OPINION

Court rulings expand design firm liability

2 Superior Court decisions might affect firm liability in Pennsylvania; awareness of these cases and potential impact could save firms trouble.

Rob Hughes

GUEST SPEAKER

Pennsylvania's Superior Court issued two opinions in recent months that might have a significant impact on design firm liability. Notably, this court has great influence over Pennsylvania's entire judicial system, including the courts of common pleas – the venue for most civil litigation, including suits against design firms based or doing work in Pennsylvania.

DESIGNING TO CODE MIGHT NOT PROVIDE ADEQUATE PROTECTION. The first opinion, Truax v. Roulhac, involved a bodily injury claim sustained by a pedestrian struck by a car as she walked along a sidewalk outside a local bar. The driver, intoxicated at the time of the accident, was trying to park near the bar when her car jumped the curb. The pedestrian filed suit against the business owner for damages related to her injuries.

The trial court dismissed the claims against the bar, stating: "No Pennsylvania court has held that a business owner was negligent for failing to install vertical bollards in addition to horizontal wheel stops." The standard of care was met because the design "complied with all applicable building codes and zoning ordinances, and to impose a duty upon property owners above and beyond these standards would defeat the purpose of having such standards in the first place."

The Superior Court disagreed and found the bar owners potentially negligent. The court's rationale was that because the building protruded slightly at the site of the accident, pedestrians were left exposed to the potential threat of a car jumping the curb. Thus, the owner provided inadequate protections and was obliged to take additional precautions. The court went on to note that the adequacy of the precautions was not definitively established by showing that the design met applicable building codes. Simply put, more was required of the building owner (and, by extension, of any design engineer working on plans for this property).

Although this case did not involve a design firm, the opinion could leave design engineers exposed to significant liability, even when their design meets all applicable codes. The designer must be able to proactively identify potential areas of "greater concern" for safety and design above and beyond the standards at these locations (while presumably convincing the client to pay for these additional costs).

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RULING ERODES PENNSYLVANIA'S ECONOMIC LOSS DOCTRINE. The second opinion – Gongloff Contracting L.L.C. v. L. Robert Kimball & Associates, Architects and Engineers Inc. – further erodes Pennsylvania's interpretation of the economic loss doctrine. That doctrine prohibits direct claims against design professionals for purely economic damages, absent privy of contract. In this case, Gongloff was the structural steel erector on a convocation project designed by Kimball for California University of Pennsylvania. Gongloff sued Kimball directly for additional costs incurred because of errors in Kimball's design documents, allegedly resulting in significantly undersized roof trusses.

Readers might recall the 2005 Bilt-Rite opinion, which opened the door in Pennsylvania to direct claims based on negligent misrepresentation. This case broadens Bilt-Rite by answering two questions adversely with respect to the design community: (1) Must the design professional make an explicit negligent misrepresentation of a specific fact to a third party? (2) Did Kimball either "expressly or implicitly" represent that the structure could safely sustain all required in situ loads?

Kimball argued that absent this specificity, no direct claim could be maintained and the trial

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court agreed, having dismissed the case at an earlier stage – and prior to discovery. This allowed Kimball to avoid the significant efforts and costs of engaging in depositions and other discovery.

However, the Superior Court rejected Kimball's argument that Gongloff must identify a particular communication or document provided by Kimball as being false. The court opined that the "design itself" is: "A representation by the architect that the plans and specifications, if followed, will result in a successful project. If, however, construction in accordance with the design is either impossible or increases the contractor's costs beyond those anticipated because of defects or false information included in the design, the specter of liability is raised against the design professional."

The actual "misrepresentation" was simply Kimball's roof design. As to specificity, Bilt-Rite "requires only that information, a rather general term, be negligently supplied by the design professional." Gongloff satisfied this requirement by alleging that the design was supplied "in order to provide guidance" to others as to how to build the project. And, as to "false" information, Gongloff need only allege that the feasibility of construction, per the drawings, was "called into question."

These "hurdles" to filing and maintaining a direct claim are of little obstacle; all project designs are offered as guidance and general contractors and their subs often question design and constructability/feasibility – indeed, do we know of any project without design-related requests for information?

Thus, not only does the opinion support the right to direct claims; as a practical matter, it appears there is little hope for an early dismissal of the design professional under the forgoing standard. At the very least, a trial court will allow the claimant to engage in discovery; imposing significant litigation and expert costs on the design defendant(s).

Unfortunately, neither case has an easy risk-management "fix." Contractual solutions might not be effective as design firms are unlikely to have a contract with the project's general contractor or its subs.

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Design firms operating in Pennsylvania might want to check with their legal counsel on the feasibility of requiring the owner to include a waiver of direct claims against the design team in their prime agreement with the contractor. This might help limit your direct exposure. Alternatively, you could seek indemnification from the client/owner for any third party claims based on a standard of care beyond that imposed by the applicable building code. Nonetheless, such agreements may not be legally enforceable and may not help if the client doesn't have the financial resources to take over your defense or reimburse you for any liabilities.

Ultimately, being aware of these cases might be a design firm's best risk management tool: Understand their potential impact on your firm and take a prudent approach to your work.

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