theories courts use to determine a design professional's liability to third parties
- 2 Study case law involving claims against design professionals by third parties
- 3 Review industry standard contract provisions for design professionals
- 4 Discuss how design professionals can manage and mitigate their liability to third parties

Breach of Contract

Failure to render services in accordance with the terms of the Agreement between the parties is cause for a breach of contract claim.

Negligence

Failure to exercise “reasonable judgement and skill” when rendering professional services. Failure to meet the standard of care is cause for a negligence claim.

Privity of Contract

Generally, only the parties to a contract, those in privity of contract, may bring a breach of contract claim. Failure to perform in accordance with the contract is cause for a breach of contract claim.

Exception: Third Party Beneficiary



Intended Beneficiary

A third party who is **intended to benefit** from a contract between two parties and for whose benefit the contract is entered into.

Incidental Beneficiary

A third party who benefits from a contract between two parties, but is **not intended to benefit** from the contract. An unintended beneficiary.

Third Party Exclusions

“

Nothing contained in this Agreement shall create a contractual relationship with, or a cause of action in favor of, a third party against either the Owner or Architect.

”

AIA B101-2017 §10.5

Breach of Contract Analysis

Does your contract
incorporate third parties by reference?

Yes

No

Design Professional may be
liable to Third Parties

Design Professional is likely
NOT liable to Third Parties

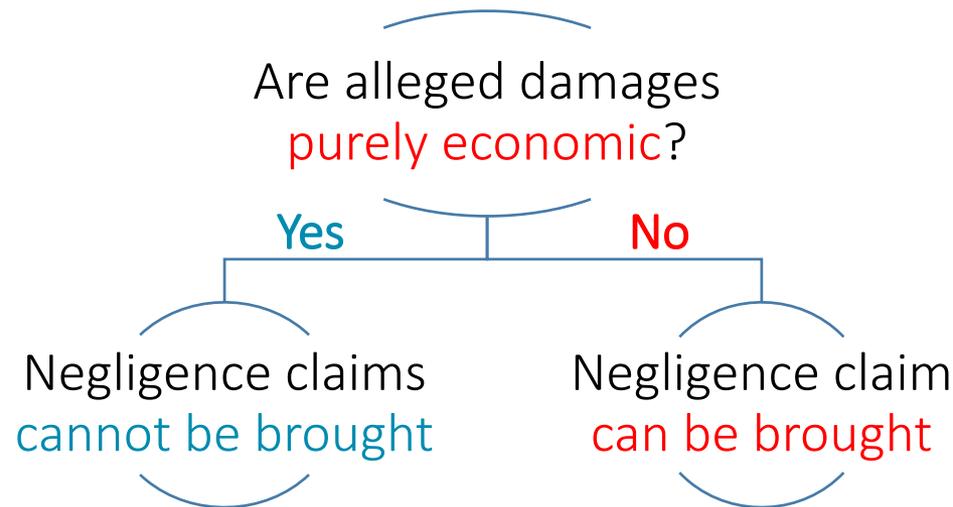
Liable only if found to be in
breach of the contract

Negligence Claims

Standard of Care

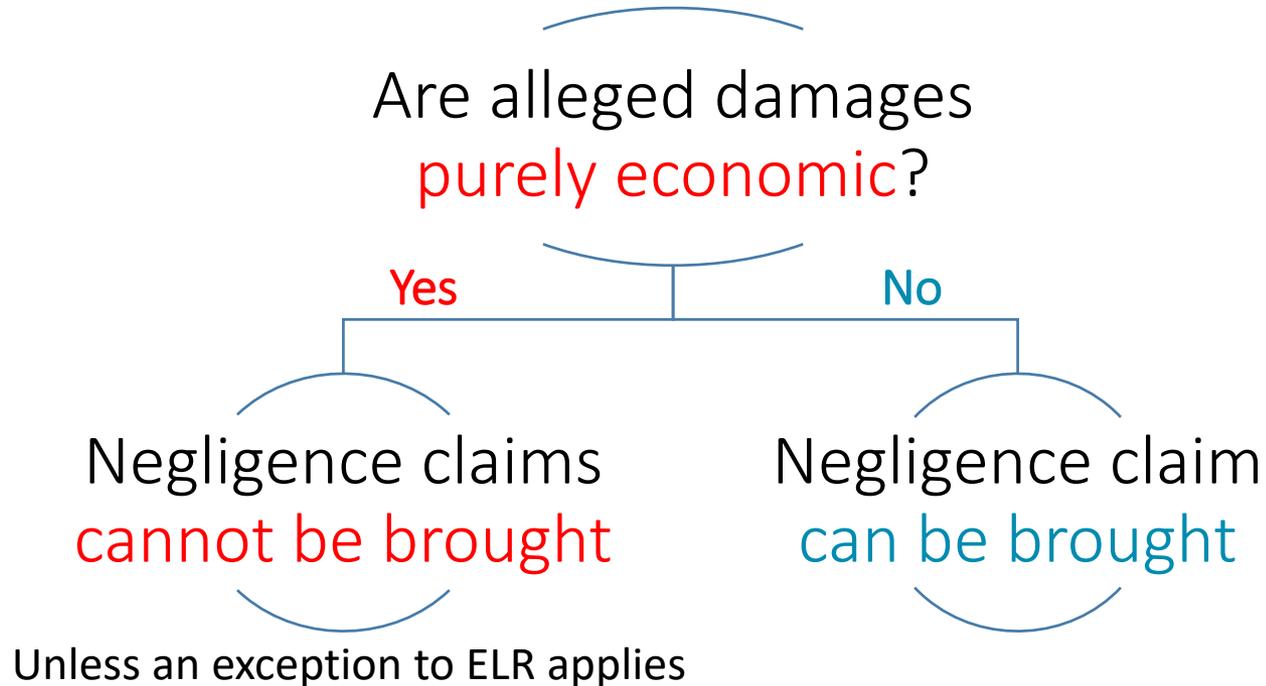
Duty to exercise “reasonable judgement and skill” when rendering professional services. Failure to meet the standard of care is cause for a negligence claim.

Exception: Economic Loss Doctrine



Unless an exception to ELR applies

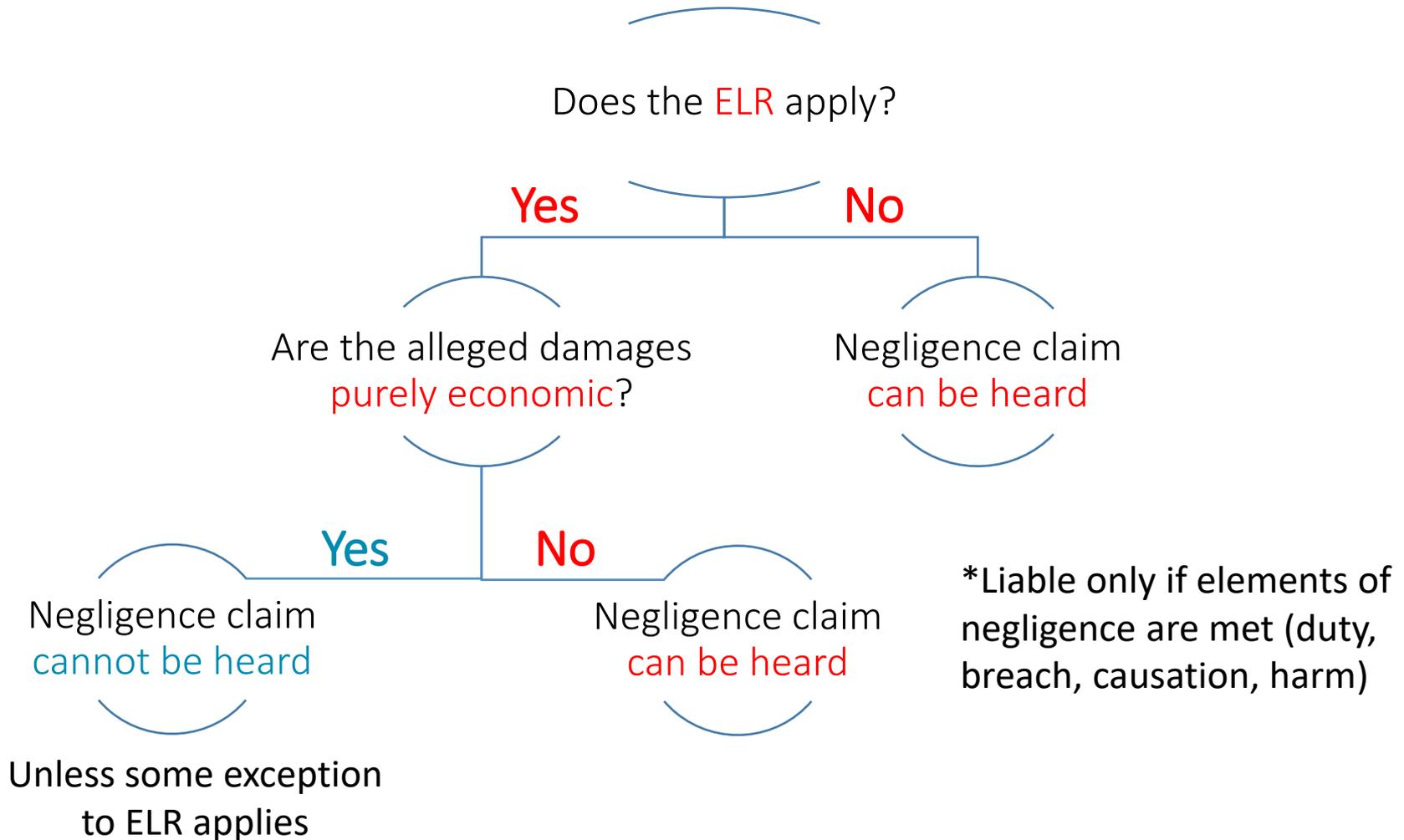
Economic Loss Doctrine (ELR)



Example – Contractor alleges incurring substantial costs due to engineer’s faulty design.

Example – Injured hotel guest alleges injury due to architect’s faulty design.

Negligence Claim Analysis



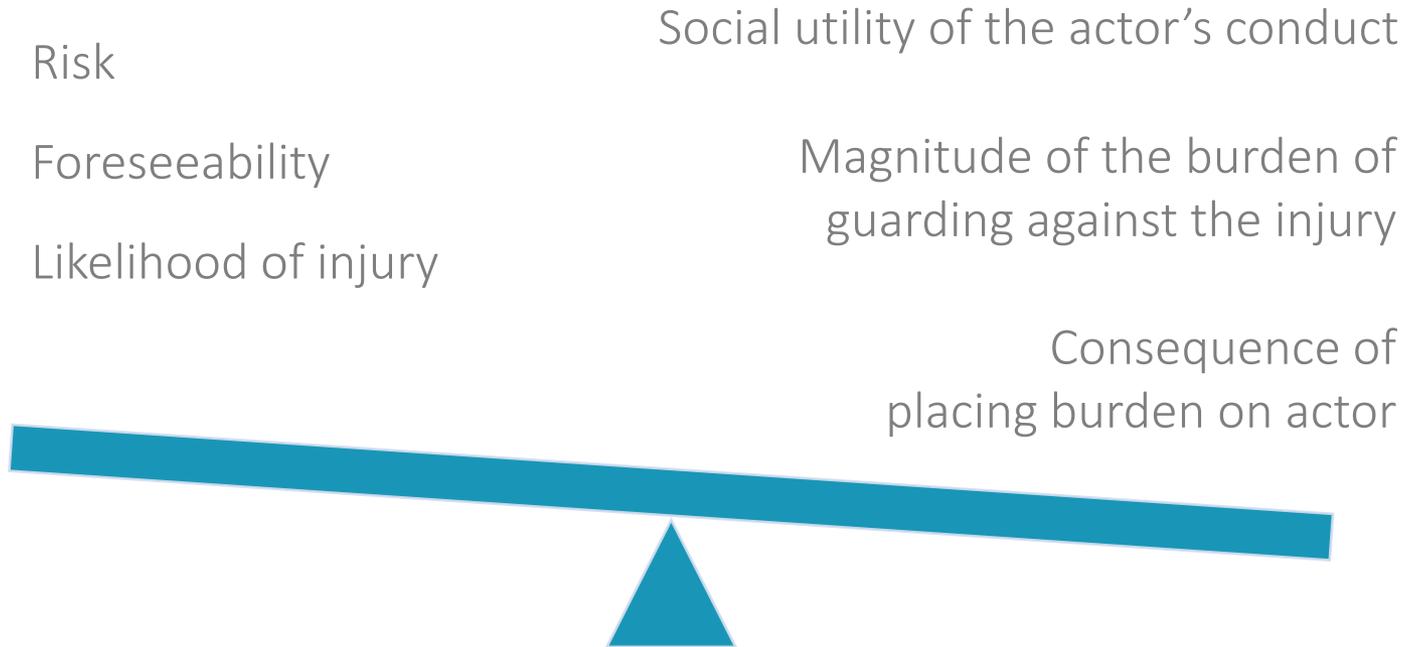
Elements – Negligence Claim

- 1** **Duty** Duty of care
- 2** **Breach** Violation of duty of care
- 3** **Causation** Actual and proximate cause
- 4** **Damages** Harm suffered

Duty Analysis

Factors for consideration:

*Factors for consideration may vary by state and jurisdiction





Third Party Claims by:

Incidental v. Intended Beneficiaries

Black + Vernooy v. Smith

No Duty of Care to Client's Guests

Robert and Kathy Maxfield

Client



Black + Vernooy Architects

Design Professional



Nash Builder, Inc.
General Contractor



Steven Rodriguez
Subcontractor

Subcontractor failed to comply with design drawings when constructing a balcony in a vacation home. The balcony collapsed and two guests of homeowners are injured.

Karen Gravely

Lou Ann Smith

Injured Guests

Contractually Assumed Liability

Duties owed to Client by contract:

- 1 Visit the **worksite** and inform [homeowners] regarding the progress of the construction, to generally **determine if the construction was being performed in the manner agreed to**
- 2 Report **known deviations** from the Contract Documents...
- 3 Endeavor to **guard the [homeowners] against defects and deficiencies** in the Work
- 4 **Reject Work** that does not conform to the Contract Documents

Black + Vernooy v. Smith

Required by Design Drawings

Metal support pipes be welded to steel plate tabs which would then be bolted to balcony

Joist hangers be used to reinforce attachment of each balcony joists to exterior wall of home

Balcony handrails bolted to home

Balcony attached to home using bolts, a rim joist, and blocking

Actual construction

Metal support pipes attached using thin metal clips

No joist hangers used

Balcony handrails not bolted to house

Balcony nailed to a one-half-inch piece of plywood

Ruling by TX Court of Appeals

No Breach of Contract by Architects

Houseguests were not intended third party beneficiaries to the design professional's contract with the homeowners.

Duty Analysis (TX)

Factors for consideration

Weighed in favor of finding for architects – No duty of care

1. Risk;
2. Forseeability;
3. Likelihood of injury;
4. Social utility of conduct;
5. Magnitude of burden;
6. Consequence of burden

Additional factors

Superior knowledge;
Right to control;
Legislative intent/public policy

Court's Analysis (TX)

Factors for consideration

Weighed in favor of finding for Architects – No duty of care owed to houseguests.

1. Significant **risk of harm**;
2. **Foreseeable** that houseguests would be injured;
3. **Likelihood of injury** exists where architects fail to identify and report structural defects;
4. Architects had **no right to control** actual construction;
5. **Significant social utility** in having the Architects involved in the construction phase;
6. **Magnitude of burden** on Architects would be great;
7. **Consequence** of placing the burden on Architects would be too great;
8. **No superior knowledge** by the Architect; and
9. **No legislative intent**

Ruling by TX Court of Appeals

No Duty Owed to Client's Houseguests

The balance of the factors weighs against imposing a duty of care on an architect towards a client's houseguests under these circumstances.

Potential Third Party Plaintiffs

Potential third parties plaintiffs alleging negligence

1

Contractors

2

Employees of contractors or subcontractors
injured on the Work Site

3

Future homeowners/Condominiums

4

Other members of the general public



Third Party Claims by:

Contractors

Bilt-Rite Contractors v. TAS

Exception to ELR/Duty to Contractors



General Contractor files claim against architect, alleging increased construction costs due to negligent misrepresentations in the design plans, drawings, and specifications.

Rule in Pennsylvania

Recognizing a duty of care by design professionals in PA:

“

Where information is **negligently supplied** by one in the business of supplying information, such as an architect or design professional, and where it is **foreseeable** that the information will be used and relied upon by third persons, even if the third parties have no direct contractual relationship with the supplier of information

”

Duty Analysis (PA)

Factors for consideration

*Factors for consideration may vary by state and jurisdiction

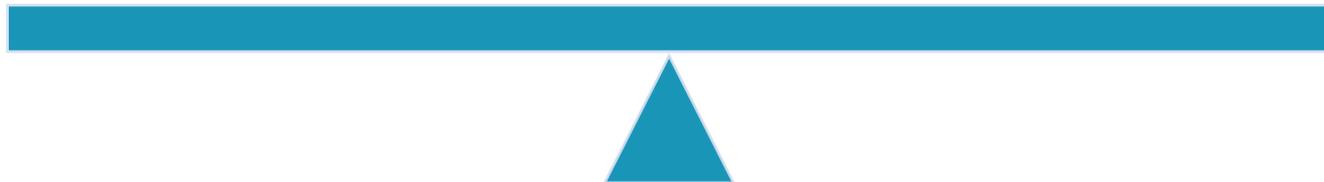
Relationship of the parties

Consequence of imposing burden

Social utility of conduct

Public interest/public policy

Nature of the risk the duty imposes
and foreseeability of the harm



Ruling by PA Supreme Court

Contractor's Claim Not Barred By ELR

Negligent misrepresentations are an exception to the economic loss rule.



Third Party Claims by:

Contractor's Employees

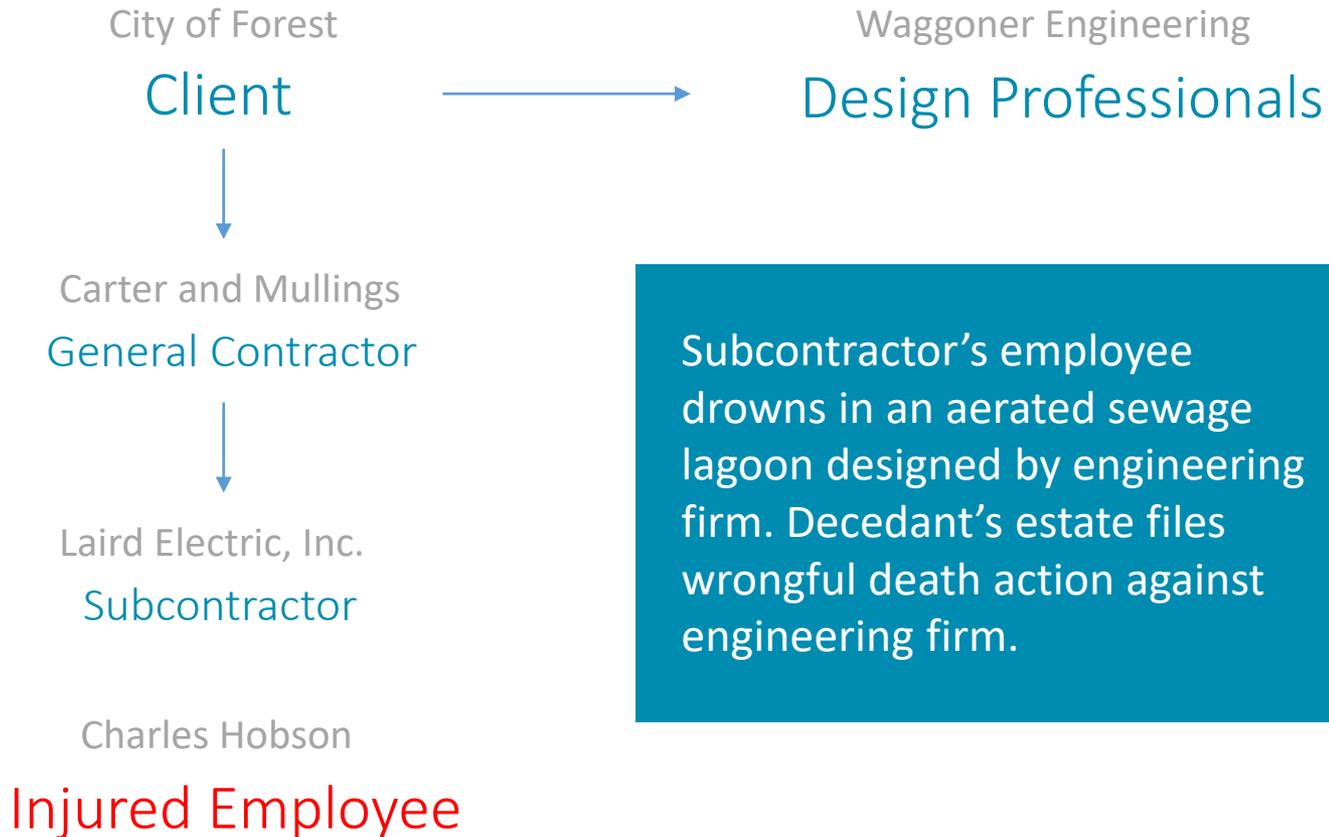
Increased Exposure

Design Professionals are targeted by contractor's employees that are injured on the job because:

- 1 Worker's compensation benefits sole remedy against employer.
- 2 Project Owners have no responsibility for jobsite safety.

Hobson v. Waggoner Eng'r

No Duty to Contractor's Employees



Rule in Mississippi

No duty to subcontractor's employee unless assumed by contract or conduct.

“

Unless [a design professional] has undertaken by conduct or contract to supervise a construction project, he is under no duty to notify or warn workers or employees of the contractor or subcontractor of hazardous conditions on the construction site.

”

Court's Analysis

No duty assumed by contract

“ Make periodic visits to the site of the construction to observe the progress and quality of the construction work...

Engineer is not responsible for construction means, methods, techniques...for any safety precautions in connection with the construction Work.

Engineer shall not advise or issue directions regarding or assume control over safety precautions and programs in connection with the Work.”

Court's Analysis

Contractor responsible for project supervision and safety

“ Contractor will supervise and direct the work. He will be solely responsible for the means, methods, techniques, sequences and procedures of construction.

Contractor will be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work.

CONSTRUCTION SAFETY is a project requirement. Contractor shall be responsible for providing any and all safety equipment necessary for the precautions of the work by his personnel and the personnel of any sub-contractors...

Duty Analysis (MS)

Factors for consideration

Weighed in favor of finding for engineering firm – No duty of care assumed by conduct

1. Actual supervision and control of work;
2. Retention of the right to supervise and control;
3. Constant participation in ongoing activities at the construction site;
4. Supervision and coordination of subcontractors;
5. Assumption of responsibilities for safety practices;
6. Authority to issue change orders; and
7. The right to stop the work

No Duty to Subcontractor's Employee

No duty to warn contractor's employees of hazardous conditions on job site where design professional did not assume responsibility for supervision or project safety by contract or by conduct.

Common Scenario

Contractor's employees are injured in collapse of trench walls.

1

Carvalho v. Toll Brothers and Developers

2

Herczag v. Hampton Township Municipal Authority

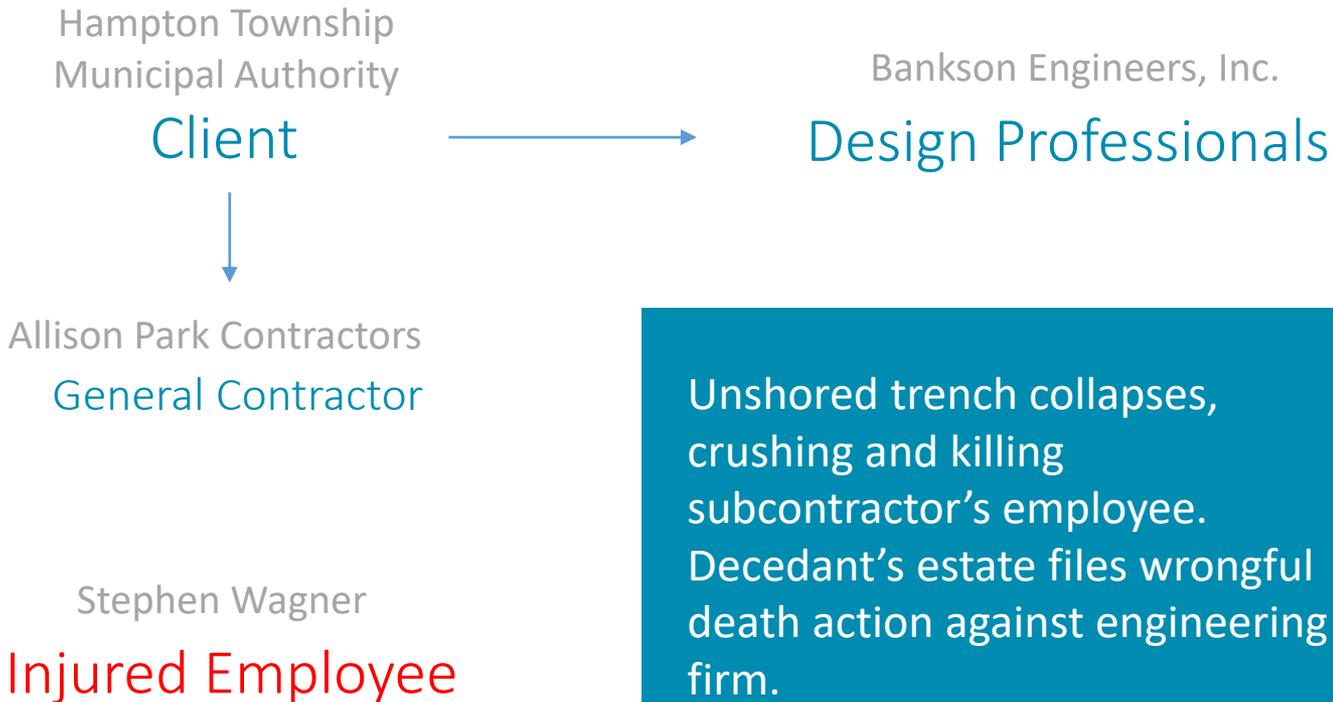
Carvalho v. Toll Brothers

Duty to Contractor's Employees



Herczeg v. Hampton Township

No Duty to Contractor's Employees



Duty to Subcontractor's Employee

Duty to warn contractor's employees of hazardous conditions on job site where design professional impliedly assumed responsibility for supervision or project safety by contract and had actual knowledge of the risk of harm.

Carvalho v. Toll Brothers and Developers, 675 A.2d 209 (N.J. 1996).

No Duty to Contractor's Employee

No duty to warn contractor's employees of hazardous conditions on job site where design professional did not assume responsibility for supervision or project safety by contract or by conduct.

Herczeg v. Hampton Township Municipal Authority, 766 A2d 866 (Pa 2001) .

Distinguishing Factors

Actual knowledge of risk

In *Carvalho*, Engineer was aware the trench had collapsed in other areas of the work site previously due to unsafe trenching conditions.

Responsibility for safety

In *Carvalho*, Engineer's responsibilities "created an overlap of work-progress considerations and work-safety concern."

- Contractually obligated to be on site every day to monitor progress of the work; and
- Authority to stop work at any time



Third Party Claims by:

Future Homeowners/
Condominiums

Beacon Residential

Duty to future homeowners



Homeowner's association brought construction design defect action against developer, architectural firms, and others.

Rule in California

“

[t]he architect's **duty** of reasonable care in the performance of their professional services is logically **owed to those who purchased the allegedly defectively designed and built condominiums...**

”

Duty Analysis (CA)

Factors for consideration

*Factors for consideration may vary by state and jurisdiction

The extent to which the transaction was intended to affect the plaintiff

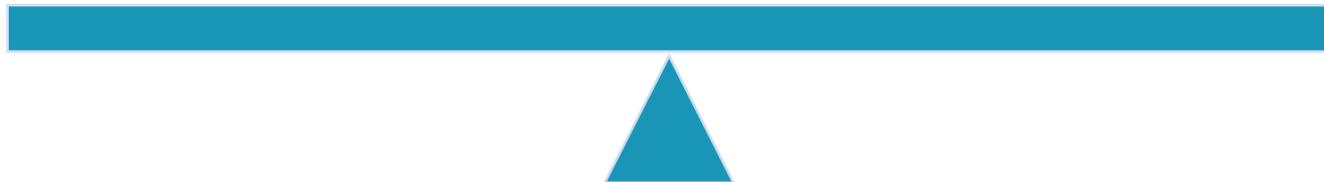
Nexus between D's conduct and harm suffered

Foreseeability of harm

Moral blame of D's conduct

Likelihood of injury

Policy of preventing future harm



Court's Analysis (CA)

Factors for consideration

Weighed heavily in favor of finding for homeowners

1. D's work was **intended to benefit** the homeowners;
2. It was **foreseeable** that homeowners would be harmed by negligently designed units;
3. P's **suffered** actual injury;
4. There is a close **connection** between D's conduct (reviewing and approving changes) and injury suffered (nonfunctional units);
5. Significant **moral blame** attaches to D's conduct; and
6. **Public policy** of preventing future harm to homeowners relying on architects' specialized skills supports the finding of a duty of care.

Ruling by CA Supreme Court

Duty Owed to Future Homeowners

Architect owes a duty of care to future homeowners where the architect is a principal architect on the projects, even if the architect does not actually build or exercise ultimate control over construction decisions.



Third Party Claims by:

Members of the Public

Thomas v. Lewis Engineering

No Duty to Adjacent Landowner



Engineering firm was hired to survey property to determine boundary line. Adjacent landowner files suit for negligent misrepresentation.

Rule in Indiana

“

A professional owes no duty to one with whom he has no contractual relationship unless the professional has actual knowledge that such third persons will rely on his professional opinion.

”

Duty Analysis (IN)

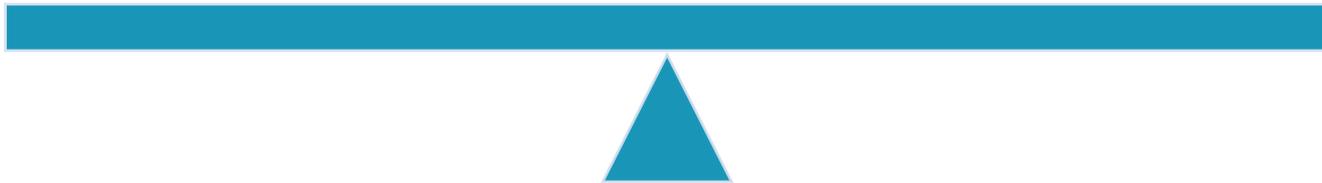
Factors for consideration

*Factors for consideration may vary by state and jurisdiction

Relationship between the parties

Foreseeability of harm

Public policy



Court's Analysis (IN)

Factors for consideration

Weighed heavily in favor of finding for design professional – No duty of care to adjacent homeowner

1. No **relationship** or contact between the design professional and adjacent homeowner;
2. It was **foreseeable** that adjacent homeowner would be harmed;
6. **Public policy** of preventing future harm to homeowners relying on architects' specialized skills supports the finding of a duty of care.

Ruling by IN Court of Appeals

No Duty Owed to Adjacent Landowner

Design professional did not owe a duty to client's neighbor where he had no actual knowledge that such third persons would rely on his professional opinion.



Take Aways:

Managing Exposure

Mitigating Liability

- 1 Include **third party exclusions**
- 2 Have a **clearly defined scope of services** that clearly delineates responsibility for site safety.
- 3 **Avoid making representations, warranties, and certifications,** unless the appropriate language is used.
- 4 Seek **indemnity** from the proper parties.

Third Party Exclusions

“

Nothing contained in this Agreement shall create a contractual relationship with, or a cause of action in favor of, a third party against either the Owner or Architect.

”

AIA B101-2017 §10.5

Construction Phase Services

“

The Architect shall advise and consult with the Owner during the Construction Phase Services. The Architect shall have the authority to act on behalf of the Owner only to the extent provided in this Agreement. The Architect shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, **nor shall the Architect be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents.** The Architect shall be responsible for the Architect's negligent acts and omissions, **but shall not have control over or charge of, and shall not be responsible for, acts or omissions of the Contractor or of any other persons or entities performing portions of the Work**

”

AIA B101-2017 §3.6.1.2

Representations, Warranties, and Certifications

“

If the Owner requests the Architect to execute certificates, the proposed language of such certificates shall be submitted to the Architect for review at least 14 days prior to the requested dates of execution...The Architect shall not be required to execute certificates or consents that would require knowledge, services, or responsibilities beyond the scope of this Agreement.

”

AIA B101-2017 §10.4

Indemnity

“

To the fullest extent permitted by law, the **Contractor shall indemnify and hold harmless the Owner, Architect**, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work...

”

AIA A201-2017 §3.18.1

Thank you for your time!

QUESTIONS?

This concludes The American Institute of Architects
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