



GUEST ESSAYS

I'm Not Responsible for Site Safety, Right?

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A construction worker enters a trench 13 feet deep. No trench box is used, nor is any other sheeting or shoring system. The ensuing developments are certainly tragic. The trench collapses and the worker is fatally injured. Lawsuits follow naming numerous parties as defendants including the design engineer. The attorney representing the engineer argues that the professional services contract includes a provision, which states, in part, "The Engineer shall neither have control over or charge of, nor be responsible for, safety precautions or programs in connection with the construction of the project." Yet even with this seemingly clear contractual language, the case proceeds through the court system and ends with the state Supreme Court issuing a decision that the engineer owed a duty to the deceased worker.

We've all heard attorneys state that, "bad facts make bad law". Well this certainly proved true in New Jersey when, in May 1996, the New Jersey Supreme Court issued its ruling in the now infamous (at least in New Jersey) Carvalho case which was based on the scenario described above. The case arose out of a fatal accident when a construction worker, (Carvalho), an employee of a subcontractor on a municipal sewer project, was killed when the walls of a deep trench in which he was working collapsed.

At first glance, the Supreme Court decision appeared to expand the scope of an engineer's duty when working on site during the construction phase of a project and the engineering community in New Jersey was greatly concerned about the ramifications of this decision. However, after extensive analysis, it became clear that the decision basically confirmed the law, as it existed in New Jersey at the time as well as the risk management advice and guidance offered to design professionals by professional liability experts for many years.

While this decision was rendered in New Jersey and may or may not have far reaching implications across the country, an analysis of the specific facts of this case, the basis upon which the Supreme Court reached its decision and the resulting legislation that was recently enacted provide another interesting chapter in the continuing saga of the role and responsibility of design professionals for construction site safety, and offers risk management guidance for design professionals based on widely accepted practices.

In order to put the context of the Supreme Court's into perspective it is important to note the chain of events as this case proceeded through the New Jersey courts. At the trial level, the engineer was successful in its motion for summary dismissal based upon the argument that it had no duty for safety on the project due to the fact that the contractor, not the engineer, was contractually responsible for site safety conditions. On appeal, the Appellate Division, in January 1995 issued its ruling reversing the trial court's decision that the engineer was entitled to summary judgment. Certification was granted by the Supreme Court the case was argued on October 23, 1995 and was decided on May 6, 1996. On behalf of the engineer, several professional organizations filed Amicus Briefs supporting the position that the engineer owed no duty. In spite of these efforts, the Supreme Court ruled against the engineer and affirmed the Appellate Court's decision.

The facts of this specific case are paramount in understanding the scope of the court's decision, and offer a significant lesson in do's and don'ts for engineers working on site. Although the engineers contract with its client, (a municipality), was very clear that it was not to have control over or charge of construction means, methods, techniques, sequences or procedures or for safety precautions or programs in connection with the work since these were solely the responsibility of the contractor, and the general

contractors agreement with the municipality specified that the contractor shall be responsible to the Township for the acts and omissions of its employees, subcontractors and their agents and employees, the Supreme Court relied upon the following facts in reaching its decision against the engineer:

- The engineer was required by its contract to have an inspector at the site everyday, full-time, to monitor the progress of the work
- The engineer's contract with the owner incorporated by reference both the New Jersey Construction Safety Code and OSHA
- The engineer's agreement with the municipality required the engineer's full-time on site representative, "to ensure the work is being performed in accordance with the requirements of the contract documents" (e.g. OSHA)
- The engineer's agreement gave the engineer the authority to stop the work of the contractor
- The engineer's site inspector had actual knowledge that trenches in other areas of the site had collapsed several times previously during the project
- The engineer even had actual knowledge of an unstable condition at a point 200 yards from the location of the collapse at issue because a trench had collapsed there only a week earlier
- The engineer's inspector was aware of the condition in the trench at issue, he actually witnessed the accident

The Supreme Court, in rendering its decision, relied upon the connection between the engineers contractual responsibility, its scope of services, and its on site activities as well as the degree of actual knowledge of the dangerous site conditions and its ability to foresee and control the risk of harm. In its opinion, the Court offered commentary worth noting. The Court commented, "The connection between the engineer's responsibilities over the progress of work and safety measures at the job site is relevant in determining whether it is fair to impose a duty of care addressed to work site safety conditions. The record thus strongly indicates that if safety conditions could affect work progress, the engineer had the authority and control to take or require corrective measures to address safety concerns." The Court in its commentary here is not ignoring the contractual undertaking of the engineer, but rather evaluating the specific role of the engineer as a whole.

In its evaluation of the awareness by the engineer of a dangerous site condition is a factor in determining whether a legal duty is owed, the Court ruled that, "The actual awareness or knowledge of the risk or harm is also significant in determining that fairness in imposing a duty of care. The record combined with all inferences favorable to the plaintiff supports a factual finding that the engineer in fact knew of the danger.... The existence of actual knowledge of an unsafe condition can be extremely important considering the fairness in imposing a duty of care."

In its conclusion, the Court commented, "We conclude that considerations of fairness and public policy require imposing a duty on the engineer to exercise reasonable care to avoid the risk of injury on the construction site. The risk of serious injury from the collapse of an unstable trench was clearly foreseeable. The engineer had explicit responsibilities to have a full-time representative at the construction site to monitor the progress of the work, which implicated work-site conditions relating to worker safety." The Court continued, "The engineer had sufficient control to halt work until adequate safety measures were taken. There was a sufficient connection between the engineer's contractual responsibilities and the condition and activities on the work site that created unreasonable risk of serious injury. Further, the engineer, through its inspector, had actual knowledge of the dangerous condition. In sum, the engineer had the opportunity and was in a position to foresee and discover the risk of harm and

to exercise reasonable care to avert any harm. Under these circumstances, we hold that the engineer and its inspector had a duty of care to the decedent."

It is very important to distinguish that the very specific factual setting of the Carvalho case resulted in the Court's ruling as opposed to a reading of the decision that the courts are attempting to expand the responsibility of design professionals by their mere presence at the site during construction. The courts in New Jersey and other states as well as on the federal level have ruled in favor of design professionals based upon more favorable factual settings. The decision in the Carvalho case and the contrary result in many other cases around the country confirm the risk management guidance offered to design professionals when rendering services on site.

The advice that has consistently been offered to design firms states that a design professional on site is obligated to take action when he or she observes and recognizes a dangerous condition that is capable of causing physical harm to a worker or other party. In those situations where the threat to safety is so imminent immediate action is prudent. This response does not create a duty to further monitor the situation, to investigate the site for other dangerous conditions or impose upon or infer the assumption by the design professional of the contractors contractually assumed responsibility. The professional liability industry has long commented that a design professional may be held responsible for construction site safety when the design professional, 1) explicitly assumes by contract responsibility for site safety; 2) has actual knowledge of an unsafe condition and fails to take appropriate action, or; 3) undertakes definitive actions at the project site during construction implicating responsibility for site safety thus superseding any contractual agreement to the contrary.

Subsequent to the Carvalho decision however, many engineering professionals in New Jersey became very concerned with the impact the decision could have on their liability for injuries to construction workers. Legal experts in New Jersey have argued on both sides of the potential liability impact issue. Some argued that the ruling will increase the number and magnitude of claims against design professionals and that it signifies a trend by the courts in New Jersey to expand the design professional's legal responsibility. Others argued that that case does not impose any more responsibility and merely mirrors New Jersey law, as it existed.

Nevertheless, and in response to their growing concerns, a coalition consisting of the major engineering professional societies formed a committee to develop a legislative remedy to the Carvalho ruling. After nearly three years of effort, and a failed attempt at a workers compensation immunity statute, similar to that which has been enacted in a number of other states, the coalition was successful in obtaining some level of legislative relief when Governor Whitman, in May 1999, signed into law a statute entitled, **An Act Concerning the Liability of Professional Engineers in Certain Circumstances**. The law, which is purported to be a "codification" of the Carvalho decision, reads in relevant part as follows:

A professional engineer or firm shall only be liable for any injury on a construction project or site resulting from a breach or disregard of construction safety standards or practices on the construction project or site...if:

1. The professional engineer or firm has by written contract expressly assumed, to the extent stated therein, responsibility for the implementation, discharge, or monitoring of safety standards or practices; or
2. In a multi-prime project, the professional engineer or firm is the representative of the project owner and no contractor has been designated to be responsible for site safety; or

3. It is shown that:

1. The professional engineer or firm, including its employees or representatives, was present at the portion of the project or site for which the engineer has provided services prior to or at the time of the accident, or both; and
2. The professional engineer or firm, including its employees or representatives, had actual knowledge of the site conditions which are alleged to be a cause of an imminent danger; and
3. The professional engineer or firm, including its employees or representatives, had the opportunity to notify the responsible contractor and worker of the presence of the site conditions which are alleged to be a cause of an imminent danger, and failed to do so within a reasonable period of time. If that notice is provided, and the contractor fails to respond within one business day, the engineer of firm shall immediately provide that notice to the project owner.

A literal reading of this statute says that there is **NO** liability on the part of the engineer **EXCEPT** in the three enumerated situations. Additionally, and most significantly, all liability of the engineer **CEASES** upon meeting the conditions set forth in section c. (3). Although this statute by no means affords the level of protection that a complete immunity law would, achieving a clear understanding of this law can be a very useful tool in assisting design professionals in managing the risks associated with construction site safety.

So the next time you ask, Am I responsible for construction site safety, all you have to do is look at the recent developments in New Jersey for useful risk management guidance.

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