

ENGINEER'S LIABILITY EXPOSURE FOR THE CONTRACTOR'S DEFECTIVE CONSTRUCTION

In the March/April, 2005 edition of this publication, I reviewed the Wisconsin Supreme Court case of Baumeister v. Automated Products, Inc., 2004 WI 148, 690 N.W.2d 1 (2004), where the Wisconsin Supreme Court held that an architect did not breach any contractual duty with regard to the installation of truss bracing as a result of not giving subcontractor employees detailed instructions on the truss bracing during construction. The Court concluded that under the AIA contract, the architect was relieved of any liability with regard to construction means or for safety precautions, and that he did not have any responsibility nor did he control the techniques chosen by the subcontractor during construction, including the use of temporary bracing while erecting trusses.

In that article I also referred to a previous case, Vonasek v. Hirsch & Stevens, Inc., 65 Wis.2d 1, 221 N.W.2d 815 (1974), which presaged the Baumeister decision. Since the Vonasek case did not involve injury to contractor employees but rather a claim of defective construction, it may be helpful to professional engineers to know more about the Vonasek case.

In Vonasek, the court was called upon to review whether the architect was liable to the general contractor for the collapse of joists during construction. The contractor in that case alleged that the architect had failed to comply with applicable code provisions calling for the use of cross bridging rather than horizontal bridging. However, the court relied upon expert testimony in concluding that either cross bridging or horizontal bridging was acceptable under applicable code provisions. DILHR had approved the construction plans and the administrator of DILHR's Industrial Safety and Building Division testified that the statute requiring cross bridging was not applicable to steel joists which were as long as the ones specified in this building construction. Other expert witnesses supported that testimony. The Supreme Court held that the trial court had not erred in finding that the architect had not violated the applicable codes.

The plaintiff in Vonasek then argued that the common law standard of care should be applied even though the applicable building code was met, and introduced expert testimony that in the building industry cross bridging would have been required. The Supreme Court held that the trial court was correct in finding that the defendant had not breached any common law duty as to proper design, based on the testimony of consulting engineers who were of the opinion that the special precautions necessary when erecting long span joists with horizontal bridging are generally known in the steel erection industry, and that if correct erection procedures were followed, horizontal bridging was as safe as cross bridging. The court also held that the architect had no duty to warn the contractor of any hazards associated with the performance of the contractor's work.

While it may seem obvious that a contractor must stand accountable for defective performance, because contractors accused of defective performance will naturally look for explanations which may extricate themselves from liability, attempts to pass the responsibility on to the professional designer can be expected.

While this article is not intended to be an exhaustive discussion of potential areas of liability in the preparation of plans and specifications, some general principles can be stated:

1. Whether the contractor has an actionable claim against the engineer or architect based on negligent preparation of plans and specifications will necessarily involve questions of whether the engineer or architect was negligent in the preparation of those plans and specifications, but
2. Since the complaining contractor has a substantial involvement in producing the condition which may be defective construction, a fact intensive inquiry will be made as to whether the contractor was negligent and whether such negligence was the cause of the defective construction or whether the plans and specifications were inadequate, or both.

The duty owed by the engineer or architect to the contractor will not be the same as the duty owed by the engineer or architect to the owner. The engineer or architect's duty toward the owner arises out of the scope of work to be performed by the design professional for the owner. The contractor is expected to follow the plans and specifications unless he knows they are inadequate. If the contractor follows the plans and specifications, and the result is unacceptable, the problem would not appear to be one of defective construction.

A contractor who asserts a claim against an engineer or architect based upon a theory that the professional designer had a duty to supervise the work of the contractor is destined to fail except where the engineer or architect has in fact contracted to perform such supervision service. Normally under the pre-published Standard Form of Agreement Between Owner and Engineer or Owner and Architect, the professional designer's legal obligations in connection with observing the contractor's work is explicitly defined as non-supervision in nature. The purpose of the engineer's visits to the project sites, for example, under EJCDC No. E-500 (2002 edition), is to enable the engineer to better carry out the duties and responsibilities assigned to the engineer by the contract between the owner and the engineer, and not to supervise the work of the contractor. Such site visits are to permit the engineer to assess the progress and quality of the work, but not to supervise the contractor's work in progress or to involve detailed inspections of the contractor's work in progress. Nor does the engineer as a result of such visits have the authority to supervise, direct or control the contractor's work, and the engineer is expressly given no authority over the contractor's means, methods, techniques, sequences or procedures of construction selected by the contractor, or for safety precautions and programs incident to the contractor's work.