The Duty of Design Professionals and the Privity Defense

by Andrew J. Carlowicz Jr. and Richard W. Gaeckle

A construction project being completed well beyond schedule and significantly beyond budget is not an unusual situation. Various contractors complaints of delays, disruptions, extended general conditions and economic damages occurring as a result with allegations of errors and omissions, lack of coordination, improper administration, and general professional negligence, are directed at the design professionals. Litigation ensues with a contractor taking the plaintiff's seat and the design professional sharing the defendant's position with many others. While discussing the potential liability and exposure with counsel, the design professional's response may be something along these lines: "But we didn't even have a contract with them!" Of course, what the design professional is alluding to is a defense based on the absence of contractual privity with the plaintiff-contractor. Unfortunately, the fruit of this defense had spoiled long ago.

The privity defense, and its application to architects and engineers, has been considered by our courts in personal injury settings for nearly a half century. Following the abandonment of the "completed and accepted rule" of *Miller v. Davis & Averill, Inc.*,[1] courts increasingly disfavored the privity defense, where a bodily injury had been sustained as a result of the negligence of a design professional. Beginning with the seminal case of *Trotten v. Gruzen*,[2] the clear direction taken by our courts held architects and engineers potentially liable for personal injuries caused by the design professionals, negligence notwithstanding a lack of privity with the injured third party. However, the question of whether a design professional could be answerable in tort to a contractor who sustained purely economic damages in the absence of contract privity remained expressly unanswered until the decision in *Conforti & Eisele, Inc., v. John C. Morris Associates*.[3] In protracted litigation involving the design and construction of the New Jersey College of Medicine & Dentistry, plaintiff Conforti & Eisel, general contractor for the project, sought recovery from various design professionals under a theory of professional negligence in coordinating project drawings. All design professionals eventually settled with the plaintiff except John C. Morris Associates, a mechanical engineering sub-consultant. Morris had challenged the propriety of a professional negligence suit by a general contractor where there was no contractual privity between Conforti & Eisel and John C. Morris Associates. The engineer's motion to dismiss raised this discrete issue, which at the time was one of first impression in New Jersey.

Recognizing that architects and engineers could be held liable for personal injuries to third persons in the absence of privity, the court questioned the logic of denying a contractor relief based on such a privity defense where the contractor suffers damages, albeit in the nature of purely economic losses. In rationalizing a rule against the privity defense, the court reasoned:

> [t]o deny this plaintiff his day in court would, in effect, be condoning a design professional's right to do his job negligently but with impunity as far as innocent third parties who suffer economic loss.
>
> Public policy dictates that this should not be the law. Design professionals, as have other professionals, should be held to a higher standard.

In adopting an adequate test for determining liability, the *Conforti & Eisel* court turned to the federal jurisdiction and the case of *United States v. Rogers and Rogers*.[4] In *Rogers and Rogers*, an architect was sued by a contractor who had sustained economic damages. In determining liability, the district court established the following test, which was embraced by the *Conforti & Eisel* court:

1. The extent to which the transaction was intended to affect the plaintiff
2. The foreseeability of harm to the plaintiff
3. The degree of certainty that the plaintiff suffered injury
4. The closeness of the connection between the defendant's conduct and the injury suffered
5. The moral blame attached to the defendant's conduct and
6. The policy of preventing future harm

While the court recognized that the result of its ruling would impose additional exposure on

design professionals, it maintained that "extending liability for economic injury is the next logical step." The Appellate Division affirmed substantially for the reasons stated by the trial court.

The *Conforti & Eisel* decision has been left unmolested for more than two decades, although at least one court has appeared to suggest *in dictum* that the privity exception is limited to public construction projects.[5] Regardless of whether one subscribes to the existence of an independent duty owed by a design professional to third parties despite the lack of contractual privity, the duty owed by a design professional to third parties is not without limitation. While *Conforti & Eisel* stands for the proposition that a design professional *may* be liable to a third party in the absence of privity, the court does not address the extent of a design professional's duty to such a third party. Arguably, *Sykes v. Propane Power Corp.*[6] is informative in this regard.

In *Sykes*, the defendant engineer was retained to assist in the preparation of drawings relating to a chemical processing plant in response to an administrative intervention by the Department of Environmental Protection. As a condition for the continued operation of the plant, the Department of Environmental Protection required the plant comply with certain waste management regulations. Consistent with these directives, the engineer investigated and took photographs of the processing system; prepared process flow diagrams, topographic plots and tank location drawings; and prepared an engineering plan that included titles such as "Explosion and Disaster Plan," "Serious Injury Plan," and "Safety Standards and Policies" under the general heading of "Risk Analysis." Shortly after the plans were completed and submitted to the owner, an employee was killed when a chemical distillation unit in the plant exploded.

A wrongful death suit against the engineer followed, alleging that the engineer had breached a duty of care to the employee by sealing documents that reflected an unsafe and negligently developed chemical processing system. The plaintiff pointed to the risk analysis section of the engineering plan, which referred to explosions, injuries and safety standards and policies. Summary judgment was ultimately granted in favor of the engineer, based on the finding the engineer was hired solely for the purpose of preparing documents in response to the Department of Environmental Protection order, and had not been engaged as a safety engineer.

In affirming the ruling of the trial court, the Appellate Division explained:

> Although all engineers have a professional obligation to see that the work they do is accurate and in conformance with accepted standards of care, the duty to foresee and prevent a particular risk of harm from materializing *should be commensurate with the degree of responsibility which the engineer has agreed to undertake* [emphasis added].

The rule announced by the *Sykes* court has since been adopted into the New Jersey model civil jury charge for architects and engineers.

Although the *Sykes* court did not discuss privity issues between the engineer and the deceased employee, the same factors embraced by the *Conforti & Eisel* court in establishing liability in the absence of privity were evident in the reasoning for the *Sykes* decision: the forseeability of harm, the relationship between the parties, the nature of the risk, and the policy of preventing future harm. Moreover, while one can distinguish *Sykes* by noting it was a personal injury case, it is important to remember that the duty owed to injured workers was an underlying rationale relied upon by the court in *Conforti & Eisel*. In that regard, perhaps this duty should be narrowed further. Attention is directed to the engineer's site safety statute found at N.J.S.A. 2A:29B-1, which seems to reign in the duty owed by a professional.

In short, current law supports the proposition that a contractor may maintain an action for negligence against a design professional for purely economic damages, even in the absence of contractual privity. However, the design professional's duty to such a contractor must be tempered against the overall degree of responsibility the design professional has agreed to undertake per his or her contract. ■

ENDNOTES

1. 137 N.J.L. 671 (E. & A. 1948).
2. 52 N.J. 202 (1968).
3. 175 N.J. Super. 341 (Law Div. 1980) *aff'd* 199 N.J. Super. 498 (App. Div. 1985).
4. 161 F. Supp. 132 (S.D. Cal. 1958).
5. *See Morie Energy Management v. Badame*, 241 *N.J.Super.* 572 (App. Div. 1990) (explaining *Conforti & Eisel* as holding that a "contractor awarded a public contract may maintain a tort action for damages resulting from the negligence of a professional who has prepared plans for the contracting agency").
6. 224 N.J. Super. 686 (App. Div. 1988).

Andrew J. Carlowicz Jr., *and* ***Richard W. Gaeckle*** *are partners at Hoagland, Longo, Moran Dunst & Doukas in the firm's construction law practice group. Their practices focus primarily on the representation of architects, engineers and other design professionals. Mr. Carlowicz was lead counsel for the engineer in the* Sykes *case discussed in this article.*