

Claims Against Design Professionals on Design-Build Projects

(...and other projects)

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Subject Matter Expert



J. Kent Holland

ConstructionRisk, LLC
1950 Old Gallows Rd., Suite 750
Tysons Corner, VA 22182

www.ConstructionRisk.com

*For case notes and articles on design-build decisions and other case law, visit: www.ConstructionRisk.com.
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Course Description

Litigation can be a confusing and tedious event for legal professionals.

It is no wonder that design professionals also find it confusing to navigate. In this webinar we review litigation on design-bid-build, as well as on design-build projects, focusing on lessons learned from court decisions addressing standard of care, warranties, prime contract incorporation by reference, third party claims against design professionals, limitation of liability, indemnification, and site safety responsibility. We will discuss their implications for your services, and ways to allocate and mitigate risks through more favorable contract terms and conditions.

Learning Objectives

Participants in this session will:

- 1 Identify risks for design professionals arising out of design and design-build contracts;
- 2 Learn risk management ideas and strategies from recent court decisions;
- 3 Gain a better understanding of how to mitigate claims against design professionals by third parties and contractors; and
- 4 Discuss ways to improve contract language to better allocate and mitigate risk.

A Look Into the Agreements

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Problem Areas with Contracts

- Design-Build Contracts (What we are seeing now)
 - Owners' D-B contracts are increasingly difficult
- The Design-Builders attempt to flow down difficult Prime Contract terms to the design subconsultants
- Litigious contractors.
 - When can't recover change order from Owner they make claim against design subconsultant to recover their cost overruns
- Teaming Agreement (memo of understanding)

Problematic Prime Agreements

- Owners are demanding more onerous terms and conditions in their GMP design-build contracts.
 - Warranties (including design);
 - Cost Overruns responsibility of design-builder;
 - No Reliance on Owner provided information or documents;
 - Differing site conditions claims limited;
 - No contingency or limited contingences permitted;
 - Arbitration of claims.

Horizontal Public Infrastructure Projects

- The design-builder commits to a fixed price Guaranteed Maximum Price (GMP) proposal/bid. This is often done based on limited design completion.
- Limited contractual relief available for cost and time.
- No opportunity to rely on Owner-provided information, reports and studies.
- Competitive pressures on the design-build proposers causes them to offer lower than reasonable cost/quantity estimates and may cause them to not include sufficient contingency for construction and for design.
- “Horizontal” projects like roads, rail, and bridges may have multiple governmental authorities involved and this impacts scope changes and changes – that the Owner doesn’t want to pay for. Creates higher risk for the design-builder and its design subconsultants

Problematic Design Teaming Agreements

- Beware of providing any design services to a contractor without having a strong teaming agreement limiting designer's responsibilities and liabilities.
 - Examples of claims against design firm.
- Don't sign teaming agreement without agreeing to basic terms of the future subcontract.
 - “If the pursuit is successful, Design/Builder and Designer agree to enter into a written agreement in the form of a mutually agreeable Subcontract for Design Services **with substantially the same form and substance as included in the attached Subcontract example.**”

Standard of Care and Warranties

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Standard of Care

- “The Design/Builder and Designer agree that the applicable standard of care for the Designer’s services shall be that degree of skill and care normally exercised by practicing nationally recognized professional engineers performing similar services on similar projects under similar conditions or the specific performance requirements/specifications set forth in the RFP, whichever standard is higher, provided the Designer agrees to no Standard of Care that would create a warranty or guarantee with regard to its performance of professional services, and shall not agree to any indemnity or defense obligations greater than those expressly set forth in the subcontract provisions.”

Case Law

Warranty of Habitability

Designer not subject to implied warranty of habitability in the design, construction and sale of a condominium complex.

*Trial court dismissed the suit against the designer. This court affirmed dismissal.



A/E Does Not Warrant Perfection

“

Thus, generally speaking, only builders or builder-sellers warrant the habitability of their construction work. Engineers and design professionals such as [Architects] provide a services and do not warrant the accuracy of their plans and specifications.

”

Contract Lesson: Architects and engineers should be careful not to agree to contract provisions that require them to guarantee a perfect plan or satisfactory result, as it may elevate your standard of care.

Designers Are Not “Workmen”

“

The term ‘workmen’ does not include professional persons...Thus while builders, contractors, and craftsmen in the construction trades should be held to the “workmanlike” standards, [design professionals such as] architects should not.

”

Contract Lesson: Architects and engineers should be careful not to agree to contract provisions that require them to perform their services in a "good and workmanlike manner." While the phrase is seemingly innocuous, it may elevate your standard of care.

Case Law

Warranty of Professional Services

Engineer can be held liable for breach of express warranty of professional services.

*Court denied Engineer's motion to dismiss warranty claims.



Avoid Express Warranties

“

[Design Professional] expressly or impliedly warranted to [Client] that all work performed by them would be performed in a careful, diligent and workmanlike manner...

”

Contract Lesson: Warranties or guarantees that go beyond the normal standard of care required in the performance of professional services may obligate you for damages beyond those proximately caused by your negligence and pose an uninsured risk.

Bid Quantity Estimates

- “The Parties recognize that the bid quantity estimates for the construction of the Project will be based on preliminary design calculations and past designs prepared for similar projects. Actual quantities determined after final design are expected to vary from the bid quantities derived from the preliminary design. Contractor will compute the bid quantities as accurately as possible and will estimate the anticipated tolerance for each item. Contractor shall be ultimately responsible for the determination of quantities to be included in the proposal and shall determine the appropriate amount of contingency to be included in its proposal to cover variations in quantities and other risk factors. Designer makes no warranties, express or implied, under this Agreement or otherwise, in connection with Designer’s design services.”

Case Law

Warranty of Specifications

Spearin Doctrine applies to Design-Build Contracts allowing trade subcontractors to rely on designs provided by Design Professionals.



Implied Warranty of Specifications

Court Ruling:

The Spearin Doctrine may apply to design-build projects

*However, the record in this case was not sufficiently developed to determine whether the doctrine applies to the facts in this case.

Third Party Beneficiaries

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Case Law

Claims by Project Owners on Design-Build Projects

Owner on Design-Build Project
can't sue the subcontracted
Design Professional due to
lack of privity of contract.

*Motion for summary judgement affirmed on appeal due to no contract and no 'functional equivalent to privity' of contract between Owner and Design Professional.



Case Law

Claims by Third Party Beneficiaries

Granting summary judgement to Design Professional where City failed to demonstrate it could be an intended beneficiary.

*City claimed it was an intended third party beneficiary of Design Professional's contract with NY Dormitory Authority.



Intended v. Incidental Beneficiaries

“

We have generally required express contractual language stating that the contracting parties intended to benefit a third party by permitting that third party ‘to enforce [a promisee’s] contract with another... In the absence of express language, ‘[s]uch third parties are generally considered mere incidental beneficiaries.’

”

Intended Beneficiaries

“

[A] third party may sue as a beneficiary on a contract made for [its] benefit. However, an intent to benefit the third party must be shown, and absent such an intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts.

”

Contract Lesson: Naming third parties as beneficiaries in the contract may allow them the right to bring claims directly against you. This significantly your risk and may pose issues related to insurability.

Intended Beneficiaries – Contractual Rights

Recently it seems more contracts are including wording expressly stating that the project owner or some other non-party is an "intended beneficiary."

This will give them the contractual right to sue the subcontracted design firm.

Case Law

Claims by Contractor for Defective Plans & Specifications

Contractor may sue design firms for defective plans and specifications on which the Contractor relied, despite a lack of privity between the parties.



“Foreseeable Zone of Risk”

“

[T]he duty arises because of a foreseeable zone of risk arising from the acts of the [Design Professional]...Therefore the foreseeable zone of risk created by the [Design Professional]’s conduct defines the scope of [their] legal duty.

”

“Control”

“

In the absence of privity...
[a Design Professional must] have some
level of control over a third-party contractor
for a duty to arise.

”

* Design Professional must have some economic, supervisory, or other control over the contractor.

“Control”

“

Control may be established...where the [Design Professional] acts with knowledge that the plaintiff will rely on its designs or plans.

”

Case Law

Claims by Contractor for Negligent Construction Phase Services

Contractor may sue Construction Manager for failing to oversee and administer a Project according to industry standards despite a lack of privity between the parties.



Duty Owed By A/E

“

[A] ‘third party who is not in privity may, nevertheless, have an action in tort against an architect or engineer,’ because ‘an engineer or architect must be deemed and held to know that his services are for the protection, not only of the interests of the owner’ but also to third parties who must ‘rely on the architect or engineer to produce a completed project conformable with the contract plans and specifications.

”

Duty Owed By Other Professionals

“

[A] duty to third parties, even absent direct contractual privity, should not be confined to only those construction professionals holding the title of “architect” or “engineer”. Rather...the focus is necessarily on the management responsibilities and supervisory authority that the particular construction professional holds or practices on the project that may warrant extending the duty owed by that construction professional to a third party not in privity.

”

Ruling

“

[A]lthough [Construction Manager] was not in direct contractual privity with [Contractor], [CM] must be deemed and held to know that its services were not only for the protection and interests of the owner but also third parties, including [the Contractor] on the project...it was foreseeable and to a degree certain that [Contractor] would suffer economic harm if [CM] failed to perform, or negligently performed many of its professional duties.

”

Case Law

Claims by Contractor for Construction Phase Services

Design Professional not liable to Contractor for alleged negligent interpretation and application of project plans & specification where Contractor failed to establish “bad faith” conduct.



“Good Faith” Decisions

Express Contract Term:

Neither Engineer’s authority or responsibility under this Article 9 or under any other provision of the Contract Documents nor any decision made by Engineer *in good faith* either to exercise or not exercise such authority or responsibility or the undertaking, exercise, or performance of any authority or responsibility by Engineer shall create, impose, or give rise to any duty in contract, tort, or otherwise owed by Engineer to Contractor, or any Subcontractor, any Supplier, any other individual or entity, or to any surety for or employee or agent of any of them.

Public Policy

“

Control may be established...where the [Design Professional] acts with knowledge that the plaintiff will rely on its designs or plans.

”



Incorporation By Reference & Flow Down

From Prime Agreement to Subcontract

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Flow Down Clauses



Put limits on what terms and conditions flow down to you. In particular, limit the standard of care and indemnification obligations.

Helpful Tip: At a minimum, try to ensure that any obligations that flow down are insurable.

Protect Against Incorporation by Reference



provided however, that notwithstanding any clause in the Prime Contract or this Agreement to the contrary, Subconsultant expressly disclaims all express or implied warranties and guarantees with respect to the performance of professional services, and it is agreed that the quality of such services shall be judged solely as to whether Subconsultant performed its services consistent with the professional skill and care ordinarily provided by firms practicing in the same or similar locality under the same or similar circumstances (“Standard of Care”), and provided further that Subconsultant shall not provide indemnification of any indemnitee other than to the extent damages arise out of third party claims against the indemnitee and to the extent caused by Subconsultant’s willful misconduct or negligence, and provided further that Subconsultant shall not defend any indemnitee against professional liability claims.



Case Law

Flow Down Clauses & Conflicting Terms

The limitation of liability clause contained in the Prime Agreement did not flow down to the benefit of the subcontractor.



Limitation of Liability Clause

Prime Contract Term:

Owner agrees it will limit Design/Builder liability to [O]wner for any errors or omissions in the design of the Project to whatever sums Owner is able to collect from the above described professional errors and omissions insurance carrier.

Flow Down Clause

Subcontract Term:

Worthgroup [the subcontractor] shall, **except as otherwise provided herein**, have all rights toward Centex which Centex has under the prime contract towards the Owner, and Worthgroup shall, to the extent permitted by applicable laws and except as provided herein, assume all obligations, risks and responsibilities toward Centex which Centex has assumed towards the Owner in the prime contract with respect to Design Work.

Liability for Redesign & Additional Costs

Subcontract Term:

Design Professional was responsible for “[r]edesign costs and additional construction costs of Contractor or the contractor required to correct [Design Professional’s] errors or omissions.”

Ruling

“

[W]e determine that the subcontract's terms regarding liability govern for any one of three reasons:

- (1) **The flow-down clause's words of definite limitation** must be given effect;
- (2) **The well-recognized rule** that when specific provisions in the subcontract conflict with provisions in the prime contract, the subcontract controls; and
- (3) **The order or precedence clause** explicitly requires that the subcontract govern when clauses cannot be read as complementary.

”

Limitation of Liability

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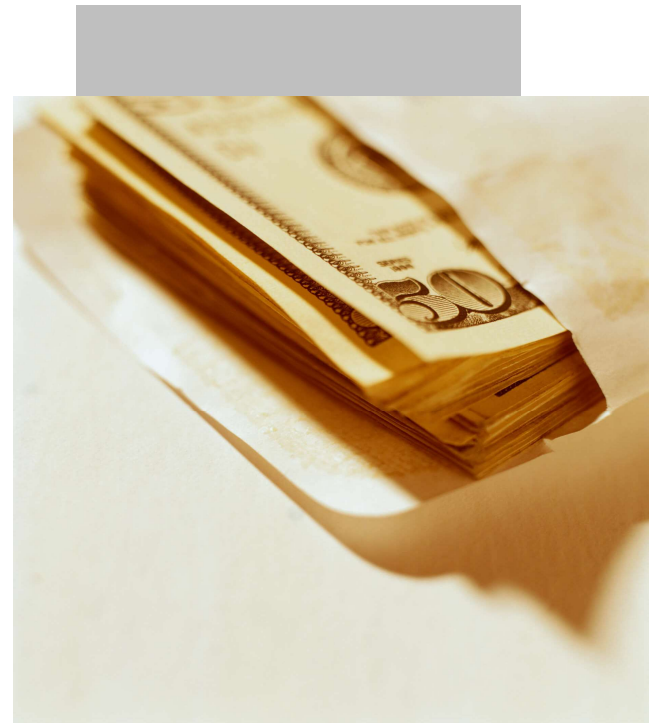


Case Law

Limitation of Liability (LOL) & Public Policy Exception

Design firm's liability capped at \$50,000 where Contractor alleged over \$1 million in damages due to a limitation of liability clause in the contract.

*LOL clause upheld because it did not violate public policy.



Limitation of Liability Clause

Contract Term:

To the fullest extent permitted by law, [Design Professional] and Client waive against each other, and the other's employees, officers, directors, agents, insurers, partners, and consultants any and all claims for or entitlement to special, incidental, indirect, or consequential damages arising out of, resulting from, or in any way related to the Project and agree that [Design Professional]'s total liability to Client under this Agreement shall be limited to \$50,000.

Freedom to Contract



The fundamental tenet of modern contract law is freedom of contract; parties are free to mutually agree to terms governing their private conduct so long as those terms do no conflict with public laws...

To permit the avoidance of a written contract because the terms of the contract now appear burdensome or unreasonable would defeat the very purpose of placing a contract into writing.



Public Policy Exception

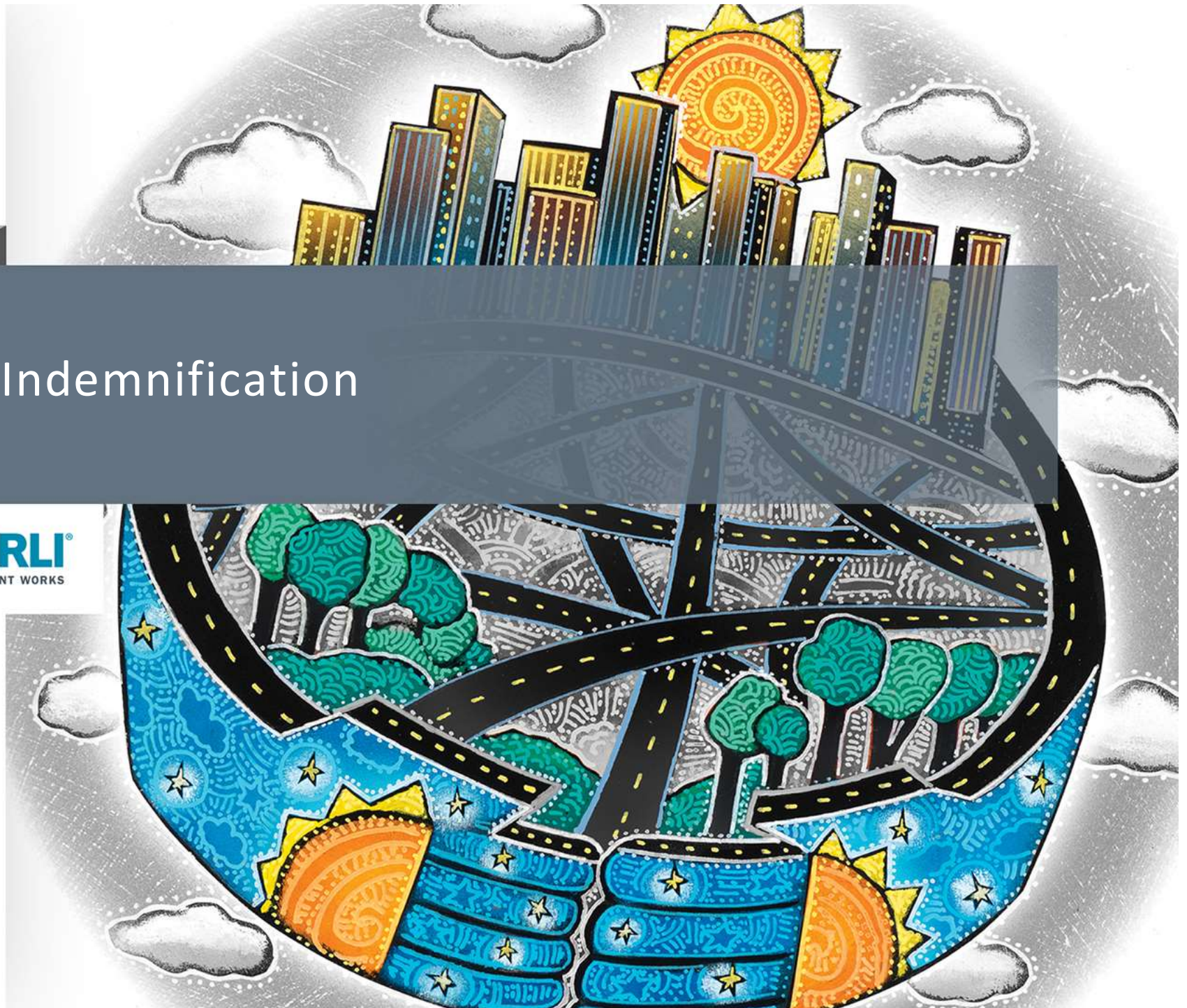
“

[Public law] is not violated when business entities contractually limit liability but do not eliminate liability entirely.

”

Indemnification

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Indemnification & the Duty to Defend

Design Professional had a duty to defend Client against a lawsuit by the Contractor alleging defective plans and specifications.



Site Safety

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Case Law

Site Safety & the Right to Control

Construction Manager (CM) not liable for injuries to Contractor's employee where they did not have the authority "to exercise supervision and control" over the Work.



“Authority and Control” Exception

“

In order to impose liability on a construction manager... the plaintiff must show that the [CM] had the authority to exercise supervision and control over the work that brought about the injury so as to enable the defendant to avoid or correct an unsafe condition.

”

*At issue is a construction manager’s liability for site safety under N.Y. Labor Law § 200, 240(1), or 241(6)

“Authority and Control” Exception

“

A construction manager of a worksite is generally not responsible for injuries under Labor Law § 200, 240(1), or 241(6) unless it functions as an agent of the property owner or general contractor under circumstances where it has the ability to control the activity which brought about the injury.

”

Ruling

“

The [CM was] authorized only to review and monitor safety programs and requirements and make recommendations, provide direction to contractors regarding corrective action to be taken if an unsafe condition was detected, and stop work only in the event of an emergency...[CM] did not have control or a supervisory role over the plaintiff's day-to-day work and they did not assume responsibility for the manner in which that work was conducted.

”

Case Law

Site Safety & Clearly Defined Scope of Services

Finding genuine issues of material fact exist as to whether safety consultant may be liable for the death of Client's employee.

*Lower court granted safety consultant's motion for summary judgement. This court reversed.



Negligence

“

A safety consultant is liable to an employee of the firm that hired the safety consultant when the employee establishes the elements of a negligent undertaking...

”

Artiglio Factors

Elements of Proof:

- (1) [Consultant] undertook to render services to [Employer];
- (2) The services rendered were of a kind [Consultant] should have recognized as necessary for the protection of the employees of [Employer];
- (3) [Consultant] failed to exercise reasonable care in the performance of its undertaking;
- (4) [Consultant's] failure to exercise reasonable care resulted in harm to [Employee]; and
- (5) One of the following is true:
 - (a) [Consultant's] carelessness increased the risk of such harm;
 - (b) the undertaking was to perform a duty owed to [Employer's] employees, or
 - (c) the harm was suffered because of the reliance of [Employer] or employees upon the undertaking.

Ruling

“

Based on the information provided...we cannot determine the precise nature and extent of [Consultant's] undertaking, which necessarily leads to the conclusion that we cannot determine on the record before use whether [Consultant] fulfilled that undertaking.

*Lower court granted safety consultant's motion for summary judgement. This court reversed.

”

Case Law

Site Safety & Non-delegable Duties

Design Professional using DBIA Contract Form (530 and 535) found liable for overall site safety, where those duties were non-delegable.



General Rule

“

[T]he long-standing rule in Indiana is that ‘a principal will not be held liable for the negligence of an independent contractor.’

”

Exception to the General Rule

“

[F]ive exceptions to our general rule exist. One such exception allows for the existence of a duty of care where a contractual obligation imposes a “specific duty” on the general contractor.

”

Non-Delegable Duty of Care

“

...by entering into a contract containing language that required [Consultant] to assume responsibility for implementing and monitoring safety precautions and programs for all individuals working on the site, and by agreeing to designate a safety representative to supervise such implementation and monitoring, [Consultant] affirmatively demonstrated an intent to assume a non-delegable duty of care toward [the injured employee].

Contract Lesson: Revise the Prime Contract to allow for assignment of duty to subconsultants.

”

Thank you for your time!

QUESTIONS?

**This concludes The American Institute of Architects
Continuing Education Systems Program**

Ellen Wechsler, Operations Representative
Ellen.Wechsler@rlicorp.com

Vince Costello
Vince.Costello@rlicorp.com

Kent Holland, Esq. | ConstructionRisk LLC
Kent@ConstructionRisk.com
703.992.9480 (o)
703.623.1932 (c)

