LAW FOR DESIGN PROFESSIONALS

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I. THE OWNER-DESIGN PROFESSIONAL AGREEMENT

A. INTRODUCTION

Major professional societies, such as the American Institute of Architects (AIA), have developed a series of form agreements aimed at protecting the interests of their professional membership. Form agreements such as these have become a standard in the industry. Because many design professionals fail to consult legal counsel before executing these standard form agreements, they fail to understand the legal significance of various contract clauses. In construing the terms and conditions of the standard form or, worse yet, by interlineating new terms and conditions or by deleting existing ones, design professionals generally fail to recognize the far reaching legal significance of their actions. The standard terms and conditions established in AIA Document B141 (1987), Standard Form of Agreement Between Owner and Architect,.

B. BASIC SERVICES

Article 2 of AIA Document B141 (1987) sets forth the scope of the design professional's[1] basic services. These services embrace the usual requirements of the design professional who has contracted directly with the owner. Included in the scope of work are the various phases of professional services: the schematic design phase, the design development phase, the construction documents phase, the bidding or negotiation phase, and the construction phase - administration of the construction contract.

(1) BIDDING OR NEGOTIATION PHASE

The bidding or negotiation phase is a distinct phase of the design professional's basic services. During this phase the design professional helps the owner to obtain bids or negotiate proposals for the construction project. Governmental agencies do not usually place the responsibility of this phase upon the design professional. After the bids are opened and compared and the successful bidder chosen, the contract for construction will be awarded and the construction contract executed by the parties. Before work on a project begins, a preconstruction meeting between the owner, design professional, and contractor is advisable

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[1]AIA Document B141 (1987) does not use the term "design professional," but rather the term "Architect." However, in this text, the term "design professional" has been used to encompass the term "Architect" as well as others that may function in similar capacity.

to provide an opportunity to resolve any preliminary questions, conflicts, or ambiguities regarding the plans and specifications.

(2) CONSTRUCTION PHASE - ADMINISTRATION OF THE CONSTRUCTION CONTRACT - SELECTED AIA DOCUMENT PROVISIONS

Since the design professional's construction phase duties create the greatest potential for liability, this phase has generated the most extensive provisions of Article 2 in AIA Document B141 (1987). Therefore, the following discussion highlights selected AIA Document provisions dealing with contract administration.

(a) Incorporation by Reference (Paragraph 2.6.2, AIA Document B141 (1987)).

In AIA Document B141 (1987), Paragraph 2.6.2 imposes an obligation on the design professional that may prove to be outside the contemplation of the design professional when the owner-design professional agreement is executed. Paragraph 2.6.2. incorporates by reference the obligations of the design professional in AIA Document A201, *General Conditions of the Contract for Construction*. Although AIA Document A201 may simply reiterate most of the requirements of AIA Document B141 regarding the design professional's construction-phase services, the incorporation by reference to the owner-contractor agreement may prove dangerous with regard to the design professional's liability. For example, in *Moore v. PRC Engineering, Inc.*[2] the contract between the owner and the engineer provided that it shall be the sole responsibility of the engineer to guide compliance of all other consultants with respect to their compliance with work performance contracted for with the owner. The engineer alleged that pursuant to the terms of its agreement, it had a duty to the owner to ensure that the owner received what was contracted for, and that it was performing inspection services for that purpose. The contract between the owner and the contractor, however, provided that the engineer will inspect the execution of the work contemplated under the contract, and that when in the judgment of the engineer, the work or materials are being furnished in a manner considered hazardous to persons or property, the engineer shall have the power to stop the work, and that the provision of this clause shall not relieve the contractor for the sole responsibility of any injury or damage that may result. An employee of the contractor who was injured when he fell from a beam brought an action naming the engineer. The court found that the engineer had a duty by virtue of the contract provisions, and by virtue of its inspection services, to ensure that each step of the construction was done in a safe manner, and accordingly, that the engineer could be liable to the injured worker notwithstanding a lack of privity between them. Therefore, by virtue of the incorporation clause in the owner-design professional contract, the design professional was held to have

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[2]Moore v. PRC Engineering, Inc., 565 So.2d 817 (Fla. 4th DCA 1990).

assumed duties assigned to him in the owner-contractor agreement.

(b) Agency (Paragraph 2.6.4, AIA Document B141 (1987)).

In Paragraph 2.6.4 of AIA Document B141 (1987), the architect is placed in an agency relationship with the owner during the construction-administration phase. The design professional, as the owner's agent, has the fiduciary duty to represent the interests of the owner in good faith and with due diligence.

Frequently, the provision on change orders will not specifically identify the person required to sign them. In that case, common law doctrines of agency apply. Obviously, the owner may individually sign any orders. In addition, family members, employees, and members of the owner's organization may have express, implied, or apparent authority to act on the owner's behalf. Unless power is expressly given, however, it has been held that neither architects nor engineers have any inherent power to authorize changes. Likewise, no inherent power rests in the project representative or a state inspector. Although these people have no inherent or implied authority, they may be given apparent authority by the owner's action. For example, by permitting increases and decreases in the contract price with just the signature of the architect, the owner was held to have given apparent authority to the architect to execute change orders.[3]

(c) Inspections. (Paragraphs 2.6.5 and 2.6.6, AIA Document B141 (1987)).

Paragraphs 2.6.5 and 2.6.6 establish the extent of on-site observation or inspection services. The design professional and owner may agree for the design professional to provide for more extensive site representation, but the owner must agree to pay the design professional additional compensation for these services in accordance with Paragraph 3.2. The word supervision is conspicuously absent from these provisions for "basic services" under the construction-phase duties. In fact, Paragraph 2.6.6 clearly states:

> The Architect shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility under the Contract for Construction. The Architect shall not be responsible for the Contractor's schedules or failure to carry out the Work in accordance with the Contract Documents. The Architect shall not have control over or

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[3] Fletcher v. Laguna Vista Corp., 275 So.2d 579 (Fla. 1st DCA), *cert, denied,* 281 So.2d 213 (Fla. 1973).

charge of acts or omissions of the Contractor, Sub-contractors, or their agents or employees, or of any other persons performing portions of the Work.

This language is crucial to protecting the interest of the design professional and to avoiding litigation based upon a duty to "supervise" construction activities. This provision delineates the extent of the design professional's on-site involvement and is facilitated by Paragraph 2.6.7, which provides that the architect shall have access to the work whenever it is in preparation or progress.

(d) Applications for Payment. (Paragraphs 2.6.9, 2.6.10 and 2.6.11, AIA Document B141 (1987)).

Paragraphs 2.6.9, 2.6.10 and 2.6.11 address the design professional's responsibilities for evaluating the contractor's application for payment. The design professional represents "that to the best of the Architect's knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents,". . . and "that the Contractor is entitled to payment in the amount certified." Additionally, Paragraph 2.6.11 permits the design professional to reject nonconforming work. The purpose of these provisions is to prevent the design professional from being liable in situations in which work of inferior quality exists beyond the design professional's "knowledge, information and belief."

(e) Shop Drawings, Changes, and Substantial Completion.(Paragraphs 2.6.12, 2.6.13, and 2.6.14, AIA Document B141 (1987)).

Paragraphs 2.6.12, 2.6.13, and 2.6.14 provide for the design professional's authority to approve shop drawings and other submittal data, to approve minor changes, to prepare change orders and construction change directives, and to determine the dates of substantial completion. All these obligations are subject to the usual criteria governing the architect's standard of performance.

(f) Interpretation of Plans and Arbitration Disputes. (Paragraphs 2.6.15, 2.6.16, 2.6.17, and 2.6.19, AIA Document B141 (1987)).

Paragraph 2.6.15 provides that the design professional will be the interpreter of the construction documents in arbitrating disputes between the owner and the contractor. Paragraph 2.6.16 establishes a standard of interpretation for the design professional and grants "immunity" from liability resulting from faulty interpretations of the construction documents made in good faith. Paragraph 2.6.17 provides that the design professional's interpretations on matters relating to aesthetics will be final and exempt from arbitration. Paragraph 2.6.19 provides for arbitration as a remedy to disputes involving the design professional's decisions.

The provisions in Article 3 of AIA Document B141 (1987) continue to describe the design professional's responsibilities, providing for project representation beyond the basic services, as well as for "additional" services. In agreeing to perform "additional" services, the design professional may be undertaking a standard of performance far beyond that of other design professionals in the ordinary practice of their profession. Consequently, the design professional runs the risk of expanded liability.

II. EXPRESS CONTRACTUAL OBLIGATIONS

A. INTRODUCTION

The authority and responsibility of the design professional affects virtually all parties participating in the construction setting. The design professional enters into a contractual relationship with the owner, thereby assuming authority and responsibility giving rise to liability. In addition, liability to nonclients may be based on such common law theories as third-party beneficiary arising under the contract as well as causes of action sounding in tort, such as negligence, misrepresentation, fraud, and causes of action based upon statutory violations. In many circumstances liability may extend to persons involved in the construction process but not in privity of contract with the design professional. These persons may include developers, contractors, subcontractors, laborers, sureties, and lenders. Liability may also extend to nonconstruction participants, such as condominium unit purchasers, adjoining property owners, and third parties injured as a result of construction defects.

B. ESTIMATES OF CONSTRUCTION COST

Owner-design professional agreements usually require the design professional to make periodic estimates of the construction cost at various specified points during the design phase. Often owners will want to establish explicit cost limitations for the construction project and make them binding upon the design professional. In this scheme if bids are higher than the agreed-upon estimate of cost, taking into consideration any agreed-upon margin of variation, the design professional may be required to redesign the project with no additional compensation to bring it within the budget. Although there are no reported cases on point in Florida, it appears that the language of the contract between owner and design professional would direct the result of a dispute over this issue. In the absence of an agreed-upon project budget, it is likely that courts will hold that the design professional has no obligation to inquire into, or to keep informed of, the client's financial status. Furthermore, a design professional who is not required by contract to design to a budget should be under no duty to inform the owner of the cost of construction. The failure of the design professional to inform in this situation would not be a bar to recovering design professional fees. However, if the owner-design professional agreement provides that a condition of payment is the production of plans and specifications for construction that can be built for a predetermined amount, then payment of the design professional's fees would not be due unless the condition is satisfied.

Finally, if the design professional pursuant to his contract with the owner agrees to produce plans and specifications for construction that can be built for a predetermined amount, then he must either timely provide such plans and specifications or be liable to the owner for consequential damages as a result of his breach of agreement.[4] Consequential damages could include such items as payments made to the design professionals, surveyors, and testing laboratories as well as other reasonably foreseeable costs associated with the preparations for the contemplated construction project.

C. ON-SITE INVOLVEMENT DURING THE CONSTRUCTION PHASE

Supervision provisions have always been a delicate subject with respect to design professional liability. Design professionals have learned to steer clear of the term "supervision." The exact nature of the design professional's supervision duties will turn on the particular facts of each case and the language in the contract. Liability may arise under two situations. The design professional may be liable to the owner for failure of the contractor to comply with the contract documents, or the design professional may be liable to persons injured as a result of his failure to warn of observed defects.

Generally, a design professional is not under a duty to supervise construction.[5] However, if the design professional has contracted with the owner to make periodic inspection visits to the site to familiarize himself generally with the progress and quality of the work and to determine in general if the work is proceeding in accordance with the contract documents, to endeavor to guard the owner against defects and deficiencies in the work of the contractor, but not be responsible for the acts or omissions of the contractor, then the design professional will be liable for defective workmanship if it is demonstrated that he did not make the inspections. However, if the design professional provides the required inspections, but fails to detect the defective workmanship, he will not be liable to the owner.[6]

Where an owner-design professional's contract only obligates the design professional to visit the construction site to verify that construction is in accordance with drawings and specifications, the design professional cannot be held liable to an injured employee of a subcontractor due to a failure of the contractor to comply with required safety regulations.[7]

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[4]Justin Sweet, *Legal Aspects of Architecture, Engineering, and the Construction Process* (4th ed. 1989).

[5]Geer v. Bennett, 237 So.2d 311 (Fla. 4th DCA 1970).

[6]Shepard v. City of Palatka, 414 So.2d 1077 (Fla. 5th DCA 1981).

[7]Vorndran v. Wright, 367 So.2d 1070 (Fla. 3d DCA 1979), City of Miami v. Perez, 509 So.2d 343 (Fla. 3d DCA 1987), Swartz v. Ford, Bacon & Davis Construction Corp., 469 So.2d 232 (Fla. 1st DCA 1985).

However, as the owner's representative, the design professional is charged with the duty to give notice of a dangerous condition known to him but unknown to the independent contractor's employees.[8] Nevertheless, even where a design professional has contracted to provide inspection services for compliance with plans and specifications, he is not liable for injuries to employees of the independent contractor caused by an obviously defective condition if supervisory personnel of the employees were also aware of the condition.[9] Thus the design professional will be prevented from disclaiming liability for construction defects that could have been detected by simple, perfunctory monitoring if he has a contract obligation to do so, or if the defect is obvious to him, and also unknown to the injured party or his supervisory personnel.

A design professional whose contractual duties include the supervision of a construction project is not ordinarily charged with supervision responsibilities for the contractor's disbursements to subcontractors, suppliers, and laborers. Although there are no reported Florida cases directly related to this issue, other Florida cases reported elsewhere in this chapter, are indicative that factors determinative of the design professional's liability are:

(1) The scope of the design professional's undertaking;

(2) compliance with contractual requirements; and

(3) the course of action taken when confronted with problems.[10]

It would follow then, that if the design professional had no contractual obligation to supervise or administer payments to subcontractors and suppliers, then he would not be liable for his failure to observe that payments were not being properly made.[11] Moreover, if the contract provided that the design professional was to monitor the contractor's payments, and the design professional reviewed the documentation including releases of lien and notices to owner, and was not made aware of payment lapses by the subcontractors or suppliers, then

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[8]Horton v. Gulf Power Co., 401 So.2d 1384 (Fla. 1st DCA), *review denied*, 411 So.2d 382 (Fla. 1981).

[9]City of Miami v. Perez, 509 So.2d 343 (Fla. 3d DCA 1987), Horton v. Gulf Power Co., 401 So.2d 1384 (Fla. 1st DCA), *review denied*, 411 So.2d 382 (Fla. 1981).

[10]Justin Sweet, *Legal Aspects of Architecture, Engineering, and the Construction Process* (4th ed. 1989).

[11]MacIntyre v. Green's Pool Service, Inc., 347 So.2d 1081 (Fla. 3d DCA 1977).

likewise, he would not be liable.[12] However, if the design professional knew or should have known that the contractor was not paying bills for materials and labor on work already performed for which the contractor had been paid, the design professional would have a duty to make inquiries and take steps to correct the situation before certifying further payment for work performed.

D. CERTIFICATION FOR PAYMENT TO THE CONTRACTOR

Frequently, the owner-design professional agreement provides for the design professional to approve and certify or to disapprove, as the case may be, the contractor's applications for periodic payment. These requests for payment generally itemize work performed and materials incorporated into the project or stored on-site for a particular payment period. The design professional is obligated to inspect the project site visually prior to approval of these payment requests to ascertain whether the request is an accurate reflection of the status of the project for the payment period.

If the owner relies on the design professional's certification as a basis for payment and if the design professional was negligent in certifying the work performed, the design professional will be liable for damages incurred by the owner. These damages may be offset against compensation due the design professional.

Design professionals may find themselves in the unfortunate position of being liable to a project lender. In one notable case an employee of an engineering firm signed certificates of inspection of the construction work in blank and delivered them to a principal of the contractor-borrower. The court held that the employee knew or should have known that the certificates would be used as evidence of the scope of work completed upon which the lender would rely in making payments to the contractor-borrower. The engineering firm and the employee were liable for an amount representing the total damages incurred by the lender when it was discovered that the office building was not being completed in accordance with payment requests and inspection certificates.[13]

III. IMPLIED OBLIGATIONS

A. INTRODUCTION

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[12] *Cf.* Shepard v. City of Palatka, 414 So.2d 1077 (Fla. 5th DCA 1981) (architect not liable where he made inspections pursuant to contract, but did not detect that the wrong type of drywall was installed).

[13] Barrett, Daffin & Figg, Architects-Planners-Eng'rs, Inc. v. McCormick, 362 So.2d 966 (Fla. 1st DCA 1978), *cert. denied*, 368 So.2d 1362 (Fla. 1979).

In addition to duties expressly provided for in the contract, other implied obligations will be imposed on the design professional. These implied obligations include compliance with building and zoning codes and observance of standards of performance coextensive with the level of knowledge, ability, and diligence reasonably attributable to other design professionals in the community at the time.

B. COMPLIANCE WITH BUILDING AND ZONING CODES

The design professional is required to comply with local building and zoning codes. A design professional who undertakes to situate a proposed construction at a particular site, pursuant to a plot plan, must do so according to applicable zoning ordinances and restrictive covenants.[14] Furthermore, one Florida court has held that a design professional who designs a building not in conformity with building and zoning codes or similar local ordinances will be liable in both contract and tort for breach of the duty of care owed to a client. Liability will extend to all damages proximately caused by the breach.[15] A design professional who reasonably relies on the advice of the owner's attorney about the applicable codes will, however, be relieved of liability.[16]

C. STANDARDS OF PERFORMANCE

Standards of performance by the design professional have common law roots, but they may be amplified by terms specifically agreed upon by the parties to the owner-design professional contract. The common law standard requires that the design professional exercise and apply his professional skill, ability and judgment in a manner which is reasonable and without neglect,[17] insure that the plans and specifications comply with the applicable building codes for the area where the structure is to be built,[18] and that all of his work be performed in compliance with recognized standards of good practice in his profession in the same locality at the same time.[19]

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[14]Robsol, Inc. v. Garris, 358 So.2d 865 (Fla. 3d DCA 1978), Edward J. Seibert, AIA, Architect and Planner, P.A. v. Bayport Beach and Tennis Club Assoc., Inc., 573 So.2d 889 (Fla. 2d DCA 1990), *reh'g denied* (1991).

[15]Robsol, Inc. v. Garris, 358 So.2d 865 (Fla. 3d DCA 1978); Edward J. Seibert, AIA, Architect and Planner, P.A. v. Bayport Beach and Tennis Club Assoc., Inc., 573 So.2d 889 (Fla. 2d DCA 1990), *reh'g denied* (1991).

[16]Krestow v. Wooster, 360 So.2d 32 (Fla. 3d DCA 1978).

[17]Shepard v. City of Palatka, 414 So.2d 1077 (Fla. 5th DCA 1981).

[18]Atlantic National Bank v. Modular Age, Inc., 363 So.2d 1152 (Fla. 1st DCA 1978).

[19]Hutchings v. Harry, 242 So.2d 153 (Fla. 3d DCA 1970), *reh'g denied* (1971).

Beyond this common law duty the owner-design professional agreement may require a higher standard of care, or the design professional may create expanded liability beyond the contract by conduct that demonstrates an assumption of quasi-contractual obligations. For example, when the owner-design professional agreement is silent about the construction-phase duties of the design professional, the design professional's appearance at the site to observe, inspect, or supervise the construction may constitute an assumption of quasi-contractual obligations, as well as tort liability for any failure to perform the assumed functions in a reasonable manner.

However, when the design professional performs or fails to perform services at the owner's request that are not obligations under the contract and are not ordinarily imposed by custom, trade or practice in the community, the design professional's liability is limited. In one case an owner sought damages against the design professional for negligence in performing a variety of services that were not a part of the owner-design professional contract. The owner alleged that the design professional negligently advised on the selection of the general contractor, negligently advised on the proper party to receive progress payments and the appropriate time to make progress payments, and failed to record a notice of commencement under the construction lien statute. The court reasoned that because the contract placed none of these duties on the design professional and because the construction lien statute placed the burden of recording and posting a notice of commencement on the owner, the design professional was not liable to the owner. The court emphasized that none of these duties fell within those ordinarily assumed by, or placed on, a design professional by custom and practice.[20] If there had been a showing that these duties fell within those ordinarily assumed by, or placed upon, the design professional by custom, trade, or practice, a different result probably would have been reached.

IV. THEORIES OF LIABILITY AND DEFENSES

A. INTRODUCTION

If the design professional fails to perform his duties properly, he can be held liable to a number of people under several different theories. These theories include breach of contract, negligence, strict liability, third-party beneficiary, negligent misrepresentation, impropriety as an arbitrator, and vicarious liability. The design professional does not, in the absence of a specific agreement, guarantee that his work will produce the results the owner intended. Florida has rejected the "continuous treatment" doctrine to toll the statute of limitations while corrective measures are being performed.

B. BREACH OF THE OWNER-DESIGN PROFESSIONAL CONTRACT

The owner-design professional agreement enumerates the contractual duties of the

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[20] MacIntyre v. Green's Pool Service, Inc., 347 So.2d 1081 (Fla. 3d DCA 1977).

parties. A design professional who fails to perform these duties will be liable to the owner for breach of contract, which is the subject of this section. In addition, a design professional who fails to use due care in the performance of these contractual duties may be liable to the owner or to third parties for negligence. Tort liability is the subject of Section 5.05(b).

The owner-design professional agreement usually stipulates the essential contractual provisions - the scope of work to be performed, the time for performance, and the amount of compensation. Accompanying these express provisions is the implied obligation of the parties to act in good faith. As with any contractual arrangement, the failure of either party to perform an obligation arising under the contract will constitute a breach.

Owing to the nature of a professional service business, it is difficult to substantiate the design professional's failure to perform, since some level of performance is usually rendered. Likewise, during the design phase of any project, an owner who wants to have the project completed on schedule is in no position to fail to perform.

In the event of a breach, however, damages would be limited to those that were a reasonably foreseeable result of the breach at the time the contract was made. Damages may be awarded for losses that are the "natural" result of the breach ("general damages") and for those that are the result of reasonably foreseeable special circumstances ("special damages").[21]

With the exception of actions for compensation for past due services brought by the design professional against the owner, most owner-design professional contract disputes are based on the failure of the design professional to exercise a duty of care in the performance of contractual obligations. Although failure to exercise this duty of care is a component of negligence, it is also a breach of contract, and recent cases have emphasized that damages for economic losses are available outside of contract breach only under very limited circumstances.[22]

C. NEGLIGENCE

The law imposes upon individuals certain standards of conduct, such as the standard that an individual's actions must not cause injury to others. These standards, formulated through the development of tort law, constitute the concept of "duty." Standards imposed by tort law vary in response to the activity in which the individual is engaged. Therefore, design professionals who are acting in a professional capacity will be held to have a duty not only to

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[21]RESTATEMENT (SECOND) OF CONTRACTS § 351 (1979).

[22]Bay Garden Manor Condominium Assoc., Inc. v. James D. Marks Assoc., Inc., 576 So.2d 744 (Fla. 3d DCA), *reh'g denied* (1991); City of Tampa v. Thornton-Tomasetti, P.C., 646 So.2d 279 (Fla. 2d DCA 1994).

exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability.[23]

A design professional whose conduct does not meet a reasonable standard of care and causes injury to third parties will be held liable for negligence. The general rule is that the design professional is under a duty to exercise the degree of reasonable care, technical skill, ability, and diligence that is ordinarily required of design professionals in the course of their preparation of plans, inspections, and supervision toward any person who foreseeably and with reasonable certainty might be injured by their failure to do so.[24] Tort liability, therefore, extends to third parties when it is reasonably foreseeable that they may be injured by the failure of the design professional to exercise due care.

However, as a general rule tort liability arises only when persons suffer physical injury or damage to their property. In contrast, solely economic losses cannot be recovered in an action for malpractice based upon tort liability. When a plaintiff seeks damages for "commercial expectations," the actionable claim is limited to those parties with whom the plaintiff has a contract or other contractual remedy.[25]

As previously indicated, duties above and beyond the common law duty to use reasonable care can arise contractually. When a design professional contracts with an owner to provide specialized services during construction, many courts have held that the design professional's duty of care includes an affirmative duty to protect third parties from foreseeable risks arising from the occurrence of conditions that the design professional is obligated to prevent.[26] By undertaking such a contractual obligation to an owner, a design professional may be assuming a duty of care beyond that ordinarily required of like professionals similarly situated. This duty of care extends to third parties who are reasonably foreseeable plaintiffs.

D. STRICT LIABILITY

Strict liability is a theory that is rarely used to impose liability on the design professional, since courts have been reluctant to hold the design professional strictly liable for defects in the completed construction. This result may be due to the fact that in construction cases, liability arises from design defects, construction defects, or a combination of both. Since it is difficult to classify a particular defect as a design defect or a construction defect because of the myriad

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[23]Miriam Mascheck, Inc. v. Mausner, 264 So.2d 859 (Fla. 3d DCA 1972).

[24]Geer v. Bennett, 237 So.2d 311 (Fla. 4th DCA 1970).

[25]Casa Clara Condo. Assoc., Inc. v. Charley Toppino and Sons, Inc., 620 So.2d 1244 (Fla. 1993). *But see* A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla.), *reh'g denied* (1973).

[26]Geer v. Bennett, 237 So.2d 311 (Fla. 4th DCA 1970).

of intervening circumstances possible in construction projects and because the design professional does not have the same control over the end product as a manufacturer, public policy reasons for creating strict liability for manufacturers or sellers of products are not present. Therefore, Florida courts have not imposed strict liability standards upon design professionals in cases related to improvements to real estate.[27]

E. LIABILITY UNDER THIRD-PARTY BENEFICIARY THEORIES

Third-party beneficiary claims are available when an intended beneficiary can be shown to exist. Many losing arguments are formulated around incidental beneficiaries for which no cause of action accrues in the construction setting. The concept of intended beneficiary is strictly construed. Most courts follow the *Restatement (Second) of Contracts* rule:

> If recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties, and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or, (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance, . . .

then the beneficiary of the promise is an intended beneficiary.[28] Nevertheless, as indicated in Section 5.05(b), generally, there is no liability to third parties for economic losses, and recovery for physical injury or damages to other property may be available under this theory only if the design professional expressly undertakes such a duty in the owner-design professional agreement.[29] However,

> . . . it is not essential to the creation of a right in an intended beneficiary that he be identified when the contract containing the promise is made.[30]

F. LIABILITY FOR NEGLIGENT MISREPRESENTATION

Design professionals may be liable to any third party whom they could reasonably expect to rely on their assertions or plans and specifications. The resulting cause of action usually appears in situations in which unforeseen conditions develop during construction that

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[27] Easterday v. Masiello, 518 So.2d 260 (Fla. 1988).

[28] RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979).

[29] A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla.), *reh'g denied* (1973).

[30] RESTATEMENT (SECOND) OF CONTRACTS § 308 (1979).

have not been accurately reflected in the design professional's drawings or specifications. When a design professional's drawings are found to contain erroneous information that was intended for use by a third party, the third party has a cause of action for negligent misrepresentation.[31]

G. LIABILITY OF THE DESIGN PROFESSIONAL AS ARBITRATOR

Frequently, the owner-contractor agreement or the owner-design professional agreement provides that the design professional will act as an arbitrator to interpret the contract documents and decide matters concerning performance.[32] Such a provision serves to cloak the design professional with "quasi-judicial immunity." Notwithstanding the fact that the design professional has been selected and employed by the owner, in the absence of fraud or bad faith of the design professional with respect to his determination, it is to be accepted as final and conclusive.[33] Although not addressed by Florida courts it follows that absent bad faith the design professional will not be liable to the owner or the contractor for making a decision that has an adverse impact on either of them. The rationale for this view is based on public policy - the need to provide the design professional with safeguards similar to those enjoyed by other quasi-judicial officers when the design professional acts as an arbitrator in resolving disputes between the owner and the contractor. Under this rule a design professional acting as an arbitrator will not be liable for interference with the contractor's performance of the owner-contractor agreement even if the design professional recommends the contractor's termination.[34]

There is no immunity, however, for design professionals who go beyond the bounds of their duties. Courts hold that an arbitrator has a duty, express or implied, to make reasonably expeditious decisions. When action or inaction can fairly be characterized as delay or failure to decide rather than as decision-making (good or bad), the design professional, by losing any resemblance to a judge, loses any claim to immunity. The design professional has simply defaulted on a contractual obligation to both parties.[35] Therefore, quasi-arbitrator immunity is qualified by a requirement of "reasonable promptness."

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[31] Geer v. Bennett, 237 So.2d 311 (Fla. 4th DCA 1970).

[32] *See* AIA Document A-201, §§ 4.3.2, 4.4.1, 4.4.4 (1987); B141 §§ 2.6.15 through 2.6.19 (1987).

[33] May v. Arnold Constr. Co., 78 So.2d 705 (Fla.), *reh'g denied* (1955).

[34] Justin Sweet, *Legal Aspects of Architecture, Engineering, and the Construction Process* (4th ed. 1989).

[35] Justin Sweet, *Legal Aspects of Architecture, Engineering, and the Construction Process* (4th ed. 1989).

H. LIABILITY OF THE DESIGN PROFESSIONAL FOR EMPLOYEES AND CONSULTANTS

Under the theory of vicarious liability, the design professional may be imputed with liability based on the negligent acts of its employees or consultants. The relationship of employer to employee gives rise to the doctrine of *respondeat superior*. The doctrine of *respondeat superior* provides that all acts within the scope of an agent's employment or impliedly possessed by him by virtue of his representative character are binding upon the principal.[36] Under the traditional employer-employee relationship, the employer determines both the manner and method in which the work is to be done, as well as the time and tenure of service.[37]

Often a design professional will hire consultants from various disciplines, such as structural engineers, civil engineers, mechanical engineers, and electrical engineers, to complete specialized tasks. Consultants to the design professional are generally considered independent contractors, and an employer is generally not liable for the negligent acts of an independent contractor because he lacks control over the manner in which the work is performed.[38] A consultant will be considered an independent contractor if he,

> . . . contracts to do certain work according to his own methods, and without being subject to the control of his employer except as to the product or result of his work. The difference between an independent contractor and [an employee] is well recognized, the chief distinction being the right of control over the work.[39]

However, when duties of the design professional are nondelegable, the design professional will be liable for the acts of his consultants.[40] Ordinances, such as building codes, usually create nondelegable duties of compliance. The *Restatement (Second) of Torts*, Section 424 provides that an individual who is required by ordinance, such as a building code, to take precautions for the safety of others is liable to those protected for harm caused by the failure of a contractor employed by that individual to provide required safeguards or

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[36] Reese v. Levin, 168 So. 851 (Fla. 1936).

[37] City of Boca Raton v. Mattef, 91 So.2d 644 (Fla.), *reh'g denied* (1956).

[38] Fisherman's Paradise, Inc. v. Greenfield, 417 So.2d 306 (Fla. 3d DCA 1982).

[39] Wilson v. Sandstrom, 317 So.2d 732 (Fla.) *reh'g denied* (1975); *cert. denied*, 423 US 1053 (1975); *see also* RESTATEMENT (SECOND) OF AGENCY § 220 (other criteria for determining independent contractor status.

[40] Atlantic National Bank v. Modular Age, Inc., 363 So.2d 1152 (Fla. 1st DCA 1978).

precautions.[41] Similarly, the duty of care is nondelegable when the work is "inherently dangerous."[42]

(I) NO GUARANTEE AGAINST DEFECTS IN THE CONSTRUCTION DOCUMENTS.

Unless specifically agreed upon in the owner-design professional contract, the design professional does not guarantee that his drawings and specifications will produce the result that the owner intended. Furthermore, a contract obligation of the design professional to furnish construction observation services to "assure conformity with the plans and specifications" does not create such a guarantee on the part of the design professional.[43]

In their contracts of employment, design professionals imply that they possess the necessary competence and ability to furnish plans and specifications prepared with a reasonable degree of technical skill. Design professionals must possess and exercise the care of those ordinarily skilled in the business, but in the absence of a special agreement, are not liable for fault in construction resulting from defects in the construction documents since they do not imply or guarantee perfect plans or satisfactory results.[44] Thus, a design professional is liable only for failure to exercise reasonable care, technical skill and ability, and diligence as are ordinarily required of design professionals in the course of their plans, inspections and supervision during the construction.[45] However, at least one court has found the design professional liable for failure to provide the owner with plans and specifications that could be used to construct a structure fit for its intended purpose pursuant to the contract. The owner-design professional agreement provided that the design professional would furnish plans as required by the City of Tallahassee as a prerequisite to the issuance of a building permit. Payment to the design professional was conditioned on the issuance of a building permit. The design professional furnished plans, but the owner determined that they were unworkable. There was evidence presented at trial that the plans would not meet the City's ordinances, and the court ruled that to be in essence an admission by the design professional of his failure to

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[41] Bialkowicz v. Pan American Condo. No. 3, Inc., 215 So.2d 767 (Fla. 3d DCA), *reh'g denied* (1968), *cert. denied*, 222 So.2d 751 (Fla. 1969).

[42] Bialkowicz v. Pan American Condominium No. 3, Inc., 215 So.2d 767 (Fla. 3d DCA), *reh'g denied* (1968), *cert. denied*, 222 So.2d 751 (Fla. 1969); Fisherman's Paradise, Inc. v. Greenfield, 417 So.2d 306 (Fla. 3d DCA 1982).

[43] Lee County v. Southern Water Contractors, Inc., 298 So.2d 518 (Fla. 2d DCA), *reh'g denied* (1974); Bayshore Dev. Co. v. Bonfoey, 78 So. 507 (Fla. 1918).

[44] Bayshore Dev. Co. v. Bonfoey, 78 So. 507 (Fla. 1918), Lee County v. Southern Water Contractors, Inc., 398 So.2d 518 (Fla. 2d DCA), *reh'g denied* (1974).

[45] Geer v. Bennett, 237 So.2d 311 (Fla. 4th DCA 1970).

satisfy the condition entitling him to payment of his fee.[46]

Many times, especially when the design professional does not have a construction administration contract on the project, the resulting structure may not completely conform to the construction documents (the drawings and specifications) through no fault of the design professional. Without the opportunity or the obligation to oversee the progress on the job, the design professional essentially has no control to assure that the work conforms to the drawings and specifications. As a general rule, the contractor or a subcontractor may not alter performance with respect to the drawings and specifications and then recover from the design professional when the resulting construction is deficient or defective.[47]

If the contractor is required to build according to the owner's drawings and specifications, the contractor will not be responsible for defects in the plans and specifications.[48] Hence the economic realities of the situation direct liability to the design professional, who, although not the guarantor of the drawings and specifications, is under a duty to exercise due care in the performance of professional obligations.[49]

J. EFFECT OF THE STATUTE OF LIMITATIONS

Florida has enacted a statute of limitations with regard to the liability of the design professional.[50] The question of when the statute tolls is always an issue. The statute provides that the duration for filing an action founded on design, planning, or construction of an improvement to real property is four years, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer, whichever date is latest (Start Date); except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event the action must be commenced within 15 years of the Start Date. The determination of whether a defect is latent is not whether the object itself was obvious to the owner, but whether the defective nature of the object was obvious to the

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[46]Maritime Constr. Co., Inc. v. Benda, 262 So.2d 20 (Fla. 1st DCA 1972).

[47]Montgomery Indus. Internat., Inc. v. Southern Baptist Hosp. of Florida, Inc., 362 So.2d 145 (Fla. 1st DCA 1978).

[48]United States v. Spearin, 248 U.S. 132 (1918); Phillips & Jordan, Inc. v. State DOT, 602 So.2d 1310 (Fla. 1st DCA 1992).

[49]Lee County v. Southern Water Contractors, Inc., 398 So.2d 518 (Fla. 2d DCA), *reh'g denied* (1974).

[50]§ 95.11, Fla.Stat. (1995).

owner.[51]

Another issue is whether continuous treatment of defects by the design professional forestalls the running of the statute of limitations. The Florida Supreme Court has held that the "continuous treatment" doctrine was not applicable and the statutory period continued to run while an architect ineffectively attempted to correct a construction defect resultant from his negligent design.[52]

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[51]Kala Investments, Inc. v. Sklar, 538 So.2d 909 (Fla. 3d DCA) *reh'g denied* (1989).

[52]Kelley v. School Board of Seminole County, 435 So.2d 804 (Fla. 1983).