Et Tu, Design-Builder? The Importance of a Zealous Defense of Ohio Design Professionals

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As the old saying goes, Rome was not design-built in a day. In fact, most historians agree that Rome reached its architectural peak in the second century A.D., a whopping 800 years after the start of construction (*force majeure* assumed). While the design-build projects of today may not necessarily require Roman scale or grandiosity, construction professionals still perform on large commercial stages alongside enormous supporting casts as well as many competing interests, demanding schedules, unforeseen limitations, and ever-changing directions.

Of course, this delicate balance is at the heart of nearly all construction litigation in Ohio. But when it comes to defending architects and engineers, the multifaceted nature of a design-build project is far too often exploited in order to justify meritless attempts to transfer the risk of loss. Indeed, it has become commonplace to defend our design professional clients against questionable contract, negligence, and indemnity claims, particularly when contractual privity or an alleged design failure does not exist. Far too often, the operative facts that give rise to the litigation arise in installation or even post-construction, long after a design professional would have performed work or administered oversight.

So, why are design professionals frequently exposed to liability? I tend to assume that claimants are generally aware that many of our state trial courts are not readily equipped to handle a complex, commercial docket, which often results in lengthy litigation or inconsistent rulings. Even so, the reality is that many design professionals are subject to self-insured retention or a high deductible before any policy coverage is activated. Not to mention the typical procedural mayhem involved in construction litigation is enough to make the client's, the insurer's, and the judge's head spin.

As such, the risk assessment can weigh in favor of resolution regardless of the merits: a design professional can either make a proportional contribution to the overall multi-party settlement pot in exchange for dismissal or must otherwise expend similar if not greater costs on a defense that could entail untangling a web of crossclaims or drilling down into derivative actions that reach depths as deep as Fifth or even Sixth-Party complaints.

Due to the considerations, there will always be cases where it makes the most sense to reach a settlement for your client as early in the process as practical. But not in all cases. From recent experience, the best path forward for our clients has been through trial. A sword is as good as a shield, if we are still indulging in my loose Roman metaphor.

Frankly, the marked increase in construction litigation that arose out of the disruptive 2020 pandemic does not appear to be slowing down. Fractured supply chains, inflation, and rate hikes still exist, all of which can contribute to a disruption in a design-build project.

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Moreover, an aggressive defense strategy is readily available because Ohio law is on the side of the design professional. Accordingly, perhaps the most practical way to hamper the proliferation of unsupported claims or for securing the design professional's dismissal in a multi-party-multi-action dispute is through our continued pursuit of obtaining well-reasoned decisions from Ohio judges that will reinforce legal precedent or otherwise extend it into novel territory.

WHAT CONTRACT?

The baseline inquiry into any design claim is whether the party asserting those claims had a contract with the design professional. In the absence of contractual privity, the economic loss rule should be raised as a defense, early and often.

The economic loss rule generally cited in *Floor Craft* states that, in the absence of privity of contract, no cause of action exists in tort to recover economic damages against design professional involved in preparing the drawings, plans, or specifications. *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass'n*, 54 Ohio St.3d 1, 560 N.E.2d 206 (1990). But with one hindering caveat: in absence of any direct contractual relationship, a plaintiff may establish a "sufficient nexus" which could serve as substitute for contractual privity. This sufficient nexus is typically shown through a design professional's "excessive control" over the job site or duties, which otherwise differ or usurp those of the typical project manager/general contractor or owner/operator.

This exception to the economic loss rule is frequently relied upon by plaintiffs in design-build litigation, whether that plaintiff be an owner/operator or its insurer-subrogee, though it could just as well be the general contractor or even another design professional on the project who is seeking to be indemnified under common law grounds. Regardless, complaint allegations that merely conclude that a nexus exists but in no way alleged the client's degree of control over the work would be patently insufficient. *Floor Craft,* 54 Ohio St.3d at 8; *see also, Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, 835 N.E.2d 701 (holding that mere knowledge of project owner's identity did not create a nexus sufficient to establish privity so as to allow project owner to bring direct action in contract against subcontractor).

If the pleadings do not reflect a way around the absence of a contractual relationship, the economic loss rule can be raised in an initial motion to dismiss, pursuant to Rule 12(B)(6), or otherwise preserved as an affirmative defense. Due to the nature of the Court's obligation to take all complaint allegations in a light most favorable to the plaintiff, initial dispositive motions are routinely denied. However, very same defense can be renewed again at the summary judgment stage.

Thus, whether or not motion practice leads to immediate success, placing this strong defense before the Judge's feet at the onset of litigation could very well benefit a client's success at the summary judgment stage or later, on appeal.

WHO'S ACTUALLY RESPONSIBLE FOR A NEGLIGENT DESIGN?

It is important to assess the particular design plans that have been called into question as well as the roles of the design professionals on the design-build project.

Generally, only the designer *of record* owes a duty of care as to record design plans. *Cincinnati Riverfront Coliseum, Inc. v. McNulty, Co.*, 28 Ohio St.3d 333, 337, 504 N.E.2d 415, 419 (1986). Indeed, a plaintiff cannot bootstrap a tort duty onto an engineer or architect not of record. *Id.*; *see also Auto-Owners Ins. Co. v. Old Time Roofing*, 7th Dist. Mahoning No. 98-CA-176, 2000 WL 652612, *5. The one exception to this is a causation argument, wherein evidence of subcontractor's material deviation of the record design can be shown as the proximate cause of claimed damages. Because of this limited and often difficult to prove deviation exception, all design professionals are at risk of being named as defendants, particularly those who are hired later as design-assist subcontractors for the purpose of implementing the approved design of record during construction.

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This common misconception over the roles and duties of design professionals in a negligent design case was addressed in a recent case that my firm and I handled on behalf of an engineering client.

In or around December of 2020, a renovated commercial property located in Cincinnati suffered a water loss event after the HVAC system malfunctioned. Specifically, a heating coil located within a renovated air-handling unit suddenly burst on the top floor of the building. At the time, the property had been unoccupied and would be for several days due to the holiday break. The building's HVAC System was designed to be regulated or monitored by automated maintenance software managed by on-site facility staff. However, neither the software platform nor the facility staff with access to the platform had noticed an impending heating coil malfunction. These factors culminated in the unmitigated flow of water, which lasted 2-3 days and traveled to all lower floor levels, resulting in around $2 million in property damages. The insurer paid out the loss under the owner's applicable policy and later initiated subrogation against our design-assist client. Oddly, despite the high number of design and construction professionals involved in the design-build work, our client was the only professional named as defendant in the case. More oddly, our client did not have a contractual relationship with the property owner nor with the engineer of record or architect of record. Rather, our client was hired by the general contractor later in the project schedule as a design-assist subcontractor for the implementation of the already approved record design plans of the engineer of record.

So, why did the subrogee only sue our client? This was always the most intriguing aspect of this entire case,

In the trial court, our client was required to proceed with a defense on the merits, which we nonetheless believed was exceedingly strong: the subrogee did not sue the design professional of record, the subrogee had no real evidence showing a design deviation was committed nor any expert opinion that opined our client was the sole proximate cause of the loss. Thus, even if the loss were in fact caused by a negligently prepared record design, our client cannot be liable for merely implementing it as contracted to do.

As we worked to solidify these defenses, the case took an unexpected turn once discovery revealed that full terms of the project's underlying AIA contracts, which had been executed well before our client's involvement on the project. Specifically, the AIA contract documents contained several waiver of subrogation provisions, which had been mutually agreed upon as between the owner, the architect of record, the engineer of record, and the general contractor. But it gets even better – these provisions also contained express language that extended the applicability and enforceability of waiver as to all respective subcontractors, subconsultants, or agents on the project, whether or not existing at the time of the contract or successively hired. As such, our client moved for summary judgment and included a strong contractual waiver defense in addition to its defenses for negligent design under Ohio law.

Ultimately, the trial court rightfully enforced this waiver provision and granted summary judgment to our client without having to reach any other raised defense. Thereafter, the First District Court of Appeals subsequently affirmed the trial court's decision in favor of our client, publishing a sound opinion that upholds the enforceability and applicability of waiver of subrogation provisions negotiated during AIA contract formation. *See, e.g., Hartford Fire Ins. Co. v. Debra-Kuempel, Inc.*, 1st Dist. Hamilton No. C-240100, 2024-Ohio-5830.

As a result of mounting a full defense, our client received an appropriate dismissal with prejudice. Moreover, these favorable rulings in the trial court and on appeal clarified a limited issue of law as well as gift new authority for defending Ohio design professionals going forward.

IF NOT THE DESIGN, THEN WHAT?

The defense of design professionals can be straightforward by comparing the construction work back to the record design. Errors in the installation or the use of defective

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materials can occur in the post-design phase. It is not unusual to discover certain aspects of the design were circumvented or certain materials were swapped out due to costs or delay in the construction phase. All of these can be factors for demonstrating a deviation from an otherwise adequate record design.

By way of brief example, the owner of a commercial apartment complex sued the general contractor for breach of contract based on a litany of alleged defect conditions on the property after occupancy, such as water intrusion and sound proofing issues. In turn, the general contractor filed a third-party complaint, asserting claims against all its subcontractors, including the design professional of record, which was our client. This was of course followed by countless crossclaims and additional derivative actions against subconsultants and agents. As can be the case, the primary plaintiff's case did not allege any specific failure but took a rather kitchen sink approach, alleging a nebulous fact pattern describing faulty design work, faulty materials, and faulty construction to support a breach of contract action.

During discovery, it became clear that our clients' design work had been fully vetted and approved across all project management as well as local authorities. As such, we felt strongly that none of the alleged defective conditions could be related to a failed design but more so related to failure during construction, if at all. As such, we looked at the ways in which project specifications or UL assemblies were or were not followed as well as the materials used versus the materials recommended in the record design plans. This nuts and bolts approach led to ample fodder for preparing a strong dispositive motion for our client.

Boiled down, any investigation into the ways in which the construction team adhered to a design professional plan will generally require expert retention, site visits, voluminous document review, and all necessary depositions, particularly any witnesses that were in project management or the operation of the commercial property. Importantly, the standard of care of the design professional must be supported by qualified expert opinion. A design expert is generally qualified if they are licensed in the pertinent design field in dispute, i.e., a licensed architect opining on the architect of record's design work. But it is not uncommon for a plaintiff to only disclose an engineer but not an architect, or vice versa, in support of their claims. *See, e.g., Simon v. Drake Const.*, 87 Ohio App.3d 23 (1993), citing Evid.R. 702(A) (holding the plaintiff's *professional engineer expert* could not opine on the sufficiency of the architect's drawings and specifications in order to meet the burden of proof). An oversight of this magnitude should be raised in motion practice.

Although uncovering all pertinent facts in these large design-build disputes takes substantial time and effort, this long road can lead to great success for our clients and will only strengthen binding precedent in favor of Ohio design professional.

Michael J. Caligaris, Esq., is a partner at Reminger Co. LPA and is based out of the Cincinnati office. His practice is primarily focused on defending professionals and businesses, largely in the areas of but not limited to Professional Liability (i.e., Legal, Architects and Engineers, Construction Liability); Employment Practices and Civil Rights Defense (inclusive of defamation claims); Medical Malpractice and Long Term Care Liability; Trucking and Commercial Transportation; Retail, Hospitality, and Entertainment; and General Liability. He also serves as personal counsel for several local business practices within the construction and the mental health industry.