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ARCHITECTS & ENGINEERS NEWSLETTER

CAN AN OWNER HOLD INDIVIDUAL DESIGNERS PERSONALLY LIABLE?

By: Frederick T. Bills

In what may be a trend in architect/engineer cases, it is increasingly common to find plaintiff attorneys filing suit not only against the design firm with which a client was in contract on a particular project, but also against the individual design professional assigned to the project by the firm for professional negligence.

A recent case I was involved in had the following scenario: an engineering firm was hired as a consultant by a design-build company to complete structural design services for a steam generating unit at a power plant. The firm assigned one of its design professionals to the project, and structural design work for the system was completed. Four years later, the design-build company began inspecting work completed by the engineering firm due to alleged errors by the firm on other projects. The design-build company alleged errors in the structural design of the steam generating unit and completed modifications and repairs to the unit. The design-build company filed suit against the engineering firm on contract claims, but also filed suit personally against the professional engineer assigned to the project on professional negligence grounds.

This scenario raises the question of whether claims for personal liability against a design professional completing work as an employee of a design firm will withstand scrutiny by Ohio Courts?

Traditionally, claims for negligence against a party for purely economic loss is barred by application of the Economic Loss Doctrine. The Doctrine states that a party so harmed "has not been injured in a manner that is legally cognizable or compensable." *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.* (2005), 106 Ohio St.3d 412, 415. It seeks to hold parties to the terms of their bargained-for contract and refuses to allow parties in privity of contract to bring claims under the more expansive umbrella of tort law. Obviously, a particular employee of a design firm is not in privity of contract with an owner or design-build company. Thus, the easy conclusion to draw is that the Economic Loss Doctrine bars such claims.

However, there exists a line of cases that establish liability against design firms for purely economic loss on professional negligence grounds that have created an avenue by which plaintiff attorneys may seek claims sounding in tort in what appear to be standard contract cases. The theory espoused by plaintiff attorneys is that professional negligence is a viable tort claim, and thereby is an exception to the Economic Loss Doctrine and allows them to sue individual design firm employees for failing to use reasonable care in preparing their designs. As shown below, however, the courts in these lines of cases do not consider the Economic Loss Doctrine in their analysis because the issue is not raised by counsel in the appeal. It is just one reason we do not believe this plaintiff tactic is persuasive.

The primary case relied on by plaintiff attorneys is *Cincinnati Riverfront Coliseum, Inc. v. McNulty Co.* (1986), 28 Ohio St.3d 333, where the Supreme Court, at Page 337, stated: "[o]ne who contracted in a specialized professional capacity to provide the design for a particular structure may be held to respond in damages for the foreseeable consequences of a failure to exercise reasonable care in the preparation of the design." The statement is made as the court contends with whether a design professional may be held liable for a structure which, as built, materially deviates from the designed structure. The Economic Loss Doctrine is not considered within the court's analysis. Plaintiff attorneys have contended, however, that the statement in *Cincinnati Riverfront Coliseum* stands for the proposition that design professionals have a duty sounding in tort to all of its clients, independent of and in addition to any duty arising out of contract. They argue, therefore, that the Economic Loss Doctrine does not bar tort claims against design professionals, much like professional malpractice claims against doctors or attorneys are not barred by the Doctrine.

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One effective argument against these practices is relying on the contract between the parties insofar as it attempts to limit their liabilities, such as a waiver of consequential damages. I recently had a plaintiff attorney argue that, while the contract at issue waived his client's right to consequential damages under contract law, he was still able to pursue consequential damages under a tort theory. When a plaintiff attorney is forced to highlight how the terms of a bargained-for contract may be undermined in allowing tort theories to proceed, then a court should be able to see that the position contradicts the clear purpose of the Economic Loss Doctrine. Another effective argument against such practices is comparing professional negligence claims against design professionals to malpractice claims against doctors and attorneys. While it is true that courts have carved out a specific area of law to be applied to attorneys and doctors which allows for recovery of economic losses regardless of whether the parties are in privity of contract, that area of law has also specifically recognized a much shorter statute of limitations period (one year). Any court should be asked why a design professional should face the same expanded liability exposure as doctors and attorneys in malpractice claims if they do not also have the benefit of a shorter statute of limitations.

RECOMMENDATION:

It is increasingly common for plaintiff attorneys to file professional malpractice claims against a design professional for personal liability. This is in addition to the standard contract claims against the design firm that employs the design professional. While there is a dearth of case law addressing this new trend, the best course of action is to file a motion for dismissal on the grounds that the Economic Loss Doctrine bars such claims because the design professional is not in privity of contract with the entity filing suit. It is also recommended that an additional miscellaneous contract clause be considered that emphasizes how liabilities under the contract are limited to the parties to the agreement.

The Economic Loss Doctrine was developed to protect contract law and the ability of owners and design professionals to create agreements defining responsibilities and limiting liabilities. Allowing tort claims to proceed in such settings only serves to undermine that goal and has no place in these types of cases. ■

ARE ARCHITECTS JOINTLY AND SEVERALLY LIABLE WITH THE ERRORS OF THE CONTRACTOR?

By: David T. Patterson

Recently I represented an architectural firm in an arbitration proceeding. Much to my surprise, opposing counsel, who also represents architects and engineers but was representing the owner in this case, was espousing a theory of law to make my client jointly and severally liable for the errors and omissions of the contractor. So what does this mean? Joint and several liability is a tort concept whereby a plaintiff may recover all the damages from any of the defendants regardless of their individual share of liability. If two tortfeasors independently created a singular injury or damage, the plaintiff can recover all of his/her damages from either tortfeasor. The tortfeasor from whom the recovery has been made then has the right to pursue another tortfeasor for contribution commensurate with his/her share of the liability. In Ohio, joint and several liability is governed by Ohio Revised Code §2307.22. Ohio's joint and several liability law has evolved from allowing the plaintiff to recover all of his/her economic and non-economic damages from one joint tortfeasor to the present division of liability pronounced in ORC §2307.22. This statute reduces joint and several liabilities to only economic damages for tortfeasors who are over 50% liable. In other words, each tortfeasor is responsible for only his/her respective share of the non-economic damages, and only if that tortfeasor is found to be over 50% liable does he or she become jointly and severally liable as to the total economic damages if the other tortfeasor is not part of the claim or is unrecoverable.

In a breach of contract case, the plaintiff is entitled to "compensatory damages." Compensatory damages are defined as "damages as will reasonably compensate him or her for losses sustained as a direct result of the Defendant's action." Breach of contract damages cover "just compensation for losses necessarily flowing from the breach of contract and those which reasonably may be supposed to have been within the contemplation of the parties at the time the contract was made." A party whose contract has been breached is entitled to a monetary award "to be placed in the position that person would have been had the contract been performed in accordance with its terms."

In the Spring 2011 Architects & Engineers Newsletter, we addressed the issue as to application of the Ohio Economic Loss Doctrine. That doctrine requires parties that are seeking economic loss to be in privity, or in other words, have a contractual relationship. The cases that address the Ohio Economic Loss Doctrine make it clear that parties that have a contractual relationship are to bring their cases in contract and not in tort.

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AIA document B101-2007 in Section 10.5 specifically states that nothing within the agreement shall create a contractual relationship or a cause of action in favor of a third party against either the owner or the architect. Further, Section 13.1 states that the agreement represents the entire and integrated agreement between the owner and the architect. These provisions are designed to create no additional claims and no additional causes of action or responsibilities to parties outside of the terms of the agreement. If Ohio's Economic Loss Doctrine precludes claims based on tort, and the contract language precludes claims brought outside of the terms of the contract and grants no cause of action in favor of a third party against either the owner or architect, then how is it that an architect can be jointly and severally liable with a contractor with whom it has no contract? In my recent arbitration case, opposing counsel cited to the case of *First National Bank of Akron v. Cann* (N.D. Ohio 1980), 503 F. Supp. 419, 435. Counsel for owner argued that Ohio allows for a contractor and architect to be jointly and severally liable to the owner for breach of contract even where each has signed a separate contract with the same owner. Although the court did make that determination, the decision is very limited in scope. The architect was also the developer and construction manager for the project. In essence, it was almost as if the architect was a design builder making both the architect and the contractor liable for the construction defects. The *Cann* case has never been adopted by the Ohio Supreme Court.

CONSIDERATIONS

Although the terms in the AIA B101 would seem to be enough, it may be necessary to go one step further to avoid any potential issue as to joint and several liability with the contractor. Consider including language which specifically states in the owner/architect agreement that the architect will not be jointly and severally liable for any construction defects created by the contractor. This way there will be no argument that counsel for the owner may raise to engulf the architect with liability for defects created by the contractor. ■

THE CLAUSE CORNER

By: Frederick T. Bills

1. To avoid imposition of joint and several liability with the Contractor for the Contractor's errors and omissions:

    A. Consider including an additional miscellaneous clause to any owner/architect agreement which states, "Nothing contained in this Agreement shall create joint liability with a third party with whom the Owner contracts. The Agreement represents the bargained-for liabilities between the Owner and the Designer."

2. To avoid personal liability as an individual designer:

    B. Consider including an additional miscellaneous clause to any owner/architect agreement which states, "Owner agrees that Owner's sole remedy is against *name of architectural firm* and nothing in this Agreement shall be interpreted to extend personal liability to the employees or consultants of the Designer for acts required under the Agreement." ■

ARCHITECT/CONSULTANT INDEMNITY AGREEMENT

By: David T. Patterson

Indemnity agreements have been a part of construction documents for decades. This includes contracts between architects and their consultants. Architects want to get as much protection from the negligent acts or omissions of their consultants as possible. However, indemnity provisions which attempt to provide the architect protection against his own negligence as well as the negligence of his consultants are barred by Ohio's Anti-Indemnity Statute (Ohio Rev. Code § 2305.31). That statute makes it clear that in a construction setting, one party that employs another cannot require the latter to indemnify the former for its own negligence. Having said that, an architect may certainly require a consultant to indemnify the architect for the negligent acts or omissions of the consultant.

AIA Architect/Consultants Agreement C401-2007 contains cross indemnity provisions. These indemnity provisions are contained in Sections 8.3 and 8.4. They provide that each party will indemnify and hold harmless the other party for "damages, losses, and judgments arising from claims by third parties…, but only to the extent… caused by the negligent acts or omissions of the consultant…" The problem with the cross indemnity provisions is that they are difficult to enforce because of the general nature of the allegations in pleadings which generally attempt to implicate the entire design team. The indemnity provisions lend themselves to an exchange of demand letters to hold harmless and indemnify.

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In the circumstance where an employee of a contractor is injured on the job site as a result of failure of a structural member, the architect is certainly going to look to the structural engineer pursuant to Section 8.3 of the contract. However, if the allegation in the complaint deals more with negligence during construction administration rather than design, then it could be the structural engineer who is demanding indemnity if he was not notified that the work was being performed so that he could engage in his construction administration responsibilities.

In *Kovach v. Warren Roofing & Illum. Co.*, 2007-Ohio-2514, the 8th District Court of Appeals was confronted with the issue of whether "alleged" negligence is sufficient to defeat a contractual indemnification clause. The plaintiff fell and was injured while replacing a roof on a building owned by Cleveland Electric Illuminating Company (CEI). CEI had contracted with Tremco, Inc. (Tremco), to replace the roof. The plaintiff was an employee of Tremco. A lawsuit was filed against Tremco, CEI, and others alleging negligence. At trial, the jury rendered a verdict that CEI was not negligent. The contract between CEI and Tremco had an indemnity provision that Tremco would indemnify and hold harmless CEI for claims by third parties. The Court of Appeals ultimately determined that a mere assertion of negligence would not be sufficient to defeat a contractual indemnification provision of a construction contract. The importance of the *Kovach* case is that the party seeking indemnity, once it establishes that it has no liability, can enforce the indemnity for the costs and expenses it incurs in establishing that it had no liability.

In looking back at the indemnity language under Sections 8.3 and 8.4, the parties seeking indemnity and to be held harmless against damages and losses would not only have to establish their absence of fault, but before they can be indemnified and held harmless against damages and losses, it must be established that the consultant under Section 8.3 or that the architect under Section 8.4 was negligent and that such negligence caused the third party's injuries. This is the only logical interpretation of these cross indemnity provisions under Sections 8.3 and 8.4 of the C401 document. ■

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