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BUT I DIDN'T HAVE A CONTRACT WITH THEM, SO HOW CAN I BE LIABLE?

By Erik Rosenwood

One of the questions we are most often asked is "But I didn't have a contract with [the GC, the masonry sub, whomever], so how can I be liable?"

Unfortunately, the law presumes duties between various parties to a construction project, even if those individuals do not have a formal contractual relationship. The theory is basically one of "with great power comes great responsibility", and the idea that the person who was best situated to prevent a problem ought to be the one responsible for it when it occurs.

Prior to 1979, architects were generally shielded from liability to those the architect did not contract with - sometimes referred to as the "wall of privity" or that an architect could not be sued in the "absence of privity." However, two seminal cases in 1979 partially lowered the privity shield: Shoffner Industries, Inc. v. W. B. Lloyd Construction Co. 42, N.C. App. 259, 257 S.E. 2d 50 (1979) and Davidson and Jones, Inc. v. County of New Hanover 41 N.C. App. 661, 255 S.E. 2d 580 (1979).

In Shoffner, the Court of Appeals held that a contractor could recover from an architect for

any costs resulting from the architect's negligence even though not in privity with that architect. Shoffner involved a claim by a contractor that the architect had negligently approved faulty roof trusses in the construction of a school. In allowing the claim, the Court of Appeals held that "[t]he law imposes upon every person who enters upon an active course of conduct the positive duty to use ordinary care so as to protect others from harm. A violation of that duty is negligence."

Davidson, which involved the construction of a law enforcement center in Wilmington, included claims against the architect and against the geotechnical engineers who had investigated subsurface soil conditions. The claims arose from damage to the neighboring library, which was apparently damaged when soil shifted at the construction site. The Court of Appeals repeated the language, above, about architects, and also held that "[a] surveyor or civil engineer is required to exercise that degree of care which a surveyor or civil engineer of ordinary skill and prudence would exercise under similar circumstances, and if he fails in this respect and his negligence causes injury, he will be liable for that injury."

The following year, in Quail Hollow East Condominium Association v. Donald J. Scholz Company, 47 N.C. App. 518, 268 S.E. 2d 12 (1980). Quail Hollow involved damages to a condominium complex resulting from problems with the underground water pipe system.

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In Quail Hollow, the Court of Appeals took this responsibility even further, holding that the architect could be sued in negligence not only by the other parties to the construction project, but also by future homebuyers or condominium purchasers. The Court held that “[t]he duty to protect others from harm arises whenever one person is by circumstances placed in such a position towards another that anyone of ordinary sense who thinks will at once recognize that if he does not use ordinary care and skill in his own conduct with regard to those circumstances, he will cause danger of injury to the person or property of the other.” Because of this “common-law duty”, a design professional could be held liable in negligence to virtually *any* foreseeable plaintiff who might be injured by the design professional’s acts.

To this day, the courts continue to analyze the scope of the duties of the various participants to a construction project and to expand the scope of those duties to potential plaintiffs. As recently as April 17, 2007, in the case of Lord v. Customize Consulting Specialty, Inc., 643 S.E.2d 28 (2007), the Court of Appeals revisited this issue, this time in the case of a subcontractor who had supplied defective trusses to a general contractor on a residential project.

In Lord, the homeowners, approximately 3 years after closing on their house, sued the general contractor alleging various defects which had allowed the house to sag. The contractor, in turn, filed a claim against the manufacturer of the trusses used in construction of the residence. At the completion of the jury trial in this matter, the jury found in favor of the contractor and therefore awarded no damages to the homeowners from the contractor.

However, the jury returned a verdict against the manufacturer of the trusses in the amount of \$42,000, to which the court added prejudgment interest and court costs.

The truss manufacturer appealed, arguing that the claim should be barred as the homeowners should be limited to suing the party they had a contract with (the general contractor) and not the supplier, who had no contract with the homeowners. The Court of Appeals disagreed, and affirmed the jury’s award.

So what can a design professional do to limit his exposure to parties with which he has no contract? While there is no easy answer to this question, one possible solution is to carefully define the scope of work the design professional performs on the project, thereby limiting the duties the design professional may be held to owe to others on that project. Ultimately, however, negligence claims cannot be completely prevented, only handled in an expeditious, efficient and careful manner to limit potential exposure. And, as always, make sure you have a document retention and file management policy in place so you have the proof to back up the good work done during the contracting process.

Contact your claims professional or outside counsel for more information on contract drafting and negotiation, and what to do when a claim of disputed work arises.

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