$155-Million Verdict against Tunneling Contractors Upheld on Appeal

King County v. Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV, discusses disputes arising from the Brightwater project, a Seattle-area tunneling project that garnered headlines several years ago when one of its contractors encountered major tunnel-boring machine (TBM) challenges. The results were disastrous for the contractor.

The Brightwater project involved the construction of a treatment plant and a new, 13 mi underground conveyance system that included extensive tunneling work to carry clean effluent from the plant to Puget Sound. Of the three tunnel segments, one was awarded by King County (the project owner) in 2006 to a joint venture of three firms, Vinci Construction Grands Projets, Parsons RCI, and Frontier-Kemper. The joint venture's price to complete the four-year project on a design/bid/build basis was approximately $210 million. Its tunnel segment had two tunnels, each with its own TBM.

Soon after starting the tunneling work, the joint venture complained that its costs and time to perform were being adversely affected by differing site conditions (DSCs) and defective specifications. These claims were rejected by the owner. Three years after the notice to proceed, all mining stopped because of damage to the TBMs. The joint venture believed that the damage was caused by unexpected abrasive soil and that the TBMs were operating under higher pressures than envisioned by the contract documents. International experts were brought in to provide recommendations, but the owner did not find the recommendations feasible.

With the project now a year behind schedule and the joint venture not having begun repairing either TBM, the owner issued a notice of default and demanded that the joint venture provide a corrective plan. The result was that the joint venture agreed to repair and complete one of the tunnels. The owner was to deduct the other tunnel from the joint venture's contract and award it to a contractor that was performing work on another tunnel segment. The owner reserved its rights to pursue a default claim against the joint venture without formally terminating its contract.

The owner filed suit against the joint venture and its bonding companies for all costs arising from the default, including consequential delay damages. The joint venture counterclaimed on the basis of DSCs, defective specifications, and other issues. The jury agreed that the joint venture had encountered DSCs, and it awarded the group approximately $26 million. However, it also found that the joint venture was in default and so awarded the owner everything that it asked for ($155.8 million), plus almost $15 million in legal fees as the prevailing party. Each party appealed, and the appellate court fully affirmed the lower court's decision.

The joint venture argued that the trial court judge improperly granted summary judgment on a key point pertaining to DSCs—namely, that the joint venture encountered more frequent changes between plastic and nonplastic soils than indicated in the contract documents. The joint venture alleged that these frequent changes substantially hampered its progress by requiring the TBM operators to adjust the TBM's parameters and slurry composition more often than expected.

The appellate court agreed with the lower court, finding that although the geotechnical baseline report listed the types of soils a contractor could expect to encounter, it did not provide a baseline for the number of "transitions" between plastic and nonplastic soil conditions. It also rejected the joint venture's argument that the jury should have been allowed to consider whether the contract documents contained "indications" of such transitions. Without stating whether Washington law recognized this theory, the court found that the contract documents contained no indication, express or implicit, as to the number of transitions.

The court also relied upon the contract, which "explicitly stated that bidders should make their own interpretations and conclusions about the soil conditions along the tunnel." It noted that the contract shifted to the joint venture any risk of assumptions made by the joint venture that differed from the owner's data. The court also cited the "warranty statement" in the geotechnical baseline report, which stated that the "geotechnical baseline conditions contained herein are not necessarily geotechnical fact; the actual conditions encountered will be representative of the range of values, but the locations at which they are encountered will vary."

Also of note, the contract specified an amount for liquidated damages, and the joint venture argued to the trial court that the owner's recovery for delay damages was limited to the liquidated damages. Both the trial court and the appellate court rejected this argument. The appellate decision cited the termination provisions of the contract, which stated that the joint venture and its sureties were liable for, among other things, "any other special, incidental or consequential damages incurred by the County which results or arises from the breach" of the joint venture.

What lessons are to be learned? One is the importance of the wording of the geotechnical baseline report, as well as the difficulty of using it to support a claim of DSCs based on "implied" contract indications. Another is the significant exposure that can come from having contract language that allows any recovery of "consequential damages." **CE**

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Engineer Can Be Liable to Contractor For Furnishing Inaccurate GBR

LAST MONTH'S COLUMN discussed the results of a major geotechnical dispute in the state of Washington involving King County's Brightwater tunneling project. In upholding a $155-million verdict against the contractor, the court found that although the project's geotechnical baseline report (GBR) listed the types of soils a contractor could expect to encounter, it did not provide a baseline for the number of transitions between plastic and nonplastic soils. But suppose that the GBR had represented the number of transitions and this number differed from the actual site conditions? Could the contractor lodge a claim against the engineer who prepared the GBR?

Consider the recently decided case *Apex Directional Drilling, LLC v. SHN Consulting Engineers & Geologists, Inc.* The project involved a solicitation by the City of Eureka, California, for bids on the installation of a wastewater pipeline by means of horizontal directional drilling. The city hired SHN Consulting Engineers & Geologists to serve as the principal engineer and project manager. SHN prepared a GBR indicating that for the most part the project featured stable soils suitable for horizontal directional drilling. The GBR's findings were based on a single test bore drilled a significant distance from the planned path of the project.

In meetings with prospective bidders, SHN representatives orally affirmed that the findings of the GBR and other materials were accurate. The characteristics of the soil were of paramount importance to bidders, as soil lacking sufficient stability and density would hamper the control of drilling equipment and make the bore hole vulnerable to collapse.

Apex Directional Drilling, a leading contractor in the area of horizontal directional drilling, was the low bidder. Almost immediately after beginning work, Apex encountered unfavorable conditions, including mud and flowing sands. According to Apex, it relied on the assurances of SHN representatives present at the project site each day and continued drilling over the ensuing months but did not reach the stable soil formations described in the GBR. The firm alleged that SHN maintained that the project was proceeding in competent soils, and on that premise SHN repeatedly gave Apex illogical instructions.

Apparently on the basis of SHN's recommendations, the city rejected Apex's change order requests and ultimately terminated Apex from the project. Apex sued the city in California state court for breach of contract, and the matter was ultimately sent to arbitration. Apex later sued SHN in federal court, arguing, among other issues, that SHN breached its professional duty to Apex and was liable for negligent misrepresentation. SHN moved to dismiss, contending that it did not owe a duty of care to Apex and could not be liable for negligent misrepresentation. The federal court denied both motions.

With regard to the duty of care issue, SHN argued that it did not have a contract with Apex and therefore could not be liable for economic damages (that is, the economic loss doctrine). The court noted that, under California law, this issue was to be decided on the basis of the weighing of the following factors: (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.

In finding against SHN, the court was heavily influenced by factors 1, 3, and 4. It noted that the GBR defined key conditions affecting the cost and scope of the project for the purpose of establishing a baseline upon which bids would be based. The court also cited Apex's allegations that SHN "doubled-down on its negligent work" by repeatedly giving Apex illogical directives, all of which were clearly "intended to affect the plaintiff." Furthermore, the court noted Apex's allegations that SHN recommended that the city deny Apex's requests for change orders. The allegations demonstrate that SHN had positive knowledge—certainly by the time Apex was dropped from the project—that its actions were directly responsible for considerable losses.

With regard to negligent misrepresentation, the court similarly found against SHN. California holds that "a plaintiff must be a member of a 'specific class of persons' involved in a transaction that the defendant 'supplier of information' intends the information to influence."

The court noted that the GBR furnished contractors with "a clear explanation" of relevant project site conditions "so that key geotechnical constraints and requirements" affecting "bid preparation and construction" would be "well-defined." All of this indicated that SHN was a "supplier of information" intended to influence the substance of bids by Apex and other bidders.

Several points are worth noting. First, remember that this litigation is just starting. Apex has not proved that SHN did anything wrong or that there were site conditions that differed from the GBR representations. However, the fact that SHN was unable to dismiss the claim will undoubtedly affect how this issue is settled. Second, it is a strong reminder to engineers developing GBRs that bidders do indeed rely such reports and that there are consequences if the representations are inaccurate. **CE**

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Be Careful in Representing Your Staffing Plans and Capabilities

AS READERS KNOW, this column typically highlights construction cases that are the subject of published judicial opinions, and we analyze the court's rationale in arriving at its result. Sometimes, however, a jury verdict piques our interest. In such situations, we generally base our discussion of the case's background on court filings and then let the jury's conclusion speak for itself.

This month we consider a Pennsylvania jury verdict of $5.5 million against a designer that very much caught our attention. The case, *Community College of Philadelphia v. Burt Hill, Inc., n/k/a Stantec Architecture and Engineering, LLC,* interested us because the owner's litigation theme was that the designer marketed its services in one way but staffed its operations in a materially different way. This change, it was argued, directly led to the many problems experienced on the project.

Community College of Pennsylvania awarded a $2.1-million design contract to Burt Hill to serve as the designer for a major construction program on its Philadelphia campus. During its interviews with Burt Hill personnel prior to the award, the college allegedly stressed that it wanted to hire a full-service architecture firm with in-house mechanical, electrical, and plumbing (MEP) engineers, as it had previously incurred problems on other construction projects on which the architects hired MEP subconsultants. Burt Hill stated that it had substantial in-house higher education expertise and would staff the project with senior-level professionals with experience in higher education facilities. It also said that it was capable of performing all architecture and engineering services in-house, including those associated with MEP work.

The college used a delivery method that involved multiple prime contracts and retained a professional construction manager to coordinate the work of more than 30 prime contractors. It appears that the project was troubled from the start because of design changes, design defects, unknown site conditions, and other problems. The project finished substantially later than planned, and the final construction costs were nearly $14 million more than budgeted. The college also paid Burt Hill an additional $1.2 million in fees and claimed that, if it had not done so, the firm would have stopped work on the project.

The college sued Burt Hill on the basis that it was solely responsible for the increased construction costs, schedule delays, and associated damages. The action focused heavily on the contention that Burt Hill had engaged in "bait and switch." The college stated that none of the principals who appeared in person in the interviews played any meaningful role in the project. It accused Burt Hill of using unlicensed architects with no higher education or significant project experience (including interns from Drexel University, subconsultants from Bogotá, Colombia, and drafters with very little commercial design experience), in contrast to the senior-level professionals they had promised. Moreover, the college alleged that Burt Hill assigned new, less experienced employees not only to work on the project but also to serve in the critical role of project architect. Of particular significance, Burt Hill used a subconsultant for the MEP work. (Because of the robust economy of 2007, the firm had a significant internal workload that made it incapable of staffing the project with its own MEP personnel.)

From a review of the court filings, however, there is little available to explain Burt Hill's position on the idea of bait and switch. Instead, the firm pointed the finger at both the college and the construction manager. It claimed that the college had made material changes to the project's scope and that the lawsuit was an attempt to essentially have the design team pay for the college's "wish list of add-ons" to the project. Burt Hill also contended that the construction manager failed to properly assign specific scopes of work to the multiple prime contractors and that the overruns had nothing to do with any design errors or omissions.

Burt Hill defended its design by stating that the design documents had been reviewed by the construction manager, resulting in a "nearly perfect compliance check." It also argued that, once purported change order errors and omissions arising from these changes and related issues were culled, those attributable to the design team were well within the margins permitted by professional standards.

The jury trial lasted two and a half weeks, and from the outcome it appears that something about the college's case resonated with the jury. Readers should note that the jury's verdict did not make a distinction between the damages awarded for the college's various theories of recovery, namely, breach of contract, negligence, and negligent misrepresentation. It is not surprising that the case is on appeal and will conclude in one of three ways: a reported decision, a settlement, or a payment of the judgment to the college. If there is a reported decision that provides some helpful perspectives, we will discuss it in a future column.

What can be drawn from this result? All too often, design professionals are aggressive in touting their capabilities, particularly those relating to highly experienced personnel. When things go wrong, these representations loom large to a disappointed client looking to establish a litigation theme or strategy. How a jury or an arbitration panel actually views this may never really be known. But it certainly puts the designer on the defensive and may be enough to convince a trier of fact that the project's problems derive from the incompetence or lack of experience of the designer's personnel. **CE**

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Project Architect And Engineer Avoid Liability for Jobsite Accident

THIS MONTH WE highlight a case concerning a design professional's worst nightmare: a jobsite scaffolding collapse and ensuing injuries that result in negligence claims against the design team and others. This lawsuit involved four employees of a concrete subcontractor who were injured when scaffolding broke apart. The workmen sued the general contractor, the project architect, the engineer, and the owner. The tort claims and allegations encompassed defective scaffolding design, failure to warn workers of hazardous conditions, failure to inspect the scaffolding after construction, and failure to conduct adequate jobsite inspections. Even with this litany of defendants and legal issues, the case never went to trial.

In *McKean v. Yates Engineering Corp.*, a state court ruled in favor of the defendants, granting each of them summary judgment on different grounds and dismissing the claims. After an expensive appeal, the rulings were affirmed, and none of the four defendants were held liable for the injuries sustained.

The Anderson Regional Medical Center, the owner, engaged Foil Wyatt Architects and Planners PLLC as the project architect and Yates Construction as the general contractor. After the reinforced-concrete slab for the first floor had been poured, Yates Construction was preparing to pour the concrete walls and columns that would help support the reinforced-concrete slab for the next story. The firm's superintendent asked Yates Engineering, a sister company, to prepare design drawings for the scaffolding and formwork for that story. No contract was entered into between Yates Engineering and Yates Construction, and no other project participant entered into such a contract.

Yates Engineering prepared preliminary design drawings and submitted them to Yates Construction for comment. The latter, however, had already begun building the scaffolding. Yates Engineering submitted a final design that was fundamentally flawed in that it could not be built without modification. The scaffolding design proposed using posts that were 24 ft long and 4 in. square in cross section. Yates Construction could not comply because posts of that cross section were "not available in that length." The posts would therefore have to be "tiered" by stacking them end to end and "spliced" for stability. Ultimately, Yates Construction did not comment on the final package sent by Yates Engineering, and it ignored essential features of the scaffolding design.

When the concrete subcontractor's employees were pumping concrete into the formwork, the scaffolding collapsed, and the plaintiffs were injured. They sued the contractor for negligently failing to build the scaffolding in accordance with the design Yates Engineering had prepared. Yates Construction was dismissed from the case by virtue of a state statute protecting general contractors from tort liability if they adequately procure workmen's compensation insurance covering their employees.

The plaintiffs next set their sights on the design team: Yates Engineering and Foil Wyatt. They argued that the architects and the engineers negligently failed to design the scaffolding, negligently inspected the scaffolding, and failed to correct or refused to correct defects in the construction that made the scaffolding dangerous. The plaintiffs also alleged the owner negligently failed to supervise and inspect Yates Construction's work and failed to maintain the premises in a reasonably safe condition or to warn the workers of the dangers.

The trial court granted judgment in favor of the architect, the engineer, and the owner prior to trial. On appeal, the court held that there was no authority to support the conclusion that either the architect or the engineer had an absolute duty to inspect the scaffolding and formwork to ensure that the contractor had followed the design. Since there was no written contract between the contractor and the engineer, Yates Engineering had no express contractual requirements to fulfill.

Because of this, the engineer's duty to inform workers of hazardous conditions needed to be triggered by the engineer's actual conduct during construction. Examples of conduct cited by the court that would imply such a duty included (1) actual supervision and control of the work; (2) retention of the right to supervise and control; (3) constant participation in ongoing activities at the site; (4) supervision and coordination of subcontractors; (5) assumption of responsibilities for safety practices; (6) authority to issue change orders; and (7) the right to stop work. The court found no evidence that Yates Engineering engaged in any of these activities, as it only visited the site once.

The court reviewed Foil Wyatt's American Institute of Architects B141 contract and found unambiguous language stating that the architect was not responsible for construction methods or safety precautions in connection with the work. Moreover, nothing in the contract made the architect responsible for ensuring that the engineer's scaffolding design was adequate. Instead, the architect had a duty only to visit the jobsite "at intervals appropriate...to determine that the work when completed will be in accordance with the contract documents." The architect's drawings were silent as to scaffolding, stating only that adequate bracing and forming were required.

Courts look first at the architects' and engineers' contractual safety obligations and then at their activities on the project to determine whether those activities have a bearing on safety. **CE**

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The Risk of Using LOIs in Lieu of Subcontracts

THIS MONTH'S case, *CG Schmidt Inc. v. Permasteelisa North America,* involves what a Wisconsin court framed as a "classic trilogy of a general contractor and subcontractor relationship gone wrong: a bid, ensuing negotiations, and disengagement." The project involved a $52-million mixed-use building of 18 stories in Milwaukee. In April 2013 the general contractor, CG Schmidt, awarded a custom curtain wall subcontract to Permasteelisa North America. The parties did not enter into a written subcontract at that time because CG Schmidt had not yet executed its contract with the owner or agreed to a guaranteed maximum price.

After being awarded the subcontract, Permasteelisa worked with CG Schmidt on various matters related to the curtain wall. Some of these meetings were held with the owner and its architect. The parties also discussed subcontract terms. In early 2014 CG Schmidt informed Permasteelisa of its desire to move forward with certain engineering activities to keep the schedule on track. Permasteelisa advised CG Schmidt that this would require some form of financial commitment and either a subcontract agreement or a letter of intent (LOI). While CG Schmidt provided Permasteelisa with a draft of an LOI, it made no financial commitment.

Permasteelisa continued to participate on the project, attending a kickoff meeting to discuss, among other topics, shop drawing submittal dates and the overall schedule. CG Schmidt and the owner ultimately executed a contract in late April 2014, and this led to rapid-fire communications between CG Schmidt and Permasteelisa over the subcontract and project developments. Permasteelisa provided CG Schmidt with some drawings and glass sample options but stated that it could not move forward on mock-up materials until it had an executed LOI in hand.

The following month CG Schmidt issued a signed LOI to Permasteelisa for approximately $7.7 million. The letter stated that the parties intended to enter into a subcontract, and over the next several weeks there was correspondence addressing subcontract terms. Permasteelisa was concerned about "open-ended liquidated damages," compensation for delay damages, and other items and would not start shop drawings until contract issues were resolved. CG Schmidt believed that Permasteelisa was holding the shop drawings as "hostage to the contract" and so emailed two proposed subcontracts to Permasteelisa.

The day it received the second subcontract, Permasteelisa advised CG Schmidt that it was "disengaging" from the curtain wall project. It cited civil unrest in Thailand and stated that this took away the production slot to meet the revised project schedule. The parties had not signed any subcontract, and Permasteelisa had never informed CG Schmidt of this potential problem. CG Schmidt was forced to hire another curtain wall contractor. It did not know what the ultimate contract amount would be for the replacement subcontractor but expected to use all of its contingency to cover the curtain wall scope in excess of the original budget.

CG Schmidt sued Permasteelisa in federal court, alleging both promissory estoppel and breach of contract. The promissory estoppel doctrine essentially allows one to sue on a "promise" if the party relied on that promise to its legal detriment. Permasteelisa moved for summary judgment on both claims against it.

Permasteelisa argued that the parties intended to sign a subcontract and that unless and until a subcontract was signed, neither party owed a binding obligation to the other. For its part, CG Schmidt argued that a binding contract could be formed even in the absence of a signed, written agreement. It alleged that during the 14 months of interaction, four different "contracts" could be enforced based on the terms of (1) Permasteelisa's original bid; (2) the LOI; (3) Permasteelisa's updated bid proposal, which reflected value engineering efforts and was used for the guaranteed maximum price; and (4) the proposed subcontracts.

The court agreed with Permasteelisa on the breach of contract count, finding that the parties never manifested an intent to be bound to any of the four "contracts." Instead, the documents all pointed to the unmistakable conclusion that CG Schmidt and Permasteelisa fully intended to be bound by a subcontract but that such a subcontract was never executed.

On CG Schmidt's claim for promissory estoppel, the court acknowledged that promissory estoppel has frequently been applied to disputes between general contractors and subcontractors. However, it rejected its applicability in this case, holding that "plaintiffs cannot rely on [promissory estoppel] to transform complex negotiations into a no-lose situation for themselves." Here the court pointed to the parties' extended negotiations and numerous exchanges of drafts and proposals as evidence that any reliance by CG Schmidt on Permasteelisa's bid was unreasonable.

The decision expressly noted that the parties were "experienced actors in the commercial construction industry" and acknowledged that this influenced its decision. "The losses," it noted, "are best left where they have fallen." It is also noteworthy that CG Schmidt had not delineated any realized damages. Although its contingency fund was expected to be eaten up, there was no out-of-pocket financial harm to speak of, just the anticipated detriment of having relied on Permasteelisa's bid.

The case also underscores the risks of using LOIs instead of firm subcontracts. This court read the LOI for what it was: a document that was to be superseded by a "real" subcontract. By the time CG Schmidt realized it was exposed, its moves to create that "real" subcontract were too late. **CE**

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Engineer Found Negligent for Not Verifying Product Data

LEGAL QUESTIONS that go to the heart of liability issues concerning architects and engineers are rarely considered by state supreme courts. However, the highest court in Virginia recently dove into the following two issues: (1) whether a contract between a contractor and an owner can absolve an engineer of liability and (2) the evidence required to establish a breach of the standard of care on the part of a professional engineer. These issues were of such significance to the architecture and engineering community that ASCE, the National Society of Professional Engineers, the American Council of Engineering Companies, and other associations filed amicus curiae briefs to support the engineer's position. In the end, the Supreme Court of Virginia found against the engineer on both issues.

In *William H. Gordon Associates, Inc. v. Heritage Fellowship, United Church of Christ,* a church contracted with an engineering firm (Gordon) to design final site plans, including a rain tank system. According to Gordon's plans, the rain tank was to be buried beneath 10 ft of soil and paved over for use as a parking lot. The church then engaged a contractor to build the rain tank, the parking lot, and a new sanctuary. The tank's design plan was signed and sealed by Gordon and approved by the permitting agency.

During construction the contractor submitted a request for information, raising concerns about the tank's location in light of a high water table. Gordon responded by referring the contractor to information in the manufacturer's drawings; it did not modify or reevaluate the tank system. Two months after the tank was installed, the tank and the parking lot above it collapsed. The problem was ultimately addressed by a different stormwater management design. The cost and delay were considerable, prompting litigation to determine responsibility.

At trial, the owner's and the contractor's experts testified that Gordon breached its standard of care by failing to conduct due diligence regarding the suitability of the tank design for the site in question, incorporating specifications from nonengineers into its own plans without verification of those specifications, providing ambiguous plans, and failing to respond appropriately to questions during construction. Gordon defended itself by arguing, among other points, that the prime contract shifted the risk of any failures in the rain tank from it to the contractor. It also argued that it met its standard of care by relying on information from the tank manufacturer.

The trial court ruled against Gordon, finding that "the sole proximate cause of the damages was the failure of Gordon to meet the minimum standard of care as an engineer required of it by its contract with the church." The Supreme Court of Virginia examined the evidence before the trial court and concluded that this decision should be upheld.

The high court rejected Gordon's argument that the construction contract shifted the risk of design defects to the contractor, citing evidence that the contract left no design discretion to the contractor and that Gordon's plans were "prescriptive specifications," as opposed to "performance specifications." Because the contractor was obligated to adhere to Gordon's plans, it could not be made liable for defective design.

Gordon argued that it met the standard of care by relying on information from the tank manufacturer. Its contract, it noted, included a provision stating that the engineer "shall be entitled to rely on the accuracy and completeness of...information supplied by third parties." The high court rejected this argument as well, citing substantial expert testimony presented to the trial court that the tank's design was not suitable for the water table at the site.

This testimony included opinions that Gordon violated the standard of care when it relied on the manufacturer's recommendations without first tailoring the design to the location and then failed to reexamine its design and conduct its own review of the product when the contractor submitted a request for information about the suitability and performance of the tank. The decision noted evidence that Gordon relied on information from standard manufacturing literature to respond to the contractor's performance concerns instead of conducting its own review of the product and the situation at the site.

Gordon and the professional associations unsuccessfully argued that the contractor's work on the tank was defective and that this should have shifted liability for the failure to the contractor. The trial court concluded that any deviations by the contractor from the plans were immaterial and did not contribute to the collapse. The high court's opinion cited expert testimony that the primary cause of the failure was the excessive depth of the tank. Other experts opined that Gordon's plan was not "clear, constructible, or very likely to serve its purpose because it did not provide specifications, drawings, and a design that was clearly understood by the contractor." The high court concluded that the trial court did not err in finding that Gordon's negligence proximately caused the tank collapse.

It is clear that experts persuaded the trial court that Gordon breached its responsibilities and that this evidence was used by the Supreme Court of Virginia to uphold the trial court's decision. Does this mean that whoever has the best expert wins? Perhaps. But remember that experts need facts to support their opinions. Gordon's conduct enabled the opposing experts to create the impression that Gordon blindly relied on the tank manufacturer's representations even after the contractor raised questions about the product's suitability given the site conditions. **CE**

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Designer Exposed To Liability To Contractor For Negligent Misrepresentation

NEARLY A DECADE ago we wrote about a state supreme court decision that allowed a contractor to sue an architecture and engineering firm directly for negligent misrepresentation from design documents furnished to the owner. That decision was not in keeping with the economic loss rule, which is designed to prevent parties from suing third parties—that is, those with whom they are not in privity of contract—for purely financial damages. Unfortunately for architects and engineers, a recent case breathes new life into the theory that design professionals may be liable to third parties for "negligently supplied" design information.

The disputes in *Gongloff Contracting, L.L.C. v. L. Robert Kimball & Associates, Architects & Engineers, Inc.*, stemmed from the design and construction of a convocation center for the California University of Pennsylvania. Using the traditional design/bid/build method, the university hired L. Robert Kimball & Associates to prepare the design and Whiting-Turner to act as the general contractor.

Whiting-Turner entered into a subcontract with Kinsley Construction, Inc., the latter to provide structural steel fabrication and serve as the erection contractor. Kinsley then entered into three subcontracts of its own: one with Gongloff Contracting, L.L.C., for the labor, materials, and equipment to erect the structural steel, another with Vulcraft, Inc., to detail and fabricate the long-span steel trusses, and the third with Carney Engineering Group, a professional engineering firm, to assist in the detailed design of the structural steel. Kimball's design of the steel structure was supplied to all of the parties.

Problems with the roof design were noted as early as the preconstruction phase. Both Vulcraft and Carney repeatedly complained that the entire design of the roof system was faulty. In particular, they warned that the header beams supporting the roof trusses were drastically undersized. Vulcraft issued a letter formally stating that the Kimball-designed roof system "was not adequate to bear the construction loads." Kimball denied that the roof design was faulty.

Gongloff experienced myriad problems during construction, including three shutdowns of the steel erection, all allegedly traceable to Kimball's "never-before-utilized" design. At that point Kimball acknowledged that the trusses as designed could not accommodate the construction loads. Even Carney, Kinsley's professional engineer, confirmed that Kimball's roof design was "grossly inadequate." For reasons not discussed in the opinion, instead of suing up the privity chain for breach of contract, Gongloff sued Kimball directly for negligent misrepresentation.

Kimball attempted to obtain an early dismissal of the suit, arguing that Gongloff's claims were barred by the economic loss doctrine. Gongloff countered that its claim against Kimball was governed by the precedent set in *Bilt-Rite Contractors, Inc. v. The Architectural Studio.* In that case, the Supreme Court of Pennsylvania created an exception to the economic loss doctrine by holding that design professionals may be liable to third parties for supplying design information that turns out to be "false."

To fend off a dismissal during the pleading phase of the suit, Gongloff relied on the factual allegations in its complaint that Kimball (1) either explicitly or implicitly represented that the structure could safely sustain all required construction and in situ loads, (2) either explicitly or implicitly represented that normal construction methods could be employed to erect the structure, and (3) supplied false information in the form of its structural design of the project.

The trial court considered the allegations insufficient to establish a claim for negligent misrepresentation and granted Kimball's motion to dismiss. explaining that, to fit within the exception to the economic loss doctrine given in *Bilt-Rite,* a design professional must make a negligent representation that is relied upon by a third party and causes that party economic harm. Since the complaint alleged only that Kimball either "expressly or impliedly" represented that the structure could safely sustain all required construction loads and in situ loads, no specific negligent representation was shown.

While conceding that Gongloff may have suffered an economic loss, the court noted that the firm could not point to an explicit negligent misrepresentation by Kimball that led to the loss. The fact that the design was complex and required further engineering and design by the contractor could not be attributed to any representation by Kimball.

The appellate court, however, reversed the trial court's ruling, holding that Gongloff was not required at the pleading stage to provide details of the faulty design or to single out an express representation by Kimball. It also held that the "actual" misrepresentation was the alleged faulty roof design itself. Finally, the court concluded that *Bilt-Rite* requires only that "information, a rather general term, be negligently supplied by the design professional."

This ruling opens the door to claims by third parties against design professionals, particularly in Pennsylvania. Stated simply, it supports the view that the design itself can be construed as a "representation" that the plans and specifications, if followed, will result in a successful project. If the design is defective and increases the contractor's costs beyond those anticipated, then the architecture or engineering firm may be liable, effectively nullifying the protections afforded by the economic loss rule. **CE**

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