

## Engineer Had No Duty to Warn General Contractor's Employee of Danger

Kent Holland, Esq.

An engineer was not liable for injuries sustained by an employee of a construction contractor where the engineer's contract did not make the engineer responsible for site safety and where the engineer did not take any action in the field to supervise or control the contractor's work or otherwise involve itself in the contractor's safety practices.

In the case of *Hobson v. Waggoner Engineering, Inc.*, 2003 WL 21789396 (Miss. App. 2003), suit was brought against an engineer by the estate of a deceased worker employed by a subcontractor to the general construction contractor. The worker died by drowning in a lagoon that was being built for a wastewater treatment plant, designed by the engineer. The engineer's role during construction was limited to monitoring the progress of the construction work for general compliance with the plans and specifications. Its contract did not give the engineer authority to stop work or issue change orders but required it to make recommendations for approval by the project owner. In contrast, the construction contract gave the contractor full responsibility for site safety.

Allegations by the worker's estate included that the engineer defectively designed the lagoon by making it's the liner sides too slick and its incline too steep to be climbed out of by a worker. The estate also argued that the engineer violated a duty to warn the worker that the steep slides and slick surface posed a danger.

The court held the engineer had no duty to the construction worker because the contract gave the engineer no site safety responsibility and the engineer did not act outside its contractual authority to take on any site safety responsibility. On the issue of the alleged defective design, the court held the engineer could not be found liable in the absence of evidence via expert testimony (which the plaintiff failed to present) that the slope and slickness of the liner was contrary to the standard of care. Although the plaintiff's expert testified that there was insufficient traction for the worker to climb out of the lagoon, he did not testify that any alternative design would have been available or that the engineer did not comply with the standard of care. Without such expert testimony, the issue could not even go to a jury for consideration and a summary judgment was appropriately granted in favor of the engineer by the trial court.

**Risk Management Note:** This decision reaches a reasonable conclusion concerning site safety responsibility by honoring the intent of the contracting parties and recognizing the appropriately restricted role of design professionals during construction. Another case that we reported on last year was the case of *Herczeg v. Hampton Township Municipal Authority and Bankson Engineers*, 766 A.2d 866 (2001). In that case the Pennsylvania Supreme Court held: "We are not persuaded that the rationales expressed in these cases [such as *Carvalho*] warrants the establishment of a new rule of law fastening liability based strictly upon an assertion of actual knowledge of unsafe work-site conditions." "We reject any notion that a duty arises based solely upon an engineer's actual knowledge of dangerous conditions... If someone is under no legal duty to act, it matters not whether that person is actually aware of a dangerous condition... Conversely, if someone by contract or course of conduct has undertaken the responsibility for worker safety that person may still be liable even in the absence of actual knowledge of the dangerous condition if they should have known of the condition."

The factors which would appear to be relevant in any case where an attempt is made to expand a design professional's liability beyond the specific provisions of its contract with the owner include the following:

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 construction site;
4. supervision and coordination of subcontractors;
5. assumption of responsibility for safety practices;
6. authority to issue change orders; and
7. the right to stop the work.

These same factors may be used by courts in evaluating whether the project owner retained sufficient control over the site to be held responsible for site safety. Where an owner does not retain any control over the manner in which the work was performed, and it has no actual knowledge of the danger or condition that resulted in a laborer being injured, it generally has no liability according to the cases reported in this course.

General contractors should also be aware of these factors that are used by the courts, because liability of a general contractor for injuries to employees of subcontractors may be limited to those situations where the general contractor has retained control over the operative details of the subcontractor's work.

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J. Kent Holland, Esq., is an attorney with the law firm of Wickwire Gavin, P.C. and is the publisher and editor of the ConstructionRisk.com Report as well as the construction risk management website: [www.ConstructionRisk.com](http://www.ConstructionRisk.com). He also provides risk management consulting services for the environmental and design professional liability unit of Arch Insurance Group. He has written and spoken extensively on the subjects of construction project risk management and contracts, and has authored several books, including a design professional's contract guide and, most recently, Construction Law & Risk Management. He may be contacted at 703-623-1932 or [Kent@ConstructionRisk.com](mailto:Kent@ConstructionRisk.com).

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