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What About the Architects?

Statute extending liability protections to engineers should apply to architects

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

The occurrence of on-site construction accidents is unfortunately all too common, often resulting in devastating injuries or even death. While workers' compensation benefits are generally available to the injured construction worker, often litigation follows against the key players involved in the project, i.e., the owner, the general contractor and the design professionals.

With no contractual privity between the injured worker and the design professional, the former must proceed under a tort theory of liability couched in a professional malpractice cause of action. As with any tort theory of liability, the injured worker must first establish that the design professional owed a duty to prevent the very injury that the worker alleges to have suffered. The enactment of N.J.S.A. 2A:29B-1, et seq., explicitly limits an engineer's legal duty to prevent such injuries to three specific circumstances. In the absence of one of these situations, the statute provides that the engineer is not liable.

An issue may be raised, however, as to whether an architect (who may have even hired that very engineer on the project) is afforded the same protections against liability as their engineering counterparts. Architects, like engineers, should be held liable for construction site injuries only in those limited circumstances as provided by N.J.S.A. 2A:29B-1, et seq., even in the absence of a specific reference to the architect in the statute.

It has long been settled that a design professional can be answerable in tort even in the absence of contractual privity. However, it is equally true that a design professionals' degree of responsibility shall not extend beyond that which the professional has agreed to undertake. See *Sykes v. Propane Power Corp*., 224 N.J. Super. 686 (App. Div. 1988).

In *Sykes*, the owner of a chemical processing plant retained Sullivan Engineering Group in response to an administrative order by the Department of Environmental Protection, which had discovered that the plant was being operated without proper authorization. Sullivan was specifically retained to prepare detailed drawings depicting the layout and location of the facilities involved in the chemical recovery process. As part of its services, Sullivan 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 topics such as "Explosion and Disaster Plan" "Serious Injury Plan" and "Safety Standards and Policies" under the general heading of "Risk Analysis." Two months after Sullivan submitted its plans to the plant owner, a plant employee was killed when a chemical distillation unit in the plant exploded. Plaintiff filed suit against Sullivan and

Carlowicz is a partner and co-chair of the construction litigation and general consultation practices group at Hoagland, Longo, Moran, Dunst & Doukas of New Brunswick. Gaeckle is a senior associate in the firm's construction litigation and general consultation practices group with a particular emphasis on representing design professionals. Carlowicz was counsel of record for the engineer in the Sykes *case, discussed in the article.*

others, alleging that the engineer had breached a duty of care to Sykes by sealing documents that reflected an unsafe and negligently developed chemical processing system. Despite these facts, summary judgment was granted in favor of Sullivan based on the finding of the trial court that Sullivan was hired solely for the purpose of preparing documents in response to the DEP order and had not been engaged as a safety engineer.

In affirming the ruling of the trial court, the Appellate Division explained "[a]lthough 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*." The Appellate Division recognized that Sullivan was not called upon to evaluate the safety of the chemical processing plant, but, rather, was only engaged to prepare a generalized layout of the existing processing systems. Thus "it would go against all settled principals of tort law and considerations of fairness and policy to visit liability upon Sullivan for any failure in the plant or its operating procedures simply because he affixed his seal to several generalized drawings depicting the allegedly defective components involved."

In the wake of *Sykes*, the Supreme Court in *Carvahlo v. Toll Brothers and Developers,* 143 N.J. 565 (1996), addressed the issue of whether an engineer has a legal duty to ensure the safety of construction workers where the engineer has not assumed construction site safety obligations vis-a-vis a written contract, but is nonetheless aware of certain conditions creating the risk if serious injury. In *Carvahlo*, a construction worker was killed when the unstable walls of a deep trench collapsed upon him. While the engineer did not have any express contractual site safety responsibilities, the engineer was required to have an inspector on site every day to monitor the progress of the work. Consequently, on the date of the accident, the engineer's inspector was onsite, admittedly was aware of the dangerous condition of the trench, and, in fact, witnessed the accident which killed the worker.

In affirming the existence of a duty on the part of an engineer in these circumstances, critical was the fact that the engineer had *actual* knowledge of the dangerous condition by way of his presence on site, as well as the *opportunity* to cure the condition and prevent harm to the worker. As reasoned by the Supreme Court:

> [t]he risk of serious injury from the collapse of an unstable trench was clearly foreseeable. [The engineer] had explicit responsibilities to have a full-time representative at the construction site to monitor the progress of the work, which implicated work-site conditions relating to worker safety. Those responsibilities related to the condition of trenches, the handling of utility lines crossing trenches, and whether measures to shore up and stabilize trenches through the use of a trench box were necessary. The engineer had sufficient control to halt work until adequate safety measures were taken. There was a sufficient connection between the engineer's contractual responsibilities and the condition and activities on the work site that created the unreasonable risk of serious injury. Further, the engineer, through its inspector, was on the job site every day, observed the work in the trench, and, inferably, had actual knowledge of the dangerous condition.

After the Supreme Court's decision in *Carvahlo*, the Legislature sought to specifically define the extent of an engineer's liability for construction site safety. The legislative enactment appears to have embraced (even "codified") the analysis of the *Carvahlo* decision resulting in the engineers' "construction site safety" statute, N.J.S.A. 2A:29B-1, et seq. This statute imposes liability on an engineer *only* in the following circumstances where the injury is otherwise recoverable under workers' compensation laws:

- The engineer has expressly assumed construction site safety responsibility by way of a written agreement; or
- In a multiprime project the professional engineer is the owner's representative and no contractor has been designated to be responsible for site safety; or
- The professional engineer was present at the portion of the site for which the engineer had provided services prior to the accident, *and* had actual knowledge of the site conditions alleged to be a cause of imminent danger, *and* had the opportunity to notify the contractor and worker of the presence of those conditions alleged to be a cause of imminent danger.

In the absence of one of the above circumstances being applicable, an engineer will be free from liability for a construction site injury as a matter of law.

By its explicit terms, N.J.S.A. 2A:29B-1 sets forth the parameter for construction site safety liability on the part of engineers. Certainly, the "spirit" of the statute's protection should have equal application to architects. By way of example, shortly after the enactment of N.J.S.A. 2A:29B-1, a similar statute was proposed with a specific application to architects. With the exception of replacing the term "engineer" with the term "architect," the present Senate bill (*S-333*) mirrors the engineer's site safety statue in its entirety. At present, and for reasons not disclosed by the legislative statements, the proposed legislation remains dormant, having been originally proposed nearly six years ago. Perhaps enactment would be superfluous.

It is notable that in discussing the limits of an engineer's duty for construction site safety, the New Jersey Supreme Court in *Carvahlo* looked favorably to

other jurisdictions and their treatment of the issue as applied to architects. For instance, in *Young v. Eastern Engineering & Elevator Co.*, 381 Pa. Super. 428, 437 (1989), cited favorably by *Carvahlo*, the Superior Court of Pennsylvania announced that "[a]bsent an undertaking by an architect, by contract or conduct, of the responsibilities of the supervision…an architect is not under a duty to notify workers or employees of the contractor or subcontractors of hazardous conditions on the constructions site." In contrast, the Illinois Supreme Court in *Miller v. DeWitt,* 37 Ill. 2d. 273 (1967), also cited by *Carvahlo*, imposed liability where the architect had a contractual duty to supervise the work, the power to halt the work to allow for safety precautions to be taken, and had actual knowledge of the dangerous condition. Since the *Carvahlo* Court sought to examine the limits of site safety liability without distinction between the architectural and engineering disciplines, and the subsequent legislative enactment simply codified *Carvahlo*, it would be unfair and illogical for a court to treat these two professions in a disparate fashion.

Equally compelling is the fact that the New Jersey Supreme Court, post-*Carvahlo*, appears to have blessed the application of the engineers' site safety statute, or at the very least its policy, as applied to architects. As in *Carvahlo*, the New Jersey Supreme Court was called upon to determine the scope of an architect's duty for construction site safety in *Pfenninger v. Hunterdon Central Regional High School*, 167 N.J. 230 (2001). In that case, Pfenninger, the principal owner of an excavation company, was killed when an unbraced trench caved in upon him while he was laying drainage piping at a high school. The Appellate Division concluded that the architect owed a duty to the deceased worker, similar to the engineer in *Carvahlo*, despite the fact that the architect did not have any contractual responsibility for site safety or on-site responsibilities. The Appellate Division reasoned that the architect had a duty to prevent the accident because its project manager was on-site on several occasions and examined the area where the trench collapse occurred, albeit prior to the commencement of the excavation work. The Appellate Division pointed to the fact that the architect was aware of the instability of the area and required that the area be secured for the safety of the students. Thus, according to the Appellate Division, such an accident was clearly foreseeable and thereby imposed a duty on the architect to prevent the same.

While affirming the ultimate disposition of the Appellate Division on other grounds, the majority of the Supreme Court rejected the Appellate Division's findings as to the issue of the architect's duty and instead embraced the conclusions reached by their colleague, Justice Coleman, in his dissent. Recognizing the legislative intention to limit a design professional's liability for construction site accidents, Justice Coleman agreed that expanding an architect's liability as the Appellate Division did would be "contrary to the public policy expressed by the Legislature in N.J.S.A. 2A:29B-1 when it codified *Carvahlo*...." Critical to this reasoning was the fact that unlike the engineer in *Carvahlo*, the architect in *Pfenninger* did not have any contractual obligation for construction site safety nor any actual knowledge of the dangerous condition that led to the workers death — the very criteria for liability now expressed in N.J.S.A. 2A:29B-1. Thus, when the entire body of law — legislation and applicable court decisions — are read as a whole, it seems clear that the intention to limit liability for construction site accidents to very specific circumstances applies equally to engineers and architects.

While enactment of an architect's site safety statute would make sense, is such a statute even necessary? It appears clear from *Carvahlo* and *Pfenninger* that architects share a similar limitation from liability for construction site accidents akin to that afforded to engineers by N.J.S.A. 2A:29B-1. This would be the only logical result since the law already considers the two professions on an equal plane, at least from a liability perspective. One need only reference the New Jersey Supreme Court's Model Civil Jury Charge § 5.38, which applies interchangeably to architects and engineers. There, aside from simply replacing the word "architect" with the word "engineer," the jury instructions as to the general duty owed by either is identical for both professions. The same result should follow in the context of construction site liability. Accordingly, like engineers, architects should only face liability for construction site accidents where they have either assumed the responsibilities for site safety vis-a-vis a written contract, or where the architect knew of that condition which presented imminent danger and failed to take steps to prevent the subsequent accident. ■