

# **LIABILITY OF ARCHITECTS AND ENGINEERS FOR OBSERVATION AND INSPECTION SERVICES:**

## **Breaking the Bonds of Privity**

Presented by:

**WILLIAM H. LOCKE, JR.**

Graves, Dougherty, Hearon & Moody

[locke@gdhm.com](mailto:locke@gdhm.com)

[http://gdhm.com/people\\_and\\_practices/bios/?ID=35](http://gdhm.com/people_and_practices/bios/?ID=35)

401 Congress Avenue

Suite 2200

Austin, Texas 78701-3587

512-480-5736

State Bar of Texas

34<sup>th</sup> ANNUAL ADVANCED REAL ESTATE LAW COURSE

July, 2012

San Antonio, Texas

**CHAPTER 33**



## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ARCHITECT’S AND ENGINEER’S DUTIES .....	1
A.	A Licensed Profession .....	1
B.	A Professional’s Standard.....	1
C.	Scope of Duty .....	1
1.	Contractual Duties .....	1
a.	AIA Documents .....	1
b.	EJCDC Documents.....	6
2.	Practical Effects of Classification – Breach of Contract or Tort .....	7
a.	Proof of Claim .....	7
b.	Statute of Limitations.....	7
c.	Professional Services Exclusion to CGL Insurance.....	7
d.	Attorney’s Fees .....	7
3.	Breach of Contract .....	7
a.	Liability to Parties in Privity.....	7
b.	Liability to Parties Not In Privity .....	8
4.	Tort – Negligence Duty to Third Parties.....	8
a.	Elements of Negligence Claim .....	8
b.	Special Relationship or Circumstances.....	8
c.	Negligent Misrepresentation.....	9
d.	Negligent Undertaking.....	10
e.	Defenses.....	10
f.	Grounds for Finding Liability to Third Parties – Breaking the Bonds of Privity – Other Jurisdictions.....	10
III.	A CASE STUDY – <i>Black + Vernoooy Architects v. Smith</i> , 346 S.W.3d 877 (Tex. App. – Austin 2011, petition filed).....	10
A.	Tragic Injury .....	10
B.	Architect and Design .....	11
C.	Contractor and Subcontractors.....	11
D.	Construction Defects.....	11
E.	Architect’s Construction Administration Services .....	11
F.	Settlements and Architect’s Trial.....	12
G.	District Court .....	12
H.	Positions on Appeal .....	12
1.	Architects’ Position.....	12
a.	No Duty to Third Parties to Identify Defects.....	12
b.	No Obligation to Ensure or Guarantee that Residence is Built in Accordance with Plans.....	12
c.	Even If There is a Duty to the Injured House Guests, Insufficient Evidence that Architects Breached the Duty .....	12
2.	Injured House Guests’ Position .....	13
a.	Architects’ Duty Is to Identify Defects and this Duty Extends to the Injured House Guests.....	13
b.	The Injured House Guests Are Third Party Beneficiaries of the Architect Contract.....	13
c.	Lack of Privity Not a Bar to Tort Liability .....	13
I.	Court of Appeals – 1 <sup>st</sup> Decision; and its Withdrawal.....	13
J.	Court of Appeals – Substituted Opinion .....	13

1.	Architect’s Duty – A Contractually Limited Duty .....	13
a.	Provider of Information – “Known Defects” .....	13
b.	Not a Guarantor of Contractor’s Work .....	13
2.	No Duty to Third Party .....	13
a.	The Injured House Guests Are Not Third Party Beneficiaries of the Architect Contract.....	14
b.	No Texas Common Law Duty Exists .....	14
c.	Balancing Test: Favors Not Creating a New Duty .....	14
K.	Court of Appeals – the Dissent .....	17
1.	Architect’s Duty - To its Client .....	17
a.	Guard Against Obvious Defects .....	17
b.	Responsible for Breach of its Own Duty .....	17
c.	Failure to Observe Deficiency Not an Excuse.....	18
2.	Architect’s Duty – To Third Parties.....	19
a.	Agreed Plaintiff’s Are Not a Third Party Beneficiary of the Architect’s Agreement.....	19
b.	Liable for Injuries if Architect Failed to Detect an Obvious Defect.....	19
c.	A Common Law Duty Exists.....	19
d.	Contractual Disclaimers of Third Party Liability Not Bar to Third Party Claims.....	22
L.	Briefs to the Supreme Court .....	22
1.	The Injured House Guests.....	22
a.	Lack of Privity Does Not Pose An Absolute Bar to Recovery Against the Architects.....	22
b.	The Risk-Utility Balancing Test Weighs in Favor of Recognizing That The Architects Owed a Duty to Petitioners Here, Albeit A Duty That is Relatively Narrow.....	22
c.	The Evidence Is Legally Sufficient To Support Petitioners’ Recovery .....	23
2.	The Architects.....	23
a.	Summary of the Argument .....	23
b.	BVA’s Reporting Obligation Existed Solely Because of the Architect Contract.....	23
c.	Petitioner’s Hypothetical Is Flawed.....	24
d.	Petitioners’ Interpretation of BVA’s Duties Under the Architect Contract Violates Settled Principles of Texas Tort and Contract Law .....	24
e.	The Court of Appeals Correctly Addressed and Applied Contract Principles .....	24
f.	The Court of Appeals’ Decision is in the “Mainstream” of Tort Law Jurisprudence .....	24
g.	The Court of Appeals Did Not Misapply the “Risk-Utility” Balancing Test .....	24
h.	The Court of Appeals Correctly Recognized that the New Tort Duty Would Create an Onerous Burden for Design Professionals and Drive Them From the Sites of Small-Scale Projects and Vastly Increase the Costs of Larger Ones.....	24
i.	There is no Evidence to Support a Finding that BVA Breached a Tort Duty Owed to Petitioners.....	25

**LIABILITY OF ARCHITECTS AND ENGINEERS FOR  
OBSERVATION AND INSPECTION SERVICES:  
Breaking the Bonds of Privity**

## I. INTRODUCTION

This article examines the scope of architect's and engineer's duties to owners and third parties for observation and inspection services undertaken during a construction project. The issue of whether the lack of privity is a bar to claims for damages and injuries suffered by third parties is addressed. This issue is addressed in *Black + Vernooy Architects v. Smith*, 346 S.W.3d 877 (Tex. App. – Austin 2011, petition filed), which is presented at the end of this article as a case study.

## II. ARCHITECT'S AND ENGINEER'S DUTIES<sup>1</sup>

### A. A Licensed Profession

The practice of architecture is defined by statute to include observing the construction, modification, or alteration of work to evaluate conformance with architectural plans and specifications.<sup>2</sup> The practice of engineering is defined by statute as including engineering for review of the construction or installation of engineered works to monitor compliance with drawings and specifications.<sup>3</sup> Plans, specifications and other construction documents issued by an architect are required to be sealed and dated. This is the architect's representation that these items may be used for regulatory approval, permitting, or construction, unless the document is clearly marked to indicate that it may not be so used.<sup>4</sup> Similar administrative rules apply to landscape architects<sup>5</sup> and interior designers.<sup>6</sup> The standards applicable to engineers also require an engineer's seal and state that "[t]he purpose of the engineer's seal is to assure the user of the engineering product that the work has been performed or directly supervised by the professional engineer named and to delineate the scope of the engineer's work."<sup>7</sup> Placing a seal and signature on plans signifies that the plans are in compliance with reasonably accepted standard and not likely to result in the endangerment of lives, health, safety, property or welfare of the public.<sup>8</sup>

### B. A Professional's Standard

A warranty by an A/E will not be implied unless there is the clearest reason for it, and the burden of showing such reason rests on the one seeking to establish the warranty. However, the sale of

professional services carries with it the implied warranty that the service will be performed in a skillful and workmanlike manner. This implied warranty of good and workmanlike performance applies to a suit for architectural malpractice.<sup>9</sup> A contract for professional services gives rise to a duty by the professional to exercise the degree of care, skill, and competence that reasonably competent members of the profession would exercise under similar circumstances.<sup>10</sup> Plaintiffs suing an A/E for injuries and damages arising out of the A/E's breach of its professional duty are required include a certificate of merit with its petition.<sup>11</sup>

This standard is the contractual standard of care contained in the AIA B Series.<sup>12</sup> For example, the AIA B101-2007 provides:

**2.2** The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

### C. Scope of Duty

#### 1. Contractual Duties

The scope of an architect's duty "depends on the particular agreement entered into with his employer."<sup>13</sup>

#### a. AIA Documents

##### (1) AIA Owner and Architect Contract

The AIA divides architect's services into the following five phases: § 3.2 Schematic Design Phase Services; § 3.3 Design Phase Services; § 3.4 Construction Documents Phase Services; § 3.5 Bidding or Negotiation Phase Services; and § 3.6 Construction Phase Services. The owners agreement with the architect may be limited to design phase services and may exclude inspection or supervision services.

**(a) Design Services**

A/Es have a duty to design safe structures.<sup>14</sup>

**(b) Contract Administration Services****[1] Limited Services**

AIA Documents are carefully drafted to limit the Architect's role during the construction phase and provide specified but limited services. The Architect does not undertake broad supervision of the project. AIA Documents exclude from the Architect's construction phase services (1) the authority to control the Contractor's means, methods, techniques, sequences or procedures, and safety precautions and programs in connection with the Work; (2) the power to stop the Contractor's Work in order to ensure safety precautions are implemented; and (3) an obligation to supervise construction.

With respect to the provision of construction phase services, the AIA Architect Contract requires architects to perform the following services.<sup>15</sup> The Architect is obligated (1) to visit the site at intervals appropriate to the stage of construction; (2) to determine, in general, if the Work *observed* is being performed in a manner indicating that that Work, when fully completed, will be in accordance with the Contract Documents; (3) to report any *known* deviations from the Construction Documents and any defects and deficiencies *observed* in the Work; and (4) to issue certificates that the quality of the Work is in accordance with the Contract Documents. The Architect's role is not defined in terms of it being a construction manager or construction supervisor.<sup>16</sup>

**[a] 2007 B Series - B101****[i] Observation, Inspection and Reporting**

The B101-2007 provides:

**ARTICLE 3 SCOPE OF ARCHITECT'S BASIC SERVICES**

§ 3.2 SCHEMATIC DESIGN PHASE SERVICES ...

§ 3.3 DESIGN DEVELOPMENT PHASE SERVICES...

§ 3.4 CONSTRUCTION DOCUMENT PHASE SERVICES...

§ 3.5 BIDDING OR NEGOTIATION PHASE SERVICES ...

**§ 3.6 CONSTRUCTION PHASE SERVICES ...****§ 3.6.1 GENERAL**

§ 3.6.1.1 The Architect shall provide administration of the Contract between the Owner and the Contractor as set forth below and in AIA Document A201-2007, General Conditions of the Contract for Construction. ....

§ 3.6.1.2 The Architect shall advise and consult with the Owner during the Construction Phase Services. The Architect shall have authority to act on behalf of the Owner only to the extent provided in this Agreement. The Architect shall *not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work,*<sup>17</sup> *nor shall the Architect be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents.* The Architect shall be responsible for the Architect's negligent acts or omissions, *but shall not have control over or charge of, and shall not be responsible for, acts or omissions of the Contractor or of any other persons or entities performing portions of the Work.*

....

**§ 3.6.2 EVALUATIONS OF THE WORK**

§ 3.6.2.1 The Architect shall visit the site at intervals appropriate to the stage of construction, or as otherwise required in Section 4.3.3, to become *generally familiar* with the progress and quality of the portion of the Work completed, and to determine, in general, if the Work *observed* is being performed in a manner indicating that that Work, when fully completed, will be in accordance with the Contract Documents.<sup>18</sup> However, the Architect shall *not be required to make exhaustive or continuous on-site inspections* to check the quality or quantity of the Work. *On the basis of the site visits*, the Architect shall keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and report to the Owner (1) known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor, and (2) defects and deficiencies *observed* in the Work.<sup>19 20</sup>

The 2007 edition drops the *endeavor to guard* the Owner against defects language contained in the prior

1997 edition quoted below. Both the 2007 edition and the prior 1997 edition require the Architect to report *known* defects, but the 2007 edition has qualified this reporting obligation to those defects and deficiencies *observed* (a subjective standard). Additionally, the 2007 edition has qualified the obligation undertaken by the Architect to determine if the Work is being performed in accordance with the Contract Documents by limiting this determination to the Work *observed*.

#### [ii] Certifications

The B101-2007 provides:

#### § 3.6.3

##### CERTIFICATES FOR PAYMENT TO CONTRACTOR

§ 3.6.3.1 The Architect shall review and certify the amounts due the Contractor and shall issue certificates in such amounts. The Architect's certification for payment shall constitute a representation to the Owner, based on the Architect's evaluation of the Work as provided in Section 3.6.2 and on the data comprising the Contractor's Application for Payment, that, to the best of the Architect's knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject (1) to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, (2) to results of subsequent tests and inspections, (3) to correction of minor deviations from the Contract Documents prior to completion, and (4) to specific qualifications expressed by the Architect.

§ 3.6.3.2 The issuance of a Certificate for Payment shall *not be a representation* that the Architect has (1) *made exhaustive or continuous on-site inspections* to check the quality or quantity of the Work, (2) *reviewed construction means, methods, techniques, sequences or procedures,* (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) ascertained how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

...

#### § 3.6.6 PROJECT COMPLETION

§ 3.6.6.1 The Architect shall conduct inspections to determine the date or dates of Substantial Completion

and the date of final completion; issue Certificates of Substantial Completion; receive from the Contractor and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract Documents and assembled by the Contractor; and issue a final Certificate for Payment based upon a final inspection indicating the Work complies with the requirements of the Contract Documents.

§ 3.6.6.2 The Architect's inspections shall be conducted with the Owner to check conformance of the Work with the requirements of the Contract Documents and to verify the accuracy and completeness of the list submitted by the Contractor of Work to be completed or corrected.

#### [b] 1997 B Series – B151

The 1997 B151 is replaced in 2007 by the B101. The B151 provided for the following observation, inspection and reporting services during the construction phase.

§ 2.6.5 The Architect, as a representative of the Owner, shall visit the site at intervals appropriate to the state of the Contractor's operations, or as otherwise agreed by the Owner and the Architect in Article 12, (1) to become *generally familiar* with and to keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to endeavor to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner *indicating* that the Work, *when fully completed,* will be in accordance with the Contract Documents.

However, the Architect shall *not be required to make exhaustive or continuous on-site inspections* to check the quality or quantity of the Work. The Architect shall *neither have control over or charge of, nor be responsible for, the 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 rights and responsibilities under the Contract Documents.

and

§ 2.6.6 The Architect shall report to the Owner known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor.

However, the Architect shall *not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect shall be responsible for the Architect's negligent acts or omissions, but shall not have control over or charge of and shall not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons or entities performing portions of the Work.*

## [2] Limited Powers

Additionally, the AIA Architect Contract grants the Architect the authority (a) to reject Work that does not conform to the Contract Documents and (b) to inspect or test the Work. The AIA B101-2007 provides:

### § 3.6.2 EVALUATIONS OF THE WORK

§ 3.6.2.2 The Architect shall have authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect shall have authority to require inspection or testing of the Work in accordance with the provisions of the Contract Documents, whether or not such Work is fabricated, installed or completed. However, *neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees or other persons or entities performing portions of the Work.*

## [3] No Third Party Beneficiaries

The AIA B101-2007 provides:

## ARTICLE 10 MISCELLANEOUS PROVISIONS

§ 10.5 Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or Architect.

### (2) AIA General Conditions

The AIA Document A201-2007 General Conditions of the Contract for Construction contain the following provisions addressing the role of the Architect during the construction phase of the project. These provisions reiterate that the Contractor is solely responsible and for has control over the construction means, methods, techniques, sequences and procedures employed in constructing the project. Like the B101, the A201 repeats the various disclaimers of responsibility of the Architect for the Work of the Contractor (again note the language italicized by this author in the following provisions).

## ARTICLE 3 CONTRACTOR

### § 3.1 GENERAL

....

§ 3.1.3 *The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons or entities other than the Contractor.*

...

### § 3.3 SUPERVISION AND CONSTRUCTION PROCEDURES

§ 3.3.1 The Contractor shall supervise and direct the Work, using commercially reasonable skill and attention. The Contractor shall be *solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work* under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be *fully and solely responsible for the jobsite safety of such means, methods, techniques,*



*sequences or procedures.* If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any loss or damage arising solely from those Owner-required means, methods, techniques, sequences or procedures.

...

#### § 4.2 ADMINISTRATION OF THE CONTRACT

§ 4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents and will be an Owner's representative during construction until the date the Architect issues the final Certificate for Payment. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents.

...

§ 4.2.2 The Architect will visit the site at intervals appropriate to the stage of construction, or as otherwise agreed with the Owner, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine in general if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. *However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will not have control over, charge of, or responsibility for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents, except as provided in Section 3.3.1.*

§ 4.2.3 On the basis of the site visits, the Architect will keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and report to the Owner (1) **known deviations** from the Contract Documents and from the most recent construction schedule submitted by the Contractor, and (2) defects and deficiencies **observed** in the Work. *The Architect, Owner, and the Owner's representatives and consultants will not be responsible for the Contractor's failure to perform*

*the Work in accordance with the requirements of the Contract Documents. The Architect, the Owner, and the Owner's representatives and consultants will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.*

#### § 4.2.4 COMMUNICATIONS FACILITATING CONTRACT ADMINISTRATION....

§ 4.2.5 Based on the Architect's evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

§ 4.2.6 The Architect has authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect will have authority to require inspection or testing of the Work in accordance with Sections 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed or completed. *However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.*

....

§ 4.2.9 The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion; issue Certificates of Substantial Completion pursuant to Section 9.8; receive and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract and assembled by the Contractor pursuant to Section 9.10; and issue a final Certificate for Payment pursuant to Section 9.10. ....

#### § 9.4 CERTIFICATES FOR PAYMENT ...

§ 9.4.2 The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data comprising the Application for Payment, that, to the best of the Architect's knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance

with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion and to specific qualifications expressed by the Architect. The issuance of a Certificate of Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified.

However, the issuance of a Certificate for Payment will *not be a representation that the Architect has* (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

**b. EJCDC Documents**

The Standard General Conditions of the Construction Contract prepared by the Engineers Joint Contract Documents Committee<sup>21</sup> contain the following provisions addressing the role and responsibilities (and disclaimers as to liabilities) of an engineer during the construction phase of a project:

**ARTICLE 9 ENGINEER'S STATUS DURING CONSTRUCTION**

...  
**9.02 Visits to Site**

A. ENGINEER will make visits to the Site at intervals appropriate to the various stages of construction as ENGINEER deems necessary in order to *observe as* an experienced and qualified design professional the progress that has been made and the quality of the various aspects of CONTRACTOR'S executed Work. Based on information obtained during such visits and observations, ENGINEER, for the benefit of OWNER, will determine, *in general*, if the Work is proceeding in accordance with the Contract Documents. ENGINEER will *not be required to make exhaustive or continuous inspections* on the Site to check the quality or quantity of the Work.

ENGINEER's efforts will be directed toward providing for OWNER a greater degree of confidence that the completed Work will conform *generally* to the Contract Documents. On the basis of such visits and observations, ENGINEER will keep OWNER informed of the progress of the Work and will *endeavor to guard* OWNER against defective Work.

B. ENGINEER's visits and observations are subject to all the limitations on ENGINEER's authority and responsibility set forth in paragraph 9.10, and particularly, but without limitations, during or as a result of ENGINEER's visits or observations of CONTRACTOR'S Work ENGINEER will *not supervise, direct, control, or have authority over or be responsible for CONTRACTOR'S means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for any failure of CONTRACTOR to comply with Laws and Regulations applicable to the performance of the Work.*

...  
**9.06 Rejecting Defective Work**

A. ENGINEER will have authority to disapprove or reject Work which ENGINEER believes to be defective, of the ENGINEER believes will not produce a completed Project that conforms to the Contract Documents or that will prejudice the integrity of the design concept of the completed Project as a functioning whole as indicated by the Contract Documents. ENGINEER will also have authority to require special inspection or testing of the Work as provided in paragraph 13.04, whether or not the Work is fabricated, installed, or completed.

...  
**9.10 Limitations on ENGINEER's Authority and Responsibilities**

...  
B. ENGINEER will *not supervise, direct, control, or have authority over or be responsible for CONTRACTOR'S means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for any failure of CONTRACTOR to comply with Laws and Regulations applicable to the performance of the Work. ENGINEER will not be responsible for CONTRACTOR'S failure to perform the Work in accordance with the Contract Documents.*

...  
**13.05 OWNER May Stop the Work**

A. If the Work is defective, or CONTRACTOR

fails to supply sufficient skilled workers or suitable materials or equipment, or fails to perform the Work in such a way that the completed Work will conform to the Contract Documents, OWNER may order CONTRACTOR to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, this right of OWNER to stop the Work shall not give rise to any duty on the part of OWNER to exercise this right for the benefit of CONTRACTOR, any Subcontractor, any Supplier, any other individual or entity, or any surety for, or employee or agent of any of them.

...

#### B. Review of Applications

...

2. ENGINEER's recommendation of any payment requested in an Application for Payment will constitute a representation by ENGINEER to OWNER, based on ENGINEER's observations on the site of the executed Work as an experienced and qualified design professional and on ENGINEER's review of the Application for Payment and the accompanying data and schedules, that to the best of ENGINEER's knowledge, information and belief:

a. the Work has progressed to the point indicated;

b. the quality of the Work is *generally* in accordance with the Contract Documents (subject to an evaluation of the Work as a functioning whole prior to or upon Substantial Completion, to the results of any subsequent tests called for in the Contract Documents, to a final determination of quantities and classifications for Unit Price Work under paragraph 9.08, and to any other qualifications stated in the recommendation); and

c. the conditions precedent to CONTRACTOR's being entitled to such payment appear to have been fulfilled in so far as it is ENGINEER's responsibility to observe the Work.

3. By recommending any such payment ENGINEER will *not* thereby be deemed to have represented that: (i) inspections made to check the quality or the quantity of the Work as it has been performed have been *exhaustive*, extended to every aspect of the Work in progress, or involved *detailed inspections* of the Work beyond the responsibilities specifically assigned to ENGINEER in the Contract Documents; or (ii) that there may not be other matters or issues between the parties that might entitle CONTRACTOR to be paid additionally by OWNER or entitle OWNER to withhold payment to CONTRACTOR.

4. *Neither ENGINEER's review of CONTRACTOR's Work for the purpose of*

*recommending payments nor ENGINEER's recommendation of any payment, including final payment, will impose responsibility on ENGINEER to supervise, direct, or control the Work or for the means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for CONTRACTOR's failure to comply with Laws and Regulations applicable to CONTRACTOR's performance of the Work....*

## 2. Practical Effects of Classification – Breach of Contract or Tort

There are practical effects from the cause of action being a contract claim as opposed to a tort claim.

### a. Proof of Claim

It is typically easier for a plaintiff to establish a breach of a contractual duty rather than to establish a breach of the professional duty of reasonable care.

### b. Statute of Limitations

The statute of limitations is longer on a contract claim than on a tort claim.<sup>22</sup>

### c. Professional Services Exclusion to CGL Insurance

Many times an A/E's commercial general liability policy is endorsed with a professional services exclusion endorsement to eliminate coverage for the A/E's negligent performance of professional services.<sup>23</sup>

### d. Attorney's Fees

Attorney's fees and costs are not recoverable in negligence actions, but may be recovered when a breach of contract,<sup>24</sup> or a violation of the DTPA,<sup>25</sup> is proven.

## 3. Breach of Contract

### a. Liability to Parties in Privity

#### (1) Economic Losses – The Economic Loss Rule

The distinction between breach of contract and professional negligence is blurry. The Texas Supreme Court has explained that it is unable to

discern any real difference between an owner's claim that an engineer's efforts were not good and workmanlike and did not meet the standards of reasonable engineering practice and its claim that the engineer was negligent in the performance of his professional services.<sup>26</sup> It has been held that an owner or a third party beneficiary of an A/E agreement has a cause of action on the contract for negligently performed inspection or construction supervision services.<sup>27</sup> The cause of action is for damages for loss of the benefit of the bargain due to A/E's breach of its contractual duty as opposed to a tort action.

### **(2) Breach of Warranty**

If the A/E has contracted to deliver a specific result (e.g., LEED certification or building size), a breach of warranty claim may lie.<sup>28</sup>

### **(3) Breach of Fiduciary Duties**

Some commentators have noted that it is unclear in Texas as to whether design professionals, simply by performing design services, are entering into a fiduciary relationship with their client.<sup>29</sup> The same commentators note that

Similarly, self-serving provisions in construction contracts drafted by architects or engineers for execution by their clients (in form contracts chosen by the design professional) might be argued to violate fiduciary duties to avoid or disclose conflicts of interest, especially if the client is not represented by its own legal counsel in negotiating or drafting the contracts.<sup>30</sup>

### **b. Liability to Parties Not In Privity**

#### **(1) Job Site Workers If A/E Contractually Responsible for Supervision of Site Safety**

If the A/E contracts in the A/E contract to supervise the means and methods of construction or the safety measures at the job site, then third parties may recover for their injuries if the A/E breaches this contractual duty.<sup>31</sup>

#### **(2) Job Site Workers If A/E Assumes by Conduct Responsibility for Job Site Safety**

Additionally, A/Es may be liable even if the A/E agreement does not impose this duty on the A/E if the A/E assumes this duty by its conduct.<sup>32</sup>

### **4. Tort – Negligence Duty to Third Parties**

#### **a. Elements of Negligence Claim**

##### **(1) General Rule**

To prevail on a claim of negligence, a plaintiff must provide proof of the following three elements: "(1) a legal duty owed by one person to another; (2) a breach of that duty; and (3) damages proximately resulting from the breach."<sup>33</sup> In order to satisfy the duty element, the "plaintiff must establish both the existence and the violation of a duty owed to the plaintiff by the defendant."<sup>34</sup> If the defendant has no duty, then he cannot be held liable for negligence.<sup>35</sup> The general rule follows the "prudent person" test; that is, if a prudent person would not have acted as the defendant did, the defendant's conduct may be considered negligent.<sup>36</sup>

##### **(2) Professionals**

A/Es are governed by a heightened standard of care in serving their clients. As noted above in Article II.B., they must use the skill and care in the performance of their duties commensurate with the requirements of the profession (not merely the degree of skill that would be exercised by a "prudent person").

#### **b. Special Relationship or Circumstances**

In general, an individual has "no duty to take action to prevent harm to others absent special relationships or circumstances."<sup>37</sup> Such a special relationship or circumstance exists if the A/E has the right to control the Work of the contractor in a fashion that would protect a third party (construction worker or other person not party to the contract between the A/E and the owner).

##### **(1) Right of Control**

###### **(a) Inspection**

Most jurisdictions, including Texas, have refused to find that the A/E has a right to control the work if it merely has a general right to order the work stopped so it can inspect the work.<sup>38</sup> Although a general duty to supervise the work may create a duty on the part of an A/E to determine and certify that a building is constructed in substantial accordance with the plans and specifications, absent a clear assumption of a duty to be responsible for jobsite safety procedures, most jurisdictions, including Texas, hold that the A/E is not liable for injuries to workers at the jobsite.<sup>39</sup>

Under AIA Documents the Architect is not employed to make “exhaustive or continuous on-site inspections”. While visiting the site, the Architect is to be “generally familiar with the progress and quality of the portion of the Work completed, and to determine in general, if the Work observed is being performed in a manner indicating that that Work, when fully completed, will be in accordance with the Contract Documents.” See AIA Documents at § 3.6.2.1 (quoted above). Architects should not rely on this provision as a means to avoid their responsibility to the owner by turning a blind eye to the construction in its inspections and observations.<sup>40</sup>

### **(b) Disclaimer of Control**

AIA Documents state that the Architect shall “not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work. AIA Documents at § 3.6.1.2 (quoted above). This type of site visit and inspection language has been held by Texas courts as not in and of itself creating in the A/E a right of control sufficient to charge the A/E with a duty towards workers at the job site (third parties).<sup>41</sup>

However, an issue remains if the effect of these provisions is to act as a disclaimer, exculpation, release and waiver in advance of the A/E’s negligence to the extent these provisions do not meet the fair notice and express negligence requirements of Texas common law, especially in cases involving consumers and boilerplate AIA forms.<sup>42</sup>

### **(2) Right to Reject Work**

The right to reject defective work is not a power to control the actual construction work performed at the site.<sup>43</sup>

### **(3) No Per Se Special Relationship**

The relationship between A/Es and the contractor on a construction project is complex, both serve the same client, and even though they are not in privity, they rely on each other to make sure that the project is completed to the satisfaction of the client/owner.

A Texas court has held that a contractor cannot maintain a suit for breach of contract against the design professional as the A/E’s contract is with the owner not the contractor.<sup>44</sup>

Some jurisdictions that have addressed A/E contracts have found that those contracts do not create a relationship sufficient to impose liability on the professional absent additional considerations, such as right of control.<sup>45</sup>

Other jurisdictions, however, have held that the relationship of the A/E to the construction site can create a duty to other persons involved in the project.<sup>46</sup>

### **c. Negligent Misrepresentation**

Assuming justified reliance, a negligent misrepresentation claim may lie.<sup>47</sup> Some commentators have noted as to architect certificates that

By their very nature, these certificates are relied upon by owners and their lenders to make payment. If the work is later deemed to be incomplete or defective, it is only natural to question the architect about why its certificates for payment suggested that the work was otherwise.<sup>48</sup>

#### **(1) Liability to Party in Privity**

The measure of damages for negligent misrepresentations made by an A/E which harm a party in privity with the A/E is the direct out-of-pocket economic damages suffered by the party in privity. Benefit of the bargain damages that typically arise in the context of a breach of contract claim do not apply to recovery on a tort claim.<sup>49</sup>

#### **(2) Liability to Third Parties**

Liability for negligent misrepresentation to a third party

is not based on the breach of duty a professional owes his or her clients or others in privity, but on an independent duty to the non-client based on

the professional's manifest awareness of the non-client's reliance on the misrepresentation and the professional's intention that the non-client so rely.<sup>50</sup>

#### d. Negligent Undertaking

Liability might lie against the A/E on the grounds of a "negligently undertaking."<sup>51</sup>

#### e. Defenses

##### (1) Economic Loss Covered by Contract Claim

Generally, the economic loss rule is not considered an affirmative defense but rather a rule "for interpreting whether a party is barred from seeking damages in an action alleging tort injuries resulting from a contract between the parties."<sup>52</sup> A Texas court has held that a tort action does not lie where the loss suffered by a third party not in privity with the defendant is an economic loss otherwise compensated by a claim for contract damages by the injured party against the party with whom it is in privity.<sup>53</sup>

The Texas Supreme Court recently ruled that an owner damaged by a municipal contractor could recover in tort for the contractor's negligent construction and that the economic loss rule did not apply in such circumstance as there was not contractual privity between the owner and the municipal contractor. This decision gives guidance whether or not the economic loss rule applies to other situations in which there is no contractual privity.<sup>54</sup>

##### (2) No Causal Connection

A court in another jurisdiction has held that an injured third party had no cause of action against an A/E where there was no causal connection between the A/E's conduct and the injury suffered by the injured third party.<sup>55</sup>

##### (3) Not a Warrantor of Quality of Product

Some courts stress that an A/E is not the warrantor of the quality of the building where there is no relationship between the A/E's design and the developer's construction defects.<sup>56</sup> This exclusion to the A/E's responsibility is sometimes stated to be

that the A/E is not a guarantor of the contractor's work or that the A/E does not take responsibility for the contractor's "means, methods, techniques, sequences or procedures, or for safety precautions".<sup>57</sup>

#### (4) No Authority to Supervise Contractor

Some courts in other jurisdictions find that an A/E is not liable for job site injuries where an A/E's duties are limited to reporting the results of inspections but does not have authority to supervise or direct the contractor.<sup>58</sup>

#### (5) Inspection Limited to Observable Areas

A court in another jurisdiction held that an A/E whose contract was to inspect "accessible and observable areas" was not liable for damages arising out of defects not readily observable during inspection.<sup>59</sup>

#### f. Grounds for Finding Liability to Third Parties – Breaking the Bonds of Privity – Other Jurisdictions

There is authority from other jurisdictions that an A/E owes a common-law duty to persons who are neither a party to, nor a third-party beneficiary of, a contract for the A/E's services.<sup>60</sup>

### III. A CASE STUDY – *Black + Vernoooy Architects v. Smith*, 346 S.W.3d 877 (Tex. App. – Austin 2011, petition filed)

#### A. Tragic Injury

Lou Ann Smith, Jimmy Jackson Smith, individually and as next friend of Rachel and Grayson Smith, and Karen E. Gravely (collectively, the "Smiths" and sometimes the "Injured House Guests") sued appellants Black + Vernoooy Architects, J. Sinclair Black, and D. Andrew Vernoooy (collectively, the "Architects" or "BVA") for negligence in connection with injuries suffered by Lou Ann Smith and Karen Gravely when the second-floor balcony of a friend's home collapsed while they were standing on it. Over a year after the home was completed, Karen Gravely and Lou Ann Smith visited the Maxfields' vacation home. At some point during the visit, Karen and Lou Ann stepped out onto the upstairs balcony. A few seconds later, the balcony separated from the exterior

wall of the home and collapsed, causing the two women to fall approximately twenty feet to the ground. Lou Ann was rendered a paraplegic as a result of the injuries that she suffered in the fall, and Karen suffered a broken finger, a crushed toe, and multiple bruises. Karen and the Smith family sued the Maxfields, Nash, the general contractor, and the Architects for negligence in connection with the collapse of the balcony.

### **B. Architect and Design**

In October 2000, Robert and Kathy Maxfield hired the Architects to design a vacation home for them. When the Maxfields hired the Architects, they signed an agreement based on forms promulgated by the American Institute of Architects that are used nationwide. As directed by the agreement, the Architects designed the Maxfields' residence and prepared the construction drawings and specifications. The proposed design had a balcony off the master bedroom.

### **C. Contractor and Subcontractors**

After hiring the Architects, the Maxfields later hired Steve Nash of Nash Builders, Inc. as the general contractor for the project. When Nash was hired, the Maxfields and Nash entered into a construction contract that was also based on forms promulgated by the AIA and that explicitly incorporated terms from those forms. Under the contract, Nash was responsible for building the home and was authorized to hire subcontractors to facilitate the construction. During the construction, Nash hired a subcontractor, Steven Rodriguez, to build the balcony.

### **D. Construction Defects**

When Rodriguez built the balcony, he did not do so in compliance with the design drawings. The design drawings required that the metal pipes supporting the balcony be welded to steel plate tabs, which would then be bolted to the balcony. As constructed, however, the metal support pipes were attached to the balcony using thin metal clips. The design drawings also required that a metal support piece, referred to as a "joist hanger," be used to reinforce the attachment of each of the balcony joists to the exterior wall of the house. In the actual construction of the balcony, however, no joist hangers were used. Although required by the design drawings, the balcony handrail was not bolted to the house. Finally, the design drawings called for the balcony to be attached to the exterior wall of the house by bolting it to a one-and-

one-half-inch-thick rim joist and another one-and-one-half inches of wood blocking. Despite these specifications, the balcony was not attached to the house using bolts, a rim joist, and blocking, but was instead nailed to a one-half-inch piece of plywood.

### **E. Architect's Construction Administration Services**

In addition to an \$84,000 fee for design services, the Maxfields paid BVA a \$16,800 fee to provide "contract administration services" during the construction of the residence. The agreement to provide contract administration services stated that BVA would, among other things, "endeavor to guard the Owner against defects and deficiencies in the Work."<sup>61</sup>

In the course of the contract administration process, BVA architects took multiple photographs depicting what they acknowledged at trial to be open and obvious structural defects in a prominent feature of the Maxfields' home—the second-floor balcony overlooking Inks Lake. BVA reviewed these photographs, but failed to identify the structural defects or bring them to the Maxfields' attention. BVA senior architect, Sinclair Black, testified that in providing contract administration services to the Maxfields, BVA was required to make periodic visits to the site to observe the construction and determine whether it was in compliance with the construction documents. During these visits, intern architect J.C. Schmeil took photographs of the balcony, which Black later reviewed to determine if the balcony was built "[i]n compliance with the design intent."

Looking at these photographs during his testimony, Black testified that they depicted that the handrail was not connected to the wall as required, the metal support pipes were not attached with welded and bolted tabs as required, joist hangers had not been used as required, and the balcony was not bolted to the house in the manner required by the design drawings. The plaintiffs' expert witness, John Allen Pierce, testified that the metal support pipes were attached to the balcony using a type of thin metal clip that would generally be used to support "light-weight items such as electric conduit or plumbing piping."

Black further testified that the absence of the required rim joists and welded tabs was obvious from the photographs. Black also testified that one of Schmeil's photographs, taken from the interior of the house, depicted plywood where the rim joist and blocking should have been. Black acknowledged that

at the stage of the framing process depicted in the photograph, the rim joist should have been in place and visible, and that the rim joist was critical to the structural integrity of the balcony. When asked whether the absence of the rim joist was open and obvious at the time BVA reviewed the photographs, Black answered, "It's obvious now. We didn't notice." Black stated that if he had noticed the defects visible in the photographs, he "absolutely" would have requested that the contractor correct them. Expert witnesses for both sides testified that the absence of the rim joist was obvious in the photographs taken by Schmeil.

The plaintiffs' expert, John Allen Pierce, also testified that a reasonable and prudent architect would have identified the balcony defects at the time the photographs were taken, brought the defects to the attention of the general contractor, and required that they be corrected. Pierce further testified that the defects "should have been observed" because the required elements were "clearly missing." In reviewing the photographs taken by Schmeil, Pierce stated that the defects were "open and obvious" and "not hidden at all." Like Black, Pierce testified that the presence of the rim joist was critical to the structural integrity of the balcony. Pierce further explained that the observation of structural defects in a balcony would be critical in endeavoring to guard an owner against defects in the work.

BVA's expert witness, John Nyfeler, testified that in providing contract administration services, an architect is "expected to make periodic visits to the project site to observe the work of the contractor," "to endeavor to protect the owner against the deviations and defects in the work," and "to call to the owner's attention deviations that he observes in ... the quality of the work." While Nyfeler testified it would be possible for an ordinarily prudent architect providing contract administration services to overlook the absence of a rim joist, he also stated that the lack of a rim joist was obvious in the photographs taken by Schmeil, and acknowledged that a reasonable and prudent architect should pay special attention to a balcony's structural integrity during the contract administration process.

#### **F. Settlements and Architect's Trial**

Nash and the Maxfields settled prior to trial. Under the terms of the settlement, Nash agreed to pay \$1.4 million, and the Maxfields agreed to pay \$250,000. Ultimately, a jury trial was held to address the issue of the Architects' liability.

A jury found that the injury was caused by the negligence of (1) the Architects who designed the home, (2) the general contractor who built the home, and (3) the framing subcontractor who installed the balcony. The jury attributed 10% of the responsibility to the Architects, 70% to Nash (the general contractor), and 20% to Rodriguez (the subcontractor).

#### **G. District Court**

Based on the jury's findings related to damages and proportionate responsibility, as well as adjustments for medical expenses actually paid, the district court rendered judgment that the Smith family recover a total of \$380,749.19 from the Architects, plus prejudgment interest, and that Karen recover nothing from the Architects.

#### **H. Positions on Appeal**

##### **1. Architects' Position**

###### **a. No Duty to Third Parties to Identify Defects**

On appeal the Architects asserted that they did not owe a duty to third parties such as the Injured House Guests to identify the balcony defects.

###### **b. No Obligation to Ensure or Guarantee that Residence is Built in Accordance with Plans**

The Architects contended that the AIA Architect Contract that they entered into with the Owner did not impose on the Architects an obligation to ensure or guarantee that the home was built in compliance with their drawings and specifications.

###### **c. Even If There is a Duty to the Injured House Guests, Insufficient Evidence that Architects Breached the Duty**

Finally, the Architects argued that even if they owed a duty to the Injured House Guests, the evidence presented during trial was legally insufficient to



support a determination that they had, in fact, breached that duty.

## 2. Injured House Guests' Position

### a. **Architects' Duty Is to Identify Defects and this Duty Extends to the Injured House Guests**

On the other hand, the Injured House Guests asserted that the jury's determination should be upheld because the Architects owed them a duty to identify the defects and because legally sufficient evidence was presented during the trial showing that the Architects breached that duty.

### b. **The Injured House Guests Are Third Party Beneficiaries of the Architect Contract**

The Injured House Guests argued that, although they had no contractual relationship with the Architects, the Architects' duty to protect against variances from the plans and specifications extended to them as third-party beneficiaries as foreseeable users of the residence.

### c. **Lack of Privity Not a Bar to Tort Liability**

Finally, the Injured House Guests argued that due to the dangers resulting from faulty construction and due to the public's reliance on architects, "public policy demands that contractual privity not be an indispensable requirement for a duty of care to houseguests, or other foreseeable users of the balcony."<sup>62</sup>

## I. **Court of Appeals – 1<sup>st</sup> Decision; and its Withdrawal**

The Third Court of Appeals opinion issued on December 8, 2010 was withdrawn and a new opinion was substituted August 5, 2011. Between the original opinion and the substitute opinion, the makeup of the Third Court underwent a change. At the time of the first decision, the Third Court was composed of Justices Henson, Jones, Patterson, Puryear, Pemberton and Rose and the original opinion was issued by a panel of 3 Justices. The first opinion was issued by Justices Diane Henson and Woodfin Jones, with Justice Puryear dissenting. By the time the motion for rehearing en banc (by all 6 Justices) was filed and granted, Justice Goodwin had replaced Justice Patterson. The substituted opinion is issued by Justice David Puryear, and joined in by Justices Pemberton, Rose and Goodwin (referred to

below as the "Court Majority") and the Dissent is by Justice Diane Henson, joined by Chief Justice Woody Jones (referred to below as the "Dissent").

## J. **Court of Appeals – Substituted Opinion**<sup>63</sup>

### 1. Architect's Duty – A Contractually Limited Duty

#### a. **Provider of Information – "Known Defects"**

The Court Majority, while acknowledging that an architect, which has undertaken a contractual obligation to "endeavor to guard" an owner against "known defects," has a duty to its client, found it did not need to opine on the extent of an architect's duty to its client as a provider of information, as it concluded that the Architects did not owe a common law duty to third parties, such as the Smiths, to identify defects in the balcony and to thus protect them from injury should defects exist. As to an architect's duty to its client, the Court acknowledges a duty but does not elaborate on its breadth. The Court Majority states

although architects entering the type of agreement at issue in this case may not owe a duty to the house guests of their clients, they do owe a duty to their clients to endeavor to guard against defects and will be liable to their clients if they fail to comply with that duty. *Id.* at 882.

(This conclusion raises an interesting question, as noted by the Dissent. If the Maxwells, the Architect's client, had been standing on the balcony with the Smiths, would the Architect have breached a duty to the Maxwells but not the Smiths?)

#### b. **Not a Guarantor of Contractor's Work**

The Court Majority argues that the practical consequence of extending tort liability protection to the Smiths under these circumstances would be to make the A/E the guarantor of the contractor's work.

To protect against liability, the Architects would have needed to effectively take on the duty of care of a guarantor so as to ensure that all critical matters were fully observed. *Id.* at 890.

## 2. No Duty to Third Party

**a. The Injured House Guests Are Not Third Party Beneficiaries of the Architect Contract**

**(1) No Intent to Create Third Party Beneficiary**

The Court Majority notes that, although the Dissent does not urge that the Smiths are third party beneficiaries of the Architect Contract, and the Dissent's opinion is not predicated on such a finding, the Smiths urged the court to find that they were third party beneficiaries of the contract. The Court Majority rejected this argument finding nothing in the Architect Contract indicating that there are third party beneficiaries of the contract. The Court Majority notes that third party beneficiary status occurs only if the contracting parties intend to secure a benefit to the third party.<sup>64</sup>

**(2) AIA Form Disclaims Such Intent**

The Court Majority points out that the AIA B151 – 1997 at ¶ 9.7 expressly disclaims that there are third party beneficiaries of the contract:

Nothing contain in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or Architect.

The Court Majority concludes that when the Architects entered into the Architect Contract with the Maxwells, they assumed no contractual duty to third parties, including the Smiths.<sup>65</sup>

**b. No Texas Common Law Duty Exists**

The Court Majority characterizes the Smiths and the Dissent as requesting “something that has never been done in the history of Texas jurisprudence, converting a contractual duty to a contract party into a tort duty to a non-contract party.” The Court Majority states:

Unquestionably, the Architects entered into a contractual agreement in which they agreed to make periodic visits to the construction site, to report observed deviations from the design plans to the Maxfields, and to guard the Maxfields against defects in the construction of the home; however, the Smiths and the dissent

ask us to do something that has never been done in the history of Texas jurisprudence: they request this Court to transform and extend the contractual duty owed to the Maxfields into a common law duty owed to the Smiths as visitors to the Maxfields' home. Although our sympathies extend to the Smiths for the suffering they have unjustly been forced to endure, this Court simply cannot create a new common law duty in order to uphold the relief that they sought against the Architects. *Id.* at 881.

The Court Majority states it is not its function to announce new duties by concluding

Having considered all the relevant factors, we cannot conclude that the imposition of a new common law duty on architects is warranted in these circumstances. This seems particularly true in this case where the general contractor had a duty to inspect and an absolute right to control the subcontractor's work and to warrant and guarantee that work and where the injured third parties could (and did) obtain relief from the general contractor for his breach of that duty. In making their request, the Smiths ask this Court to fundamentally alter the obligations of architects working in Texas and to ignore the language contained in contracts that are used industry wide. Although there may be compelling reasons for expanding an architect's duty to use reasonable care in circumstances like those presented in this appeal, the decision regarding whether to undertake such a massive expansion is better left to courts of higher jurisdiction. *Id.* at 893.

**c. Balancing Test: Favors Not Creating a New Duty**

**(1) Foreseeability**

The Court Majority acknowledges that foreseeability and a likelihood of injury weigh in this case in favor of finding a duty, but the Court Majority, in finding other factors more compelling, states

Arguably the foreseeability and likelihood-of-injury factors could be viewed as weighing in favor of extending an architect's duty of care. If an architect fails to identify and report a structural defect, a risk of harm can exist. Likewise, when the defect implicates critical safety or structural integrity concerns, one would suspect an increased likelihood of physical injury. It is also foreseeable that the risk of physical injury includes harm to third-party visitors, as it would seem to be a rare case where no person would use a structure other than the owner with whom an architect contracts.... Rather, the risk, foreseeability, and likelihood of injury are to be weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden on the actor. (citation omitted.) In addition, a court may consider whether one party has superior knowledge of the risk, whether one party has a right to control the actor who caused the harm (citation omitted.), and whether legislative enactments evidence the adoption of a particular public policy significant to the recognition of a new common-law duty ....(citation omitted.) *Id.* at 885.

## (2) No “Right to Control”

### [a] Right to Reject Work Not a Right to Control

The Court Majority notes that the agreement between the Architects and the Maxfields specified that although the Architects had the ability to reject the work done by Nash, they had no power to control the actual construction work performed at the site. The Court Majority cites *Loyd v. ECO Res., Inc.*, 956 S.W.2d 110, 130 (Tex. App. – Hou. [14<sup>th</sup> Dist.] 1997, no pet.) as explaining that right to control is “often the deciding factor” when determining the existence of legal duty. *Id.* at 886.

### [b] Agreement Negated Right to Control

The Court Majority notes that the Architect Contract specifically negates the Architect’s right to control the work. The Majority offers the following analysis of the Architect Contract:

Specifically, the agreement provided that the Architects “shall neither have control over or charge of, nor be responsible for, the

construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work.” Instead, the agreement explained that those obligations “are solely the Contractor's [Nash's] rights and responsibilities.” Further, the agreement specified that the Architects were responsible for their own acts or omissions but that they “shall not have control over or charge of and shall not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons or entities performing portions of the Work.” Similarly, the agreement stated that the Architects were not “responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents.” In addition, the agreement explained that neither the authority bestowed on the Architects by the agreement “nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect[s] to the Contractor, Subcontractors, ... their agents or employees or other persons or entities performing portions of the Work. *Id.* at 886-87.

In support of its conclusion that the Architect’s limited powers under the Architect Contract did not create duties to third parties, the Court Majority cites the decision of the Iowa Supreme Court in *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs.*, 473 N.W.2d 612, 616 (Iowa 1991) “concluding that engineer did not owe duty of care to others because engineer had no right to control work performed and only had ‘responsibility for quality control’”. The Court Majority also cites *Coastal Marine Serv. of Texas, Inc. v. Lawrence*, 988 S.W.2d 223, 226 (Tex.) “explaining that ‘right to control’ must be more than a general right to order work to stop and start, or to inspect progress.” *Id.* at 886.

Further, the Court Majority notes that another court of appeals examining an engineer’s agreement with similar but not identical language found that the engineer did not have a right to control sufficient to impose on it a common law duty to protect third parties from construction defects. *Romero v. Parkhill, Smith & Cooper, Inc.*, 881 S.W.2d 522, 526 (Tex. App. – El Paso 1994, writ denied). The Court

Majority summarizes the *Romero* decision as follows:

Under the agreement, the engineer agreed to make periodic visits to the construction site to “observe the progress of the executed work and to determine in general if such work meets the ... requirements of the contract documents” and to inspect the construction and determine if it has been completed in accordance with the contract documents. *Id.* at 525-26. However, the agreement also specified that the engineer was not obligated to “make exhaustive or continuous on-site inspections to check the quality or quantity of the work”; was not “responsible for the construction means, methods, techniques, sequences or procedures”; and was not “responsible for the acts or omissions of the contractor [or] any subcontractor.” *Id.* Ultimately, the court determined that nothing in the contract between the city and the engineer gave the engineer the right to control the construction and, accordingly, that the engineer did not have a duty of care to an employee of a subcontractor to keep the premises safe. *Id.* at 524, 527. (Omitted Footnote 7 listing cases from other jurisdictions that have addressed this type of contract and which reached similar conclusions.)

**[c] Contractor Control the Means of Construction**

The Court Majority points out that, in contrast to the Architect Contract, the construction contract gave Nash the “absolute right to control the worksite and the means of construction and also imposed on Nash significant supervisory responsibilities and liabilities.” *Id.* at 887. The Court Majority cites in support of its holding a Mississippi court in *Hobson v. Waggoner Eng’g, Inc.*, 878 So.2d 68, 76 (Miss. Ct. App. 2003) which concluded that an engineer had no duty to warn, in part, because general contractor had “full and absolute control over the work site and the means and methods of construction”.

**[d] No Actual Control**

The Court Majority also points out that “nothing in the record establishes that the Architects exercised actual control over the construction of the balcony.” *Id.* at 888.

**[e] Issuance of Certificates Not Exercising Control**

In a footnote, the Court Majority rejects the Smiths’ argument that the Architect issuance of payment and completion certificates was tantamount to exercising control of the Work. The Court Majority responded to this argument as follows:

Even assuming that the Architects’ review of the payment applications did impose some additional obligation on them, that obligation would have extended to the Maxfields for whom the Architects agreed to perform that task. In fact, the certificates relied on by the Smiths and the agreement between the Architects and the Maxfields specified that the Architects’ certifications for payment were assurances and representations to the Maxfields. Moreover, the imposition of an obligation to inspect is inconsistent with the terms of the agreement, which clarified that the “issuance of a Certificate for Payment shall not be a representation that the Architect[s] ha[ve] (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work [or] (2) reviewed construction means, methods, techniques, sequences or procedures.” In addition, as we previously mentioned, this case does not involve a negligent-undertaking claim, but we do note that nothing in the record indicates that the Smiths ever reviewed these certificates or relied on them in any manner. *Id.* Footnote 10, at 889

**(3) Social Utility**

**[a] Encouraging Inspection by a Licensed Professional**

**[1] Good to Have Architect Inspect**

The Court Majority found strong social utility in encouraging architects to undertake even limited

inspection and observation duties during construction without the risk of imposing liability for not detecting defects and deficiencies. The Court Majority states

There is significant social utility in having the architect responsible for designing a structure also agree to provide some oversight regarding whether the structure is being built in accordance with the design. In general, homeowners will not have the requisite knowledge or training to be able to ascertain whether the construction is progressing properly or to provide a check to potential builder incompetence, and any involvement by an architect during the construction will provide some potential check and will also encourage adherence to the design. Moreover, if an architect is able to identify deviations from the design plans early in the construction process, the architect will be able to minimize the cost of corrective construction and limit the need for expensive rehabilitative modifications occurring after the home has been constructed. *Id.* at 889.

## [2] Not A Guarantor of Contractor's Work

The Court Majority argues that placing a duty on the architect to the Smiths, despite the limited nature of the contractual inspection and observation duties in the Architect Contract would “impose the burden of identifying every defect.” And

The consequences of placing such a burden on architects would likewise be significant. Under the terms of the agreement, the Architects did not agree to be guarantors or insurers of the work of the general contractor. However, this is the practical consequence of the duty sought by the Smiths. The duty sought by the Smiths would expose the Architects to lawsuits brought by parties that the Architects could not have identified at the time of entering into the contract. To protect against liability, the Architects would have needed to effectively take on the duty of care of a guarantor so as to ensure that all critical matters were fully observed. *Id.* a 890.

## [3] An Intermediate Level of Service

Further, the court notes

Had the Maxfields wanted the Architects to be guarantors or insurers, they could have contracted for such services and would likely have had to pay a higher fee. Instead, the Maxfields contracted for an intermediate level of services—obtaining from the Architects some oversight but not a guarantee. Under this type of agreement, the owner obtains an architect's assistance without having to pay for a full guarantee, and the architect provides assistance without having to incur the type of liability involved with providing a guarantee. Imposing the type of duty suggested by the Smiths onto architects under the type of industry-standard agreement at issue in this case would reduce the likelihood that architects would agree to enter into such agreements in the future or, at the very least, increase the compensation required for the architects' services, despite the significant social utility of such agreements. *Id.* at 890-891.

## [b] Placing Liability with Contractor Is Placing Liability with Party With Superior Knowledge

The Court Majority concludes that given that Nash and Rodriguez were charged with the actual construction of the balcony, it cannot be disputed that they had superior knowledge of whether their actions conformed to the design plans. The Architects' knowledge of the importance of properly attaching a second-floor balcony would not be superior to that of any other party involved in the balcony's construction. *Id.* at 891.

## K. Court of Appeals – the Dissent

### 1. Architect's Duty - To its Client

#### a. Guard Against Obvious Defects

The Dissent finds that an architect contracting to “endeavor to guard” against defects and deficiencies in the work, BVA owes a duty to identify *open and obvious defects* such as those at issue here.

#### b. Responsible for Breach of its Own Duty

The Dissent would hold that while BVA is not a guarantor or insurer of the general contractor's work, it did take on “a nonconstruction responsibility” to “visit, to familiarize, to determine, to inform and to endeavor to guard” the Maxfields from defects and

deficiencies in the work. Thus, BVA may be held liable, not for the general contractor's negligence, but for a breach of its *own* duty as a “provider of information.”

The Dissent notes that in *Hunt v. Ellisor & Tanner, Inc.*, 739 S.W.2d 933, 935 (Tex. App. – Dallas 1987, writ denied), a case in which a general contractor had failed to build a parking garage in accordance with the plans and specifications, the court of appeals addressed the architect's liability under virtually identical “endeavor to guard” contract language. The contract at issue in *Hunt* stated:

The Architect will make periodic 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. On the basis of his on-site observations as an architect, he will keep the Owner informed of the progress of the Work, and will endeavor to guard the Owner against defects and deficiencies in the Work of the Contractor. The Architect will not be required to make exhaustive on-site inspections to check the quality and quantity of the Work. The Architect will not be responsible for the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, and he will not be responsible for the contractor's failure to carry out the Work in accordance with the Contract Documents. *Id.* (emphasis added by the Dissent).

The architect in *Hunt* made essentially the same argument made by BVA in the present case—that due to the contract language stating that the architect is not responsible for the contractor's failure to carry out the work in accordance with the contract documents, the architect's agreement to “endeavor to guard” the owner against defects and deficiencies did not expose the architect to liability for failure to identify any such defects or deficiencies. *See Hunt* at 936-37. The *Hunt* court of appeals rejected that argument, stating:

We conclude that the language said to be exculpatory constitutes nothing other than an

agreement that the architect is not the insurer or guarantor of the general contractor's obligation to carry out the work in accordance with the contract documents. We reach this conclusion because the first three sentences of [the contract provision quoted above] impose a nonconstruction responsibility upon the architect; to wit: to visit, to familiarize, to determine, to inform and to endeavor to guard. In short, to provide information, not to make improvements upon the job site. Therefore, we reason that the fourth sentence of [the contract provision] ... exist[s] to emphasize the architect's nonconstruction responsibility and to make certain that the architect “will not be responsible for the [general] contractor's failure to carry out the work in accordance with the contract documents.” In short, the provider of information to the owner does not insure or guarantee the general contractor's work. *It follows, and we so hold, that the contract does not exculpate [the architect] from liability for the general contractor's failure to carry out the work in accordance with the contract documents.* (emphasis added by the Dissent).<sup>66</sup> *BVA* Dissent at 898.

As the court in *Hunt* clarified,

[W]e observe the separate and independent contract obligations to [the owner] of both the general contractor and [the architect]. Each breached its obligations. [The architect] breached its obligation to observe the progress of the work and to endeavor to guard [the owner] against defects in the work. *Hunt*, 739 S.W.2d at 939.

The Dissent noted that like in *Hunt*,

Here, too, BVA had a nonconstruction obligation to endeavor to guard the Maxfields against defects in the work, and the jury was entitled to determine whether BVA was negligent in the performance of that duty. *BVA* Dissent at 898.

**c. Failure to Observe Deficiency Not an Excuse**

The Dissent would find that the fact that the defects in question did not come to BVA's attention during the contract administration process would not alter the Dissent's analysis. The Dissent states

as BVA's admitted failure to observe visible and obvious defects affecting critical safety and structural integrity aspects of the balcony, despite taking and reviewing photographs of those defects, represents more than a scintilla of evidence that BVA did not fulfill its duty to "endeavor to guard" the Maxfields against defects and deficiencies. While BVA's expert witness testified that a reasonable and prudent architect could have overlooked the defects in the photographs, the plaintiffs' expert testified that for a reasonable and prudent architect hired to perform contract administration services, the defects "should have been observed" because the required elements were "clearly missing." The jury, as finder of fact, was responsible for evaluating the credibility of witnesses and the weight to be given their testimony. *BVA Dissent at 898.*

The Dissent argues that the Architect breached its duty by turning a *blind eye* to an open and obvious structural defect. The Dissent cited testimony by BVA's intern who actually undertook the inspections and who stated that he had limited his review of the balcony as to whether it was "the correct size and under the proper door opening." *BVA Dissent at FN 6. P. 902.*

## **2. Architect's Duty – To Third Parties**

### **a. Agreed Plaintiff's Are Not a Third Party Beneficiary of the Architect's Agreement**

The Dissent agrees that the Injured House Guests are not third party beneficiaries of the Architect Contract. The Dissent argues that unlike the third party at issue in *Stine* relied upon by the Court Majority, the plaintiffs in this case (the Injured House Guests) are not attempting to bring a breach-of-contract claim against BVA to recover for an economic loss, but a negligence claim to recover damages for personal injuries.

### **b. Liable for Injuries if Architect Failed to Detect an Obvious Defect**

The Dissent would hold that the duty undertaken by an architect to identify open and obvious construction defects and to guard against such defects and efficiencies in the work extends to third parties whose injuries were proximately caused by the architect's breach of its duty. *BVA Dissent at 898.*<sup>67</sup>

### **c. A Common Law Duty Exists**

The Dissent states

Given that the plaintiffs' lack of contractual privity does not preclude them from recovering for their injuries, the relevant question is whether the circumstances surrounding BVA's contract with the Maxfields gave rise to a common-law duty to the plaintiffs. *BVA Dissent at 900.*

#### **(1) Balancing Test**

The Dissent notes that whether a legal duty exists is a question of law for the court to decide from the facts surrounding the occurrence in question. The Dissent notes that in determining whether a legal duty exists requires the balancing of the following factors: (a) the risk and foreseeability of injury, (b) the social utility of the actor's conduct, (c) the consequences of imposing the burden on the actor, (d) any other relevant competing individual and social interests implicated by the facts of the case, (e) whether one party has superior knowledge of the risk, (f) the right to control the actor whose conduct precipitated the harm, and (g) the magnitude of the burden of guarding against the injury.<sup>68</sup>

#### **(a) Foreseeability**

The Dissent finds that injuries to the homeowner's visitors were a foreseeable risk and were to be protected by the duty of the Architect to detect and report open and obvious construction deficiencies. The Dissent states:

When an architect agrees to provide contract administration services, that architect's failure to notify the owner of observable and dangerous deviations from the architect's own design drawings, particularly in connection with an element like a balcony where construction in accordance with the design drawings is a critical safety issue, creates a foreseeable risk of injury for visitors lawfully on the premises. BVA architects viewed photographs depicting

nails where the required bolts should have been, thin metal clips where welded tabs should have been, the absence of the joist hangers required by the design drawings and the uniform building code, and the absence of a rim joist and blocking, which Black acknowledged was critical to the structural integrity of the balcony. Given the number and nature of these defects, the risk of injury to a third-party visitor from BVA's failure to identify the defects and bring them to the owner's attention was foreseeable.... Under these circumstances, there was a foreseeable risk that a third-party visitor to the home would be injured as a result of BVA's failure to fulfill its "nonconstruction responsibility" to "visit, to familiarize, to determine, to inform and to endeavor to guard." *BVA Dissent* at 900-01.

## **(b) Social Utility of Actor's Conduct**

### **[1] A Licensed Profession**

The Dissent cites in support of its imposition of a common law duty in this case the responsibility that an architect takes as a licensed professional. The Dissent states:

The foreseeability factor is particularly important in this case, given the public's reliance on design professionals to properly perform their contractual obligations as a matter of public safety. When a visitor to a residence, lawfully on the premises, walks out onto a balcony, the personal safety of that visitor depends on certain professionals having non-negligently performed their contractual duties with respect to the balcony. In a case where an architect was hired to perform contract administration and to "endeavor to guard" the owner against defects and deficiencies in the work, the visitor's safety depends on the architect having fulfilled this duty using the level of care, skill, and diligence that would be exercised by a reasonably prudent architect under similar circumstances. *BVA Dissent* at 901.

### **[2] Encouraging Architects to Provide Contract Administration Services**

The Dissent concedes that there is some benefit to the public to encourage architects to provide contract administration services. However, the Dissent notes that they

fail to see the social utility in allowing an architect performing these services to "close his eyes on the construction site, refrain from engaging in any inspection procedure whatsoever, and then disclaim liability for construction defects that even the most perfunctory monitoring would have prevented." *Citing First Nat'l Bank of Akron v. Cann*, 503 F.Supp. 419, 436 (N.D. Ohio 1980), *aff'd*, 669 F.2d 415 (6<sup>th</sup> Cir. 1982) in which the court held that even where continuous on-site inspections were not required, the architect had a contractual obligation to, at a minimum, identify defects discoverable under "the most general supervision." *BVA Dissent* at 903.

### **[3] Placing Liability With the Party with the Superior Knowledge of the Risk**

#### **[a] Knowledge as to Plans as Between Architect and Contract Parties**

The Dissent points out that the Architect has a superior knowledge of the plans it drafts ("there is a reason the Maxfields paid BVA \$84,000 to create those plans" *BVA Dissent* at 903). The consequences for any deviations from the plans would be within the particular knowledge of the licensed professional architect who prepared them.

#### **[b] Balcony Drawings Specifically Noted Requirement for Architect's Approval for Deviations**

The balcony design drawings, which were entered into evidence, included the following notation:

Installation or completion of building elements in direct conflict with intent of drawings (as expressed in architectural documents) will not be acceptable without



written approval from architect. *BVA Dissent* at 903.

Every entity on the construction site looked to BVA as the ultimate authority on the design plans. As the party with final approval and authority over the design of the home, BVA had superior knowledge of the risk related to any deviations from its own drawings.

**[c] Knowledge of Plans as Between Architect and Visitors**

The Dissent:

Furthermore, it is beyond dispute that between BVA and any third-party visitor to the home who might choose to walk out on the balcony, the party with superior knowledge of the risk would be the team of architects with years of professional training who actually designed the home and conducted periodic site visits during the construction phase in order to endeavor to guard against defects and deficiencies in the work. Thus, I would view the factor related to the superior knowledge of the risk as weighing in favor of extending BVA's duty to third-party visitors. *BVA Dissent* at 902-3.

**[4] Level of Investigation Required**

**[a] Defect Open and Obvious at Time of Site Visit**

The Dissent notes that the burden being placed on the architect in cases like the present one is minimal as the defect was open and obvious at the time of the Architect's site visit. The Dissent states:

If the duty at issue here required BVA to identify every construction defect in the Maxfields' home, I would be inclined to agree. But given the undisputed testimony that the defects were not merely visible, but open and obvious in the photographs taken by Schmeil in the course of providing contract administration services, no inspections—exhaustive or otherwise—were necessary. BVA could have discovered the defects by simply looking at the photographs. *BVA Dissent* at 904.

**[b] Timing of Observations**

The facts of this case do not involve defects that were immediately covered up and thus not observable, or only visible from a certain vantage point. As noted by the Dissent:

The evidence in this case is unique in that the defects can be identified on photographs actually taken by the architects in the course of providing contract administration services. In a situation where a defect is created and then immediately obscured by walls or ceilings so that it is never observable to the architect during a site visit, no duty to identify the defect would arise. Similarly, it is possible that no duty would arise if a defect is only visible from a certain vantage point and there is no evidence that the architect ever viewed the defect from that particular vantage point. But those are not the facts of this case. In this case, Schmeil himself took photographs depicting the defects and deviations from the design drawings. There is no question that the defects were not only observable to Schmeil during his site visit, but also observable to both Schmeil and Black during their subsequent review of the photographs. *BVA Dissent* at 904....

This duty should be extended to the plaintiffs in the very limited circumstances present here, where the defects were open, obvious, observable to the architect, implicated critical safety and structural integrity concerns, involved significant deviations from the architect's own design drawings despite the fact that preapproval of any such deviation was required, and were overlooked by an architect who contracted to provide contract administration services. *BVA Dissent* at 905.

**[c] Blind Eye**

The Dissent notes that requiring an architect to have more than a "blind eye" in its observations is not a heavy burden.

Finally, the consequences of extending this duty to third parties are not so burdensome to the architect as to outweigh the remaining factors in favor of doing so. I disagree with the majority's contention that extension of this duty to foreseeable third parties will require an architect providing contract administration services to act as a guarantor or insurer of the work of the general

contractor. On the contrary, the architect is required only to act in a reasonable and prudent manner, just as anyone else must do in order to avoid negligence liability. It cannot be a particularly onerous burden to expect an architect providing contract administration services to refrain from “clos[ing] his eyes on the construction site” and then “disclaim[ing] liability for construction defects that even the most perfunctory monitoring would have prevented.” *Citing First Nat’l Bank of Akron v. Cann*, 503 F.Supp. 419, 436 (N.D. Ohio 1980), *aff’d*, 669 F.2d 415 (6<sup>th</sup> Cir. 1982). *BVA Dissent* at 905.

**(2) Right to Control Contractor’s Work Not at Issue, As Duty Breached was Its Obligations as a “Provider of Information”**

The Dissent concedes that the architect did not have the right to control the means or methods of construction and thus did not have a duty to control which was breached. The Dissent argues that the duty breached was a “nonconstruction responsibility” to “visit, to familiarize, to determine, to inform[,] and to endeavor to guard” against defects and deficiencies in the work. *Citing Hunt*, 739 S.W.2d at 937. The Dissent states

In the present case, however, the plaintiffs do not allege that BVA caused their injuries by a failure to control the construction site. Rather, they complain that their injuries were caused by BVA’s negligence in fulfilling its obligation as a “provider of information.” *BVA Dissent* at 902.

**d. Contractual Disclaimers of Third Party Liability Not Bar to Third Party Claims**

The Dissent notes that statements in contracts that a party’s contractual provision cannot create a cause of action in favor of third parties have been rejected as a limitation on negligence liability.<sup>69</sup>

**L. Briefs to the Supreme Court**

The following are portions of the arguments made by the parties in their counsel’s briefs to the supreme court. The following is not an exhaustive exposition

of their arguments and counter arguments. You are invited to read the briefs.

**1. The Injured House Guests**

**a. Lack of Privity Does Not Pose An Absolute Bar to Recovery Against the Architects**

**(1) The Architects’ Response Fails to Address the Fundamental Inconsistency of the Court Majority’s Decision**

The Smiths (the “Petitioners”) argue on appeal that the Architects do not address a fundamental inconsistency raised by the Court Majority’s opinion, the Court Majority would have found the Architects’ liable if the Maxwells were injured by the collapsed balcony.<sup>70</sup>

**(2) Lack of Privity is Not a Bar to Recovery Here Simply Because It Is a Bar to Recovery Against Some Professionals Under Some Different Circumstances**

The Petitioners argue that Texas courts have recognized that the lack of privity, although being a bar in certain cases involving professional services, is not absolute bar to third parties recovering against a professional.<sup>71</sup>

**(3) Modern Authorities Confirm that Lack of Privity Poses No Absolute Bar to Recovery Against an Architect**

The Petitioners cite a case from another jurisdiction and a leading commentator to illustrate that other jurisdictions have recognized an architect’s tort liability to third parties despite the lack of privity.<sup>72</sup>

**b. The Risk-Utility Balancing Test Weighs in Favor of Recognizing That The Architects Owed a Duty to Petitioners Here, Albeit A Duty That is Relatively Narrow**

**(1) Foreseeability Is Not the “Decisive” Factor, But It Is the “Foremost and Dominant” Consideration, and Weighs In Favor Of Recognizing a Duty**

The Petitioners argue that “foreseeability”, although not the “decisive” factor, is “the most foremost and

dominant consideration” among the various duty factors.<sup>73</sup>

**(2) This Court Should Decline to Adopt the Architects’ One-Size-Fits-All Approach to the “Control” Factor**

The Petitioners argue that the Court Majority misanalyzed the “control” factor, by minimizing two critical facts:

[a] The Architects exercised sufficient control to ensure that any construction defects that they observed in their contract administration were corrected.

[b] If the defects here—which were obvious in photographs taken by the Architects themselves—had been corrected, the balcony would not have collapsed and Mrs. Smith would not have been injured.

**[a] The Circumstances in This Case Are Fundamentally Different From Those in the Cases On Which the Architects Rely, and Thus, Call For a Different Result**

Petitioners argue that the Architects’ “control” cases address a different circumstance than what occurred in *BVA*. The Petitioners argue that the authority cited by the Architects address cases where the courts reject finding a duty on a defendant’s failure to *prevent* a contractor’s misstep *before* it occurs as opposed to whether the defendant “had sufficient opportunity to discover obvious defects, and retained sufficient ‘control’ to have the contractor *correct* his negligent work *after* he performed it but *before* injury occurred.”<sup>74</sup>

**[b] The Architects Were Not Relieved of Their Inspection Duty Simply Because Nash, as Contractor, Also Had an Inspection Duty**

Petitioners argue that the fact that the contractor had the responsibility to inspect the balcony and see that its subcontractor’s negligent work was corrected, did not relieve the Architects of their obligation to “endeavor to guard the Owner against defects and deficiencies in the Work.”<sup>75</sup>

**(3) The Contract’s “Endeavor To Guard” Duty, Though Limited, Is Nonetheless Real**

The Petitioners argue that the “endeavor to guard” language in the Architect Contract imposed a real obligation on the Architect.<sup>76</sup>

**c. The Evidence Is Legally Sufficient To Support Petitioners’ Recovery**

**2. The Architects**

**a. Summary of the Argument**

The Architects argue that neither Texas common law nor any statute imposes contract administration duties on architects. The assumption of such duties is strictly a matter of contract between the architect and its client. The Architect Contract provides that the architect is *not* contractually responsible for erecting the building or for supervising the contractors. The architect has only a limited contractual duty to “endeavor” to guard the client against defects in the construction work. The architect discharges that duty by intermittently visiting the building site and by reporting to the client “known deviations” from the design plans that are observed. *BVA* complied with those contractual duties.

The Architects argue that Petitioners and the Dissent want the supreme court to change Texas common law by imposing on architects and other design professionals a new tort duty arising from that assistance. This new duty would make design professionals liable to anyone hurt by a dangerous condition created by a contractor’s failure to follow design plans. Such liability would be imposed even though the professionals (1) did *not* create the dangerous condition, (2) did *not* agree to control the construction work or exercise actual control over that work, and (3) did *not* guarantee or ensure to the owner that the contractors would follow the design plans.

**b. BVA’s Reporting Obligation Existed Solely Because of the Architect Contract**

The Architects argue that that contractual duties, such as those imposed on *BVA* as contract administrator, do not create tort duties owed to third parties, unless the failure to perform is also the breach of a legal duty owed to the plaintiff. “The true question” is whether the defendant has breached a “duty apart from the contract.” The Architects argue that the only duty that the Architects owed was to their clients, not the Smiths who were not in privity with the Architects.<sup>77</sup>

**c. Petitioner’s Hypothetical Is Flawed**

The Architects argue that Petitioner’s hypothetical is flawed.<sup>78</sup>

**d. Petitioners’ Interpretation of BVA’s Duties Under the Architect Contract Violates Settled Principles of Texas Tort and Contract Law**

The Architects argue that the Petitioners would create a new tort duty by expanding the limited scope of the Architects’ obligations under the Architect Contract, violating existing tort and contract law.<sup>79</sup>

**(1) There Is No Duty to Warn of Dangers That One Does Not Create**

The Architects argue that the new tort duty would violate the principle that persons have no common law duty to warn others of a danger that neither they nor those under their control created.<sup>80</sup>

**(2) Liability for Defective Construction Follows Control**

The Architects argue that the new tort would violate the principle that liability for defective construction work follows control.<sup>81</sup>

**(3) Courts Do Not Rewrite Unambiguous Agreements**

The Architects argue that creating the new tort for architects working under the AIA Contracts in this case would violate the principle that courts do not rewrite unambiguous agreements. The Architects argue that Architect Contract is unambiguous. It provides that BVA will “endeavor to guard” its clients against defects in the construction work by reporting to them any “*known* deviations” from the design plans. The Architects argue that the Petitioners are saying that the “endeavor to guard” language should be interpreted to place on BVA the duty to “detect” and report defective construction work resulting from deviations that BVA “*should have*” seen.

**(4) Contractual Provisions Must Be Read Together**

The Architects argue that their interpretation of the Architect Contract does not render the “endeavor to guard” language meaningless or allow the architect to do nothing. BVA complied with its contractual duty by making intermittent visits to the building site and by reporting the deviations that it saw during those visits.

**e. The Court of Appeals Correctly Addressed and Applied Contract Principles**

**f. The Court of Appeals’ Decision is in the “Mainstream” of Tort Law Jurisprudence**

**g. The Court of Appeals Did Not Misapply the “Risk-Utility” Balancing Test**

**(1) The Foreseeability Factor**

The Architects argue that the Petitioners “want to make ‘foreseeability’ of the risk of the personal injury from an unnoticed and unreported deviation affecting safety and structural integrity the *decisive* test for holding an architect liable in tort to a non-client. But if foreseeability is always the controlling factor, then the outcomes in this Court’s cases in which professionals were held *not* liable to non-clients would have been different.”

**(2) The Control Factor**

The Architects argue that the Petitioners position is founded on the argument that BVA had “control” because it had the right to “reject” defective work and have it corrected. The Architects respond that “the right to reject work is not the kind of control giving rise to tort liability under Texas law.”<sup>82</sup>

**h. The Court of Appeals Correctly Recognized that the New Tort Duty Would Create an Onerous Burden for Design Professionals and Drive Them From the Sites of Small-Scale Projects and Vastly Increase the Costs of Larger Ones**

The Architects argue that the consequences of the new tort duty would force architects to charge their clients enormous fees to cover the costs of the exhaustive and detailed investigations that would occur and the high malpractice premiums that insurers would assess because of the massively

increased risks. They argue that many owners of small-scale projects would choose to forgo an architect's contract administration services.

- i. There is no Evidence to Support a Finding that BVA Breached a Tort Duty Owed to Petitioners**

**APPENDIX**

## Austin architect, civic leader Black ensnared in legal battle over balcony collapse

By [Barry Harrell](#) AMERICAN-STATESMAN STAFF

Updated: 6:11 p.m. Saturday, Sept. 18, 2010

Published: 7:48 p.m. Saturday, Sept. 11, 2010

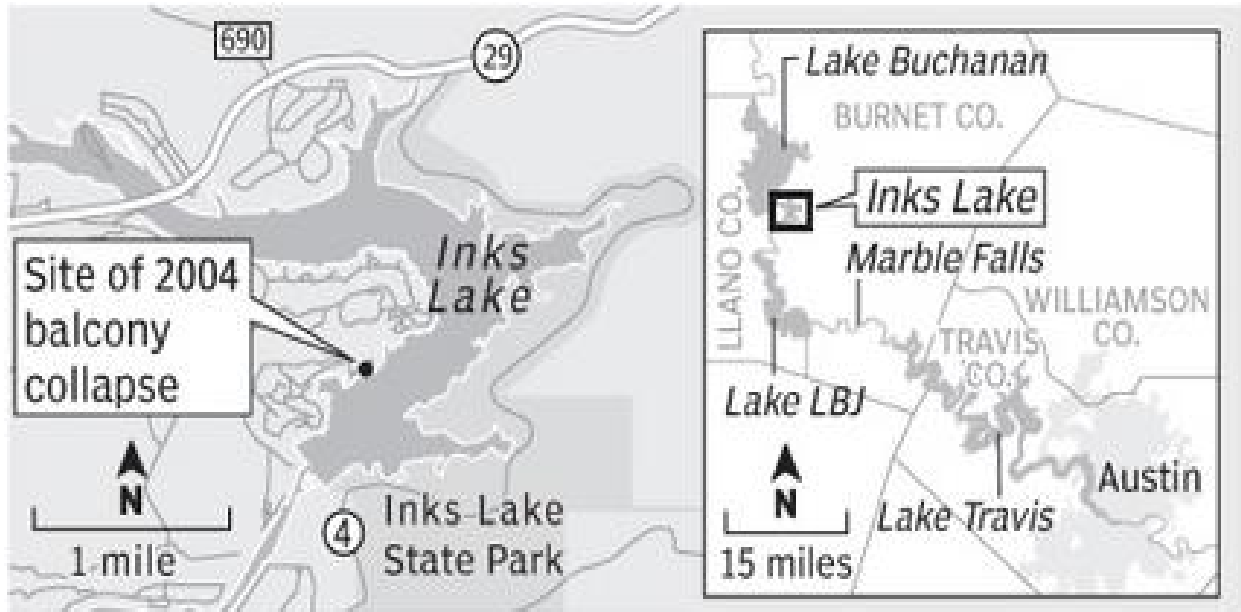


On a Texas summer night more than six years ago, Lou Ann Smith and Karen Gravley stepped onto the third-story balcony of an Inks Lake home they were visiting.

The balcony collapsed beneath them, broke away from the house and sent the women plummeting more than 20 feet to the ground. The balcony, weighing an estimated 3,000 pounds, was attached to the house with 3/4-inch nails, not the bolts that the architect's design had specified, photos and court testimony would later show.

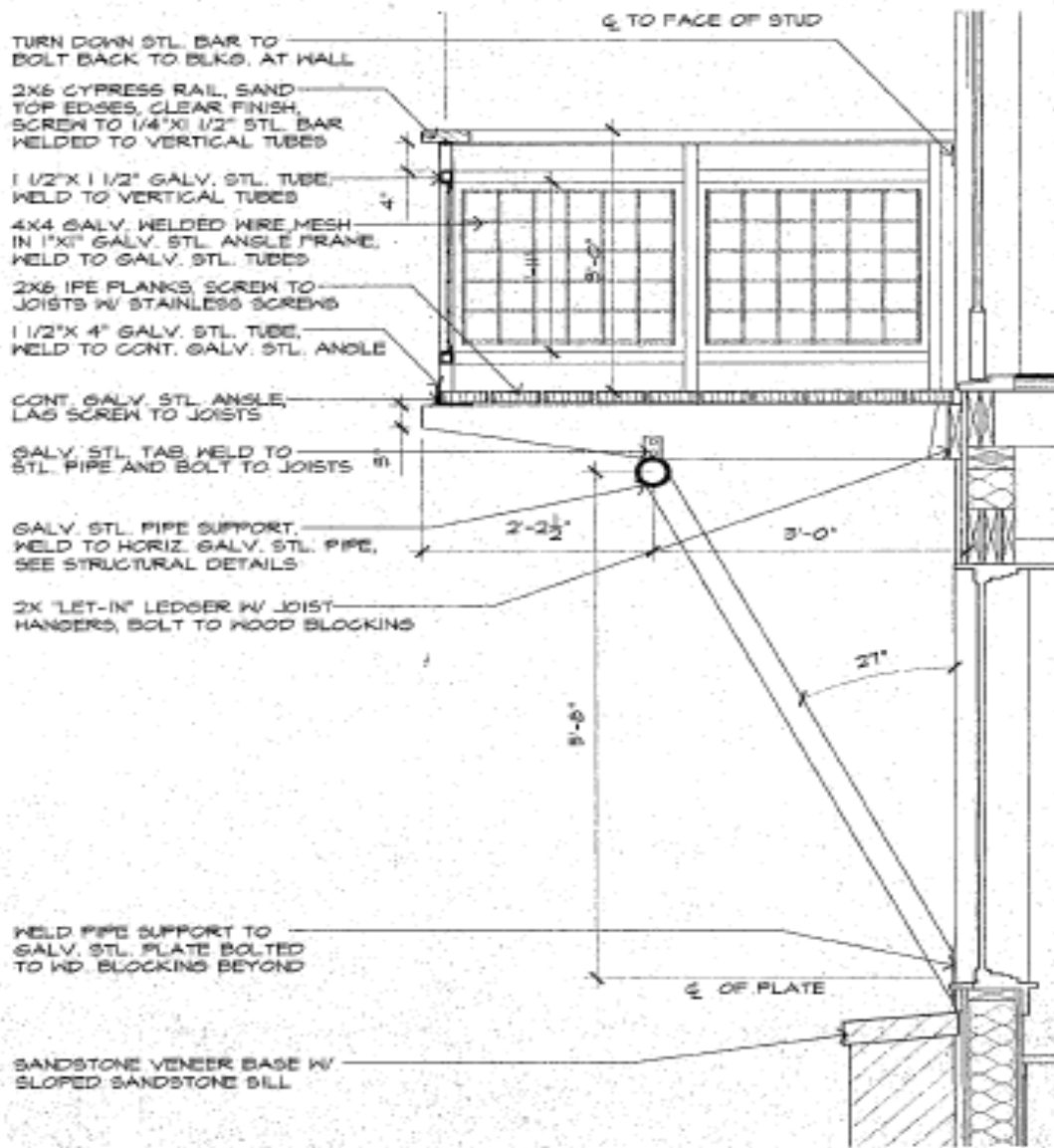
That July 2004 accident left Smith, 53, paralyzed from the waist down. It also set off a court battle that has spawned accusations of wrongdoing against one of Austin's best-known architects and civic leaders, Sinclair Black, and resulted in a jury verdict that some in the architectural industry say could have a chilling effect on their profession.

Black designed the house and, according to the language in his contract, which was entered as an...



**Robert Calzada** AMERICAN-STATESMAN





5

BALCONY DETAIL

3/4" = 1'-0"

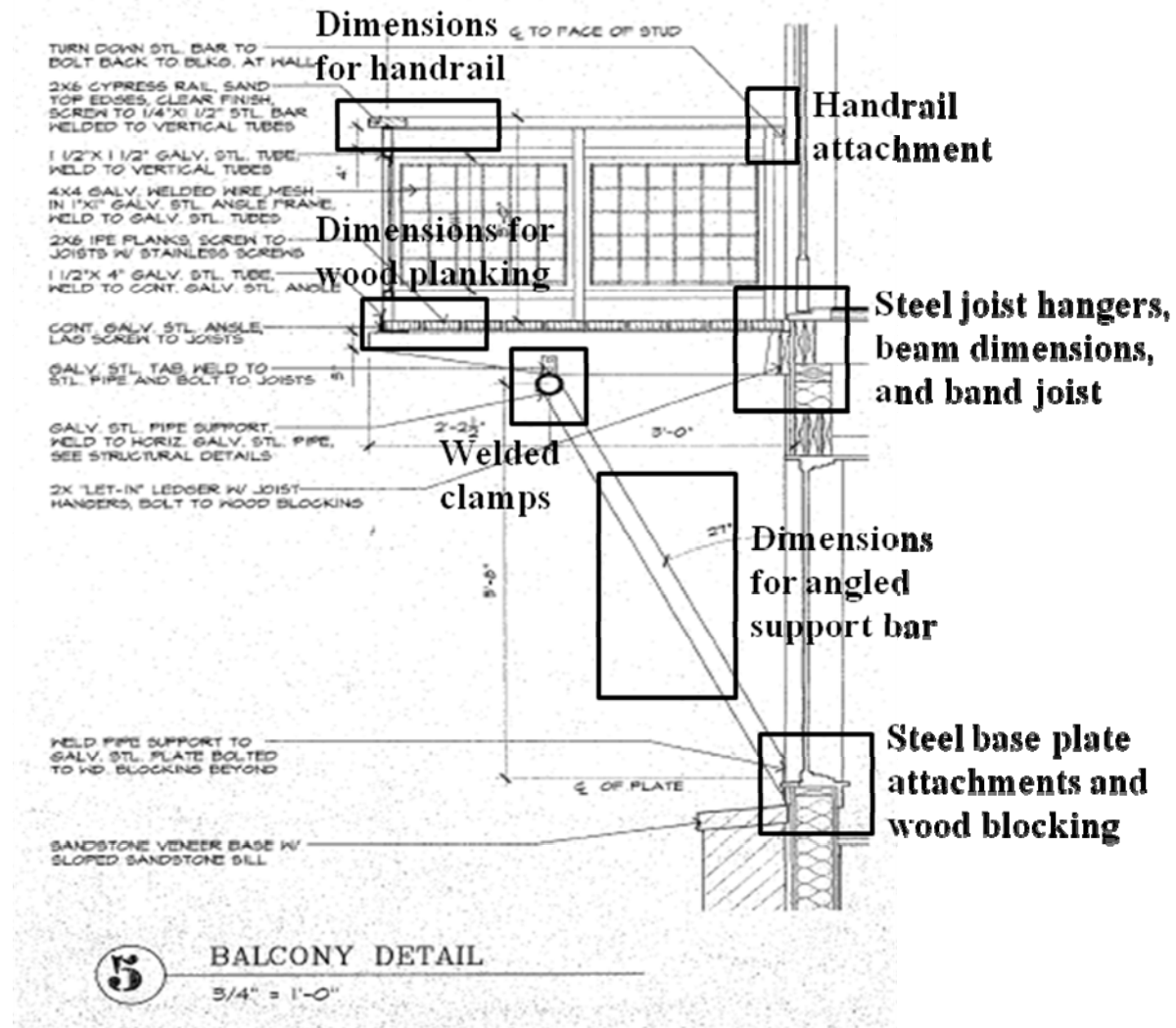
This is the balcony detail sheet, a part of the original plans prepared by the architect.



This photo was taken by the architect during its inspections. This paper's author has superimposed the white rectangles.

This photo displays the following:

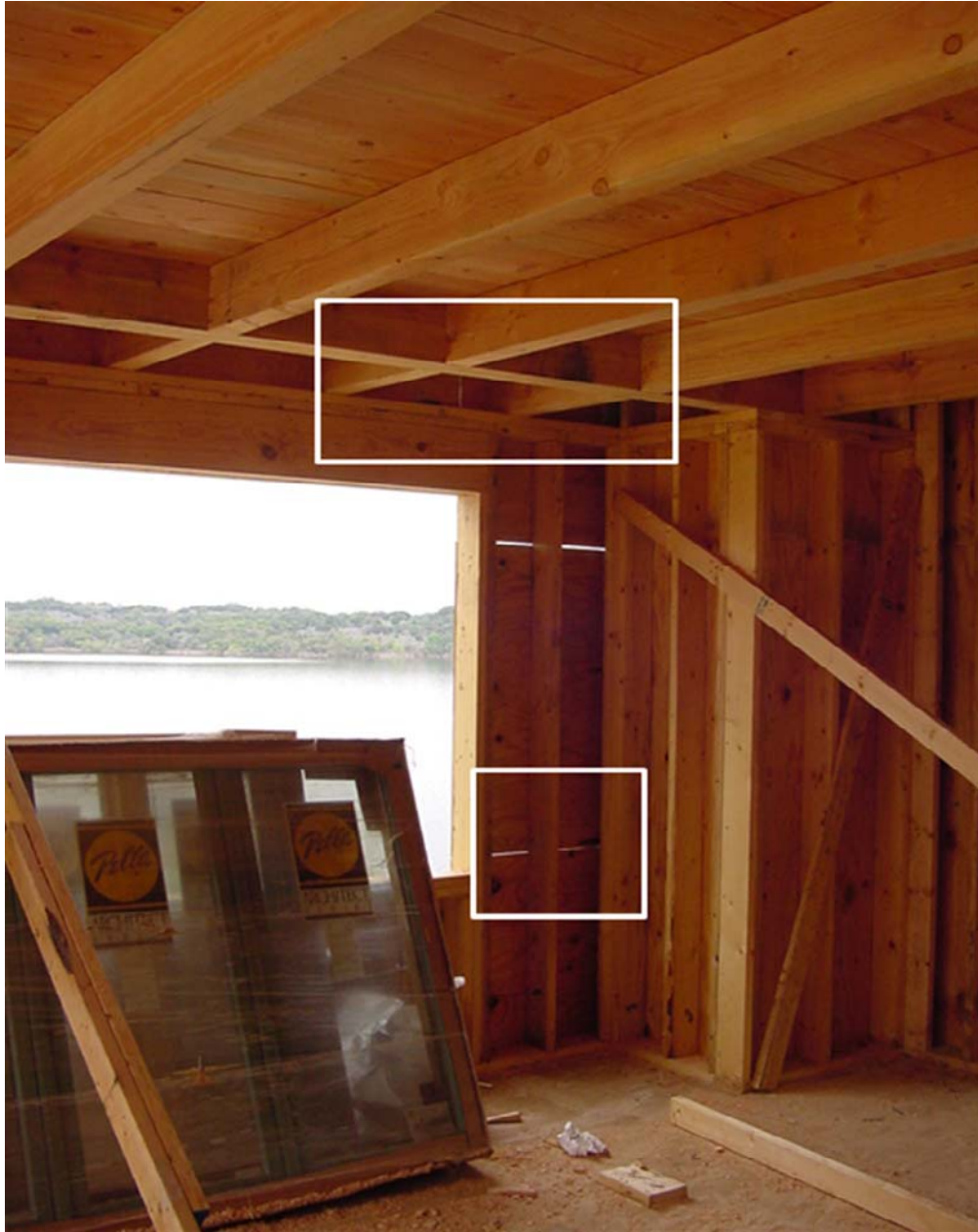
- wood handrail was 1" thick instead of 2" thick
- no steel extension to attach the metal handrail to the wall
- balcony beam was 6" wide instead of 8" wide
- conduit clamps instead of welded clamps
- poles supporting the balcony should have been thicker
- base plates at the bottom of the steel supports were only bolted into plywood and sheeting, instead of 3" wood blocking behind the wall, and were tack welded together
- no steel joist hangers to attach the balcony beams to the wall
- planking for the deck was 1x6 instead of 2x6



This paper's author has highlighted the variances between the balcony as constructed and the specs called for by the architect's plans.



This picture is a construction photo of the balcony taken by the architect during its inspections. The photo shows the weak conduit clamps and the lack of steel joist hangers to reinforce the connection between the beams and the wall.



This photo was taken by the architect during its construction inspections. The view from the interior wall shows the following deficiencies in construction:

- Air between the exterior plywood sheathing reveals that there was no band joist or blocking in place, so the balcony was held only by nails in the  $\frac{3}{4}$ " plywood sheathing. The beams could have been removed and shortened by 1.5" to make room to add the band joist. This would have provided support for the balcony across the entire front portion of the house.
- In addition, there should have been 3.0" of wood blocking in place to provide support for the angled beams providing support underneath the balcony.



This picture was taken after the balcony fell. It shows the lack of support from behind the wall, where it should have been bolted into the (absent) blocking, but instead was connected only to the outside boards and sheeting (see interior photo).



Instead of being bolted into the band joist, as per the architect's plans, the balcony was merely nailed into the plywood and sheathing of the house with 1.5" nails.



Visual representation of the size of the nails.





This photograph was taken after the balcony was repaired.



The conduit clamps have been replaced by welded clamps, which were originally called for in the plans.



This photo is a mock up prepared by the plaintiff's counsel to illustrate how the joists were to have been attached if they have been secured as called for by the construction plans. This photograph shows the addition of steel joist hangers. The picture shows holes in the joist hangers into which the steel screws are to be inserted. The balcony as reconstructed after the accident is currently supported by beams that go directly into the house and held in place by steel joist hangers.

---

**Endnotes:**

- <sup>1</sup> **Architect and Engineer.** In this article architects and engineers are sometimes referred to as “A/Es”.
- <sup>2</sup> **“Practice of Architecture”.** TEX. OCC. CODE ANN. § 1051.001(7)(C) defines the services that constitute the practice of architecture.
- <sup>3</sup> **“Practice of Engineering”.** TEX. OCC. CODE ANN. § 1001.003 defines the services that constitute the practice of engineering.
- <sup>4</sup> **License and Seals - Architects.** 22 TEX. ADMIN CODE §§ 1.101, 1.03, 3.101, 3.103.
- <sup>5</sup> **License and Seals – Landscape Architects.** 22 TEX. ADMIN CODE §§ 3.101, 3.103.
- <sup>6</sup> **License and Seals – Interior Designer.** 22 TEX. ADMIN CODE §§ 5.111, 5.113.
- <sup>7</sup> **License and Seal – Engineer.** 22 TEX. ADMIN CODE § 137.33(a). 22 TEX. ADMIN CODE § 137.33(k) requires any plan, specification, plat, or report issued by an engineer for a project “to be constructed or used in this state” must be sealed. The Texas Board of Professional Engineers has issued an advisory opinion stating that “[b]y sealing, signing, and dating an engineering document, the professional engineer represents that the document is final and that it does meet all governing codes, unless marked preliminary and the caveat would limit its purpose and applicability.”
- <sup>8</sup> **Seal Reflects Certain Assurances.** The Texas Board of Professional Engineers Rule § 137.55(b).
- <sup>9</sup> **No Implied Warranty.** 7 TEX. JUR.3d 113, 170 Architects and Engineers § 53 *Warranty*.
- <sup>10</sup> **A Professional Standard.** 7 TEX. JUR.3d 113, 166 Architects and Engineers § 48 *Generally, Architect’s Standard of Care* and § 49 *Engineer’s Standard of Care; Dukes v. Philip Johnson/Alan Ritchie, Architects, P.C.*, 252 S.W.3d 586, 594 (Tex. App. – Ft. Worth 2008, pet. denied); *I.O.I. Sys., Inc. v. City of Cleveland*, 615 S.W.2d 786, 790 (Tex. Civ. App. – Hou. [1<sup>st</sup> Div.] 1980, writ ref’d n.r.e.); TEXAS PATTERN JURY CHARGES, 60.1; also see 5 AM. JUR.2d, Architects § 5; C.J.S., Architects § 21. See Davis and Smith, *Liability of Design Professionals in Texas: Overview, Trends, and Practical Considerations* CONSTRUCTION LAW JOURNAL 5 (2006) noting that

Professional negligence in the context of design professional services is, in essence, doing that which a design professional of ordinary prudence in the exercise of ordinary care would not have done under the same or similar circumstances or failing to do that which a design professional of ordinary prudence in the exercise of ordinary care would have done under the same or similar circumstances. Citing *The Parkway Co. v. Woodruff*, 857 S.W.2d 903, 919 (Tex. App. – Hou. [1<sup>st</sup> Dist.] 1993), *aff’d as regards engineers*, 901 S.W.2d 434 (Tex. 1995).

However, the general rule in Texas historically has been that “a warranty by an architect will not be implied unless there is the clearest reason for it, and the burden for showing such reason rests on the one seeking to establish the warranty.” *Ryan v. Morgan Spear Assoc.*, 546 S.W.2d 678, 681 (Tex. Civ. App – Corpus Christi 1977, writ ref’d n.r.e.) – court followed the professional standard test and found the failing to meet that test an architect breaches its contractual duty as well as is negligent, and implying a warranty of good and workmanlike work was not required. The issue of finding an implied warranty in professional services was addressed in *Dennis v. Allison*, 698 S.W.2d 94, 96 (Tex. 1985) where the Texas Supreme Court stated in the context of a suit against a psychiatrist “the client ... can determine who is responsible for the improper conduct and pinpoint the specific wrong committed, and there it was not necessary to impose an implied warranty theory as a matter of public policy because the plaintiff “... has adequate remedies to redress wrongs...” But see *White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 798 S.W.2d 805 (Tex. App. – Beaumont 1990), writ dism’d 811 S.W.2d 541 (Tex. 1991) finding an implied warranty of good and workmanlike performance applicable to architectural services.

- <sup>11</sup> **Certificate of Merit.** TEX. CIV. PRAC. & REM. CODE § 150.002(a) provides

in any action or arbitration proceeding for damages arising out of the provision of professional services by a design professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed architect or licensed professional engineer competent to testify, holding the same professional license as, and practicing in the same area of practice as the defendant, which affidavit shall set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each such claim.

The court in *Carter & Burgess, Inc. v. Sardari*, 355 S.W.3d 804 (Tex. App. – Hou. [1<sup>st</sup> Dist.] 2011, no pet.) upheld the dismissal of the plaintiff’s negligence claim against Carter & Burgess for failing to file a certificate of merit from another licensed architect or engineer with its pleadings. Plaintiff severely cut her wrist on the sharp edge of the inside of a door to a bistro. Plaintiff alleged that a Carter & Burgess employee, who was not a licensed architect, was negligent in overseeing the installation of the door while acting as project manager. The court held that architectural services were implicated even in Carter & Burgess’s performance of construction management services and the fact the project manager was not a licensed architect did not eliminate the certificate of merit requirement. See 36 PROFESSIONAL LIABILITY REPORTER 7 *Certificate of Merit Was Required In Suit Alleging That Architectural Firm’s Unlicensed Construction Manager Was Negligent in Overseeing Construction* (2011).

<sup>12</sup> **AIA B Series Standard Form Agreements Between Owner and Architects.** The “B Series” revised and reissued in 2007 are various Architect Contracts, and includes among other agreements between the Owner and the Architect, the following forms typically used in the design and construction administration for a residence: the B101-2007 *Standard Form of Agreement Between Owner and Architect*, which replaced the B151-1997 *Abbreviated Standard Form of Agreement Between Owner and Architect*; the B104 – 2007 *Standard Form of Agreement Between Owner and Architect for a Project of Limited Scope*; the B105-2007 *Standard Form of Agreement Between Owner and Architect for a Residential or Small Commercial Project*, which replaced the B155-1993 *Standard Form of Agreement Between Owner and Architect for a Small Project*.

<sup>13</sup> **Duty Depends on Contract.** *Dukes v. Philip Johnson/Alan Ritchie, Architects, P.C.*, 252 S.W.3d 586, 594 (Tex. App. – Ft. Worth 2008, pet. denied).

<sup>14</sup> **Design Liability – Duty to Design Safe Structures.** See 97 A.L.R.3d 455 *Architect’s Liability for Personal Injury or Death Allegedly Caused by Improper or Defective Plans or Design*; 17 AM. JUR. PROOF OF FACTS 3d 49 *Negligence of Design and Construction Engineer*; 5 CAUSES OF ACTION 329 *Cause of Action Against Architect or Engineer for Negligence in Preparation of Plans or Specifications*; and *Peck v. Horrocks Eng.s, Inc.*, 106 F.3d 949 (10th Cir. - Utah 1997).

<sup>15</sup> **Author’s Underlining and Italics Added.** Shown in the paper are provisions from the current AIA B Series form, the 2007 edition, and the prior 1997 edition which has been replaced by the 2007 edition. This article’s author has added underlining to identify contractual duties and *italics* to highlight disclaimers built into the forms.

<sup>16</sup> **Scope of Services Under Non-AIA Documents.** In the circumstance of non-AIA Documents, the services agreement will have to be examined to determine if construction administration services are included, and, if so, whether these services include inspection and certification services. These contracts are many times vague or silent. The agreement may not be in writing. In such circumstances, the magnitude of the architect’s fee may indicate the scope of the services. If the construction contract has been drafted or negotiated by the architect, it may be evidence of the scope of the architect’s services. The plans and specifications may also indicate the nature of the architect’s construction phase services. The actual services performed by the architect will be a good indicator of the contracted for services.

<sup>17</sup> **Disclaimers by A/Es.** AIA Document B101 § 3.6.1.2 sets out three broad form disclaimers by the architect: (1) no responsibility for the “means, methods, techniques, sequences or procedures or for safety precautions and programs in connection with the Work”; (2) no responsibility “for the Contractor’s failure to perform the Work in accordance with the requirements of the Contract Documents”; and (3) “no control over or charge of, and shall not be responsible for, acts or omissions of the Contractor or any other persons or entities performing portions of the Work.”

<sup>18</sup> **Construction Phase Services - Basic Duty: Assurance Constructed in Accordance with Construction Documents.** The basic duty of an A/E that undertakes construction phase services is to assure the other contract party that construction is completed in substantial accordance with the plans and specifications. *Balagna v. Shawnee County*, 668 P.2d 157 (Kan. 1983) and 720 P.2d 1144 (Kan. 1986); *Kelly v. Northwest Community Hospital*, 384 N.E.2d 102 (Ill. 1978).

<sup>19</sup> **Construction Phase Services - Basic Duty: Report Defects in Design.** Another basic duty of an A/E that undertakes construction phase services is to detect and report defects in design and recommend any necessary changes and corrections as construction progresses. *Comptroller of Virginia ex rel Virginia Military Institute v. King*, 232 S.E.2d 895 (Va. 1977).

<sup>20</sup> **Construction Phase Services – Other Duties?.** If workers or third parties are injured, but there are no defects in the plans and specifications, the issue may become does an A/E providing construction phase inspection or observation services have a duty to and responsibility for these injuries? This is the issue raised by *Black + Verwooy Architects v. Smith*, 346 S.W.3d 877, 880-881 (Tex. App. – Austin 2011, petition filed).

<sup>21</sup> **Engineers Joint Contract Documents Committee.** This committee is known as the “EJCDC” and is composed of representatives of the National Society of Professional Engineers, the American Consulting Engineers Council and the American Society of Civil Engineers. This Committee has prepared construction documents for use by its member engineers and received the approval of The Associated General Contractors of America and the Construction Specifications Institute. The construction documents include the Standard General Conditions of the Construction Contract and the Owner-Contractor Agreements (No. 1910-8-A-2) (1996 Editions). Comments concerning their usage are contained in the EJCDC User’s Guide (No. 1910-50). For guidance in the preparation of Supplementary Conditions, see Guide to the Preparation of Supplementary Conditions (No. 1910-17) (1996 Edition).

<sup>22</sup> **Statutes of Limitation; Statute of Repose.** TEX. CIV. PRAC. & REM. CODE § 16.003 (two-year limitations period for negligence claims); and TEX. CIV. PRAC. & REM. CODE § 16.004 (four-year limitations period for breach of contract and breach of fiduciary duty claims). There is a 10 year statute of repose applicable to claims against an A/E who has designed, planned, or inspected the construction of an improvement. TEX. CIV. PRAC. & REM. CODE § 33.003. Also see 93 A.L.R.3d 1242 *Validity and Construction, as to Claim Alleging Design Defects, of Statute Imposing Time Limitations upon Action Against Architect or Engineer for Injury or Death Arising out of Defective or Unsafe Condition of Improvement to Real Property*; 90 A.L.R.3d 507 *When Statute of Limitations Begins to Run on Negligent Design Claim Against Architect*; West’s Key Number Digest, *Limitation of Actions* k95 (10.1).

<sup>23</sup> **CGL Policy - Professional Services Exclusion.** Allegations respecting a professional’s failure to provide adequate engineering, supervisory, inspection, or architectural services or to discover or remedy a condition for which the professional services were engaged necessarily fall within a CGL policy professional services exclusion endorsement. See 4 BRUNER AND O’CONNOR ON CONSTRUCTION LAW § 11:147 “Professional Services” Exclusion. See *Aetna Fire Underwriters Ins. Co. v. Southwestern Engineering Co.*, 626 S.W.2d 99 (Tex. App.

– Beaumont 1981, writ ref'd n.r.e.); *Admiral Ins. Co. v. Ford*, 607 F.3d 420 (5<sup>th</sup> Cir. 2010); *Utica Lloyd's of Texas v. Sitech Eng. Corp.*, 38 S.W.3d 260 (Tex. App. – Texarkana 2001, no writ); and *State Farm Lloyds v. Performance Improvement Corp.*, 974 S.W.2d 135 (Tex. App. – San Antonio 1998, no writ).

<sup>24</sup> **Attorney's Fees if Breach of Contract.** TEX. CIV. PRAC. & REM. CODE ch. 38.

<sup>25</sup> **Attorney's Fees if DTPA Violation.** TEX. CIV. PRAC. & REM. CODE § 17.50(d).

<sup>26</sup> **Breach of Contract or Malpractice.** *Coulson v. Lake LBJ Mun. Util. Dist.*, 734 S.W.2d 649, 651 (Tex. 1957).

<sup>27</sup> **Breach of Contract – Negligent Performance of Inspection and Construction Supervision Services.** 16 CAUSES OF ACTION *Causes of Action Against Architect or Engineer for Negligent Inspection or Supervision of Construction* 499 (Westlaw 16 COA 499); *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999); *Roland A. Wilson and Associates v. Forty-O-Four Grand Corp.*, 246 N.W.2d 922 (Iowa 1976) – architect held liable to owner for leaking windows as architect negligently certified completion of defective work; leak was discovered during construction and architect ordered caulking but did not water test the windows and breached its contract with owner; *Dickerson Const. Co. Inc. v. Process Engineering Co., Inc.* 341 So.2d 646 (Miss. 1977) – court found that the architect had a duty to the owner “to exercise reasonable care and skill in supervision of construction to the extent necessary to attain the purposes intended” where the architect was required to be present at certain stages of construction, certify progress payments, and make final inspection; West Key Number Digest, Negligence k1205(5).

<sup>28</sup> **Contract Claims – Breach of Warranty.** *Tamarac Dev. Co. v. Delamater, Freund & Associates*, 675 P.2d 361 (Kan. 1984).

<sup>29</sup> **A/E as a Fiduciary.** See Davis and Smith, *Liability of Design Professionals in Texas: Overview, Trends, and Practical Considerations* CONSTRUCTION LAW JOURNAL 5, 6 (2006) noting that “At least one Texas court has ruled that the relationship between an architect and his client was of a fiduciary nature. The ruling was made in the context of an architect’s failure to disclose his true belief to his client about the actual cost estimate for constructing a building.” Citing *Baylor Univ. v. Carlander*, 316 S.W.2d 277, 287 (Tex. Civ. App.—Dallas 1958, writ ref'd n.r.e.) and noting that

Other jurisdictions have recognized a fiduciary duty owed by design professionals, especially when they maintain a supervisory function over the project. Citing e.g., *Hammel v. Roadway Package Sys.* Nos. 96-35544, 1997 WL 464113 (9<sup>th</sup> Cir. 1997); *Canton Lutheran Church v. Sovik, Mathre, Sathrum & Quanbeck*, 507 F.Supp. 873 (D.S.D. 1981); *Palmer v. Brown*, 273 P.2d 306 (Cal. Ct. App. 2d Dist. 1954); *Holy Cross Parish v. Huether*, 308 N.W.2d 575, (S. D. 1981); *McDaniel v. St. Clair*, 18 Va. Cir. 470 (Va. Cir. Ct. 1990). *Id.* at 6, FN 18.

<sup>30</sup> **Disclaimers and an A/E's Responsibility to Explain Effect Thereof.** See Davis and Smith, *Liability of Design Professionals in Texas: Overview, Trends, and Practical Considerations*, CONSTRUCTION LAW JOURNAL 5, 7 (2006) citing *Keck v. Nat'l Union Fire Ins. Co.*, 20 S.W.3d 692, 699 (Tex. 2000).

<sup>31</sup> **A/E's Liability to Third Parties for Breach of a Contractually Assumed Duty to Assure Jobsite Safety.** See 59 A.L.R.3d 869 *Liability to One Injured in Course of Construction, Based Upon Architect's Alleged Failure to Carry Out Supervisory Responsibilities*.

**Texas.** *Columbia Engineering Int., Ltd. v. Dorman*, 602 S.W.2d 72 (Tex. App. – Beaumont 1980, writ ref'd n.r.e.) – A/E took on the role of a construction manager. The A/E contract provided “...if any of (contractor’s) methods of executing the work appear to the Engineer to be unsafe ... the Engineer may order and direct the Contractor to improve ....”; “The Contractor under the direction of the Engineer shall be responsible ... for unloading ... all materials....”; and “The Engineer has authority in an emergency situation to stop the progress of the work whenever in its opinion such stoppage may be necessary to ensure the safety of life ....”

**Other Jurisdictions.** Any duty that an architect or engineer may have regarding safety at the construction site must be specifically assumed by contract or must be based on actions actually taken, even though not required by contract. *Wheeler & Lewis v. Slifer*, 577 P.2d 1092 (Colo. 1978); *Seeney v. Dover Country Club Apartments Inc.*, 318 A.2d 619 (Del. Super. 1974); *Hanna v. Huer, Johns, Neel, Rivers & Webb*, 662 P.2d 243 (Kan. 1983) – found that the AIA A201 General Conditions, although providing for construction administration by the architect, does not impose a duty on the architect for job site safety; *Kelly v. Northwest Community Hospital*, 384 N.E.2d 102 (Ill. 1978); *Porter v. Stevens, Thompson & Runyan Inc.*, 602 P.2d 1192 (Wash. 1979); and *Luterbach v. Mochon, Schutte, Hackworthy, Juerisson Inc.*, 267 N.W.2d 13 (Wis. 1978). Also see *Caldwell v. Bechtel Inc.*, 631 F.2d 989 (1980) holding engineer liable for jobsite injuries where engineer had contractual authority to stop work on the project when necessary to enforce safety regulations; court found such authority supported its conclusion that engineer’s duty to inspect or supervise construction included ensuring jobsite safety.

<sup>32</sup> **A/E Assumption of Assuring Jobsite Safety by its Conduct.** See 59 A.L.R.3d 869 *Liability to One Injured in Course of Construction, Based upon Architect's Alleged Failure to Carry Out Supervisory Responsibilities*. For example – A/E employees exercising right to stop work when work was being performed in a negligent and dangerous manner which was unsafe for construction workers; daily inspections for

dangerous conditions; directing contractors to correct safety hazards; supervision and coordination of subcontractors. *See Swarouth v. Beard*, 190 N.W.2d 373, 59 A.L.R.3d 858 (1971), judgment rev'd on other grounds, 202 N.W.2d 300 (Mich. 1972) – privity of contract is not a necessary prerequisite in case where architect was negligent in its supervisory activities after it failed to cause the correction of a dangerous condition of which it was advised; *Clyde E. Williams & Associates, Inc. v. Boatman*, 375 N.E.2d 1138 (Ind. 1978); *Balagna v. Shawnee County*, 668 P.2d 157 (Kan. 1983) and 720 P.2d 1144 (Kan. 1986); *Hanna v. Huer, Johns, Neel, Rivers & Webb*, 662 P.2d 243 (Kan. 1983); and *Porter v. Stevens, Thompson & Runyan Inc.*, 602 P.2d 1192 (Wash. 1979). *Jones v. James Reeves Contractors, Inc.* 701 So.2d 774, 786 (Miss. 1997) – “Unless an architect has undertaken by conduct or contract to supervise a construction project, he is under no duty to notify or warn workers or employees of the contractor or subcontractor of hazardous conditions on the construction site.”

<sup>33</sup> **Elements of Negligence.** *Dukes v. Philip Johnson/Alan Ritchie, Architects, P.C.*, 252 S.W.3d 586, 591 (Tex. App. – Ft. Worth 2008, pet. denied); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990).

<sup>34</sup> **Elements of Negligence.** *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 801 S.W.2d 523, 525 (Tex. 1990).

<sup>35</sup> **No Duty, No Negligence.** *J. P. Morgan Chase Bank v. Texas Contract Carpet, Inc.*, 302 S.W.3d 515, 535 (Tex. App. – Austin 2009, no pet.).

<sup>36</sup> **Prudent Person Test.** *Amarillo v. Martin*, 971 S.W.2d 426, 429 (Tex. 1998).

<sup>37</sup> **Duty Imposed by Special Relationship or By Law.** *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 838 (Tex. 2000); RESTATEMENT (2<sup>nd</sup>) OF TORTS § 314, 315 (1965).

**A/E Contractual Obligated for Safety Engineering.** Any duty that an A/E may have regarding safety at the construction site must be specifically assumed by contract or must be based on actions taken, even though not required by contract. *Caldwell v. Bechtel Inc.* 631 F.2d 989 (1980) – court found a special relationship existed with contractor’s workers where engineer’s contractual duty to owner of construction project included responsibility for safety engineering. Court found that A/E had superior position and resultant ability to foresee harm that employee of contractor might reasonably be expected to suffer as a result of hazardous conditions at construction site created duty to employee to prevent such harm. *Luterbach v. Mochon, Schutte, Hackworthy, Juerisson Inc.*, 267 N.W.2d 13 (Wis. 1978) - no common-law duty requires supervising architects to ensure construction site safety.

<sup>38</sup> **Right to Stop Work to Inspect Not a Right to Control the Work.** *See* Acret and Perrochet, 3 CONSTRUCTION LAW DIGESTS § 25.6 *Duty to Supervise* for discussion of numerous cases holding that A/Es have no liability for injured workers at job site unless A/E have contracted for supervisory duties. *E.g., McElvy, Jennewein, Stefany, Howard, Inc. v. Arlington Elec., Inc.*, 582 So.2d 47 (Fla. Dist. Ct. App. 2d 1991), cause dismissed, 587 So.2d 1327 (Fla. 1991) holding that architects contract created no responsibility on the part of the architect to supervise construction or contractors. Its duties were merely advisory. Final decision under the A/E Agreement rested with the owner, which had the option of whether to follow the architect’s advice.

**Texas.** *Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 226 (Tex. 1999) (explaining that “right to control must be more than a general right to order work to stop and start, or to inspect progress”).

**Other Jurisdictions.** *See Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs.*, 473 N.W.2d 612, 616 (Iowa 1991) (concluding that engineer did not owe duty of care to others because engineer had no right to control work performed and only had “responsibility for quality control.”

<sup>39</sup> **General Supervisory Responsibilities Do Not Create A/E Liability for Jobsite Injuries.** *See* Acret and Perrochet, 3 CONSTRUCTION LAW DIGESTS § 25:6 *Duty to Supervise*.

<sup>40</sup> **Blind-Eye No Defense.** *See* Sabo, LEGAL GUIDE TO AIA DOCUMENTS § 2.13 Construction Phase Services: ¶ 3.6 stating

Even though the architect is not responsible for the contractor's failure to perform the work according to the Contract Documents, if the architect fails to guard the owner against defects and deficiencies, it may be liable to the owner for damages (citing cases), particularly if the architect knows that the construction is not according to the contract documents and fails to advise the owner of the deficiency (citing cases).

Cases cited and discussed for the first proposition include *Roland A. Wilson v. Forty-Four Grand Corp.*, 246 N.W.2d 922, 924-25 (Iowa 1976); *Westerhold v. Carroll*, 419 S.W.2d 73 (Mo. 1967); *Lee County v. Southern Water Contractors, Inc.*, 298 So.2d 518 (Fla. Dist. Ct. App. 1974). Cases cited and discussed for the second proposition include *Brown v. McBro Planning & Dev. Co.*, 660 F.Supp. 1333 (D.V.I. 1987); *Dan Cowling & Assocs. V. Board of Educ.*, 618 (S.W.2d 158 (Ark. 1981) – architect breach his duty to owner by approving a wall in an obviously defective condition; and *Watson, Watson, Rutland v. Board of Educ.*, 559 So.2d 168, 174 (Ala. 1990) –

We conclude, that, although the Architect had a duty under the contract to inspect, exhaustive, continuous on-site inspections were not required. We also hold, however that an architect has a legal duty, under such an agreement, to notify the owner of a known defect. Furthermore, an architect cannot close his eyes on the construction site and refuse to engage in any inspection procedure whatsoever and then disclaim liability for construction defects that even the most perfunctory monitoring could have prevented.

<sup>41</sup> **Texas: Injured Workers - Contractual Disclaimers Limiting Scope of Liability.** See *Graham v. Freese & Nichols, Inc.*, 927 S.W.2d 294 (Tex. App. – Eastland 1996, writ denied); *Romero v. Parkhill, Smith & Cooper, Inc.*, 881 S.W.2d 522, 524, 526 (Tex. App. – El Paso 1994, writ denied); *Rodriguez v. Universal Fastenings Corp.*, 777 S.W.2d 513 (Tex. App. – Corpus Christi 1989, no writ) – engineer not responsible for contractor’s means, methods and procedures; *Grover v. Gulf States Utilities Co.*, 776 F.2d 517 (5<sup>th</sup> Cir. 1985) (applying Texas law) – non-A/E inspector not responsible for a worker’s accident.

In *Graham v. Freese & Nichols, Inc.* the court addressed a situation where an injured worker sued the engineer that designed plans for the modification and repair of a dam. No safety nets or other safety features were included to prevent someone from falling off of a conveyor which ran next to the catwalk. The injured workman claimed that the engineer retained sufficient control over safety and the premises to owe him a duty of care. The court found that the engineer had no duty regarding safety at the work site under its contract. The engineer’s contract stated that the

Engineer shall not be responsible for the means, methods, techniques, sequences, or procedures of construction... or the safety precautions and programs incident to the work of the Contractor. Also the Engineer shall not be responsible for the acts or omissions of any person except his own employees and agents.

In addition, the construction contract provided for the contractor to retain exclusive control over the construction procedures and safety precautions. The court also found that the engineer did not exercise control over the job site or the work site safety precautions. The court noted that, although the engineer had express some concern, at weekly meetings, about safety hazards, and had twice stopped the contractor’s work for quality control purpose, the court found that there was no evidence that the engineer exercised control over safety matters.

In *Romero v. Parkhill, Smith & Cooper, Inc.* the court found that the engineering services agreement with the city for the construction of a plant did not give the engineer the right to control the construction and accordingly the engineer did not have a duty of care to an employee of a subcontractor to keep the premises safe. The engineer agreed to make periodic visits to the construction site to “observe the progress of the executed work and to determine in general if such work meets the ... requirements of the contract documents” and to inspect the construction and determine if it has been completed in accordance with the contract documents and to ensure that the contractor had “fulfilled all of his obligations” so that the engineer could approve final payment. However, the agreement also specified that the engineer was not obligated to “make exhaustive or continuous on-site inspections to check the quality or quantity of the work”; was not “responsible for the construction means, methods, techniques, sequences or procedures”; and was not “responsible for the acts or omissions of the contractor [or] any subcontractor.” The court held that the contract language did not give the engineer the kind of control that would impose on it a duty to keep the premises safe for employees of the subcontractors.

**Other Jurisdictions: Disclaimers Effective.** Also see ARCHITECTS AND ENGINEERS § 1:22 *Liability to Third Parties – Workers: Worker Versus Architect; Worker Versus Engineer* (4<sup>th</sup> Ed.). The following cases from other jurisdictions have found that the inclusion of contractual disclaimers stating that an A/E is not responsible for the means and methods of construction employed by the contractor as limiting the scope of an A/E’s duty so as not to be responsible for job site safety for workers: *Kelly v. Northwest Community Hospital*, 384 N.E.2d 102 (Ill. 1978); *Graham v. Abe Mathews Engineering*, 358 N.W.2d 131 (Minn. App. 1984); *Brown v. Gamble Construction Co.*, 537 S.W.2d 685 (Mo. App. 1976); *Conti v. Pettibone Cos.*, 445 N.Y.S.2d 943 (N.Y. 1981). Also see *Parks v. Atkinson*, 505 P.2d 279 (Az. Div. 2 1973) – architect not liable for injuries suffered by contractor’s employee who fell from scaffolding erected by contractor (scaffolding not designed by contractor) as architect’s duties did not include duty to supervise the “method and manner of actually doing the work,” and architect’s supervisory controls were limited to those necessary to ensure that the contractor’s work complied with the plans and specifications prepared by the architect.

**Disclaimer as to Third Party’s Reliance.** *IFD Const. Corp. v. Corddry Carpenter Dietz and Zack*, 685 N.Y.S.2d 670 (N.Y. App. Div. – [1<sup>st</sup> Dep’t] 1999) - Labor and materials contractor did not reasonably rely on project engineers’ alleged negligent misrepresentations regarding soil conditions at site of city construction project when contractor prepared bid, as required to support contractor’s negligent misrepresentation claim against the engineers, where bid specifications advised contractors to view project site and warned that they would be working with contaminated soil.

**Other Jurisdictions: Disclaimer Not Effective.** See Acret, ARCHITECTS AND ENGINEERS 4<sup>th</sup> Ed.) § 4:1 *Breach of Contract and Negligence – Exculpatory Clause*, and § 9:30 *Exculpatory Clauses*; 32 CONSTRUCTION LITIGATION REPORTER No. 4, p. 1 (2011) *Owner May Sue Inspecting Engineer for Not Warning It of a Hazardous Construction Defect* (discussing *LeBlanc v. Logan Hilton Joint Venture* cited below); *Estep v. MacKenzie Engineering Inc.*, 927 P.2d 86 (1996) – finding that the limitation of liability clause in the engineer’s contract did not bar the homeowner’s negligence claim (engineer negligently rendered a flawed report) and 36 PROFESSIONAL LIABILITY REPORTER 3 *Owner Was Entitled to Seek Indemnification From Architect After Subcontractor Failed to Follow Instructions to Place Warning Sign on Electrical Equipment* (Mar. 2011); *Mattegat v. Klopfenstein*, 717 A.2d 276 (Conn. 1998) – liquidated damage provision not enforceable; and *Housing Vermont v. Goldsmith & Morris*, 685 A.2d 10986 (Vt. 1996) – in this case the modified AIA form contained a broadly worded disclaimer but did not contain a reference to negligence and thus the disclaimer could not insulate the architect from liability for malpractice.

**Not Effective as to Claim by Contract Party.** The court in *LeBlanc v. Logan Hilton Joint Venture*, 2011 WL 386821 (Mass. 2011) found an architect liable for negligently failing to alert Hilton of the omission by the contractor of the electrical warning label on the switchgear box required by the plans and specifications. Hilton built a 600-room hotel near Boston’s Logan Airport. It hired an architectural firm, which hired an engineer to provide electrical engineering services. Hilton separately hired a general contractor, who hired Broadway Electrical Company as the electrical subcontractor. Five years after project completion, Roger LeBlanc, a maintenance electrician, was electrocuted as he began maintenance



work on the switchgear. Contrary to the engineer's specifications, no warning diagram or text appeared on the face of the switchgear cabinets. LeBlanc was killed when he opened a cabinet and touched the gear. Plaintiff estate sued Hilton, the architect and engineer, the general contractor and Broadway Electrical for negligence. Hilton cross claimed against the architect for contractual indemnity. The trial court granted the design professionals' motions for summary judgment on the cross claims against them. Hilton appealed. The court held that the contractual disclaimers did not protect the A/E. The A/E Agreement limited the architect's liability in the performance of its construction phase administrative services. Under § 2.1.9, the architect was not responsible for the general contractor's "failure to carry out Work in accordance with the Construction Contract. [Architect] shall not have control over or charge of acts or omissions of [the general contractor or] its subcontractors...." Under § 2.7.12, the architect's approval of shop drawings or other submittals from the general contractor did not relieve the contractor from responsibility "for substantiating installation instructions, and for the performance of equipment or systems being provided by [the general contractor]. Likewise, [architect's] approval of a specific item shall not indicate approval of an assembly of which the item is a component." The court first found that the contract disclaimers--specifically §§ 2.7.12 and 2.1.9--do not preclude the architect's liability as a matter of law. The design contract imposed upon the architect and engineer duties to visit the site and to provide Hilton with biweekly reports of work progress, pointing out any deficiencies or deviations from contractual requirements. They were also obligated to arrange and observe tests and inspect the "electrical systems." In addition to these design and administrative duties, the architect in the design contract agreed to indemnify Hilton against all financial losses caused by negligent acts, errors, or omissions committed in the course of its contractual professional services or those of its consultants. While, under §§ 2.7.12 and 2.1.9, the designers did not have authority or responsibility over the contractor or subcontractors, they did have "abundant duties" to Hilton to observe the work and notify the owner of the quantity and quality of the work. These duties of observation and notification provided a basis for the architect's liability under the indemnity clause. The court held

Those duties (contractual obligations to conduct periodic observations and to notify Hilton of the quantity and quality of the work) were important because Hilton did possess a vital long-term interest in the safety of the hotel electrical equipment and in the concomitant power to compel compliance with contractual specifications by withholding payment. This chain of duty and risk was foreseeable. The parties were dealing with the inherently dangerous component of electricity. The failure to monitor and to report any deficiency to Hilton constituted a contractual breach and created a field of risk for third parties likely to come into contact with the switchgear. Therefore the failure of [the architect and engineer] to notify Hilton of Broadway Electrical's failure to install the warning signage (even though [the engineer] notified Broadway Electrical) creates a genuine issue of causal negligence for a trial.

**Not Effective as to Claim by Third Party.** *Carvalho v. Toll Bros. and Developers*, 675 A.2d 209, 215 (N.J. 1996) - The court concluded that it would be unfair to exonerate the engineer from its liability to the decedent on the basis of its exculpatory agreement with the township and the contractor. The parties' "financial arrangements and understanding do not overcome the public policy that imposes a duty of care and ascribes liability to the engineer in these circumstances."

<sup>42</sup> **Express Negligence and Fair Notice Requirements for Disclaimers, Exculpations, Releases and Waivers.** Texas. See generally *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987) and *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993) requiring such clauses to be written in a fashion as to give fair notice of the negligence waiver and expressly stating that the negligence of the released person is being released.

<sup>43</sup> **Texas: Right to Reject Work Not Power of Control of Contractor's Work.** Texas. *Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 226 (Tex. 1999) - explaining that "right to control must be more than a general right to order work to stop and start, or to inspect progress".

**Other Jurisdictions.** See Acret, ARCHITECTS AND ENGINEERS 4<sup>th</sup> Ed.) § 25:6 *Duty to supervise.* *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs.*, 473 N.W.2d 612, 616 (Iowa 1991) (concluding that engineer did not owe duty of care to others because engineer had no right to control work performed and only had "responsibility for quality control." *Carter v. Vollmer Associates*, 602 N.Y.S.2d 48 (N.Y. 1<sup>st</sup> Dept. 1993) - an injured worker had no cause of action against the project engineer as engineer's duty to inspect was not sufficient by itself to result in liability since the engineer was only obligated to report deviations from design or delays. There was no evidence indicating that the engineer had the duty or authority to direct the state to take any action.

<sup>44</sup> **No Breach of Contract Claim by Contractor Against A/E Where Contractor Neither a Party to Contract Nor a Third Party Beneficiary.** *Bernard Johnson, Inc. v. Cont'l Constructions, Inc.*, 630 S.W.2d 365, 369-70 (Tex. App. - Austin 1982, writ ref'd n.r.e.).

<sup>45</sup> **No Per Se Special Relationship.** Other Jurisdictions. *Gravelly v. Providence Partnership*, 549 F.2d 958 (4<sup>th</sup> Cir. 1977) - held that in the absence of a specific contractual provision, an architect does not guarantee that its supervision will be so perfect as to prevent injury to third persons, in this case a hotel patron who was injured after project completion in a fall from a spiral staircase; *Yow v. Hussey, Gay, Bell & DeYoung Int'l*, 412 S.E.2d 565, 567-68 (Ga. 1991) - determining that engineer owed no duty to person who was not involved in construction project but was injured when he entered construction site; *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs.*, 473 N.W.2d 612, 615-17 (Iowa 1991) - deciding that engineer did not owe duty of care to others and, therefore, could not be liable for negligence of general contractor regarding safety procedures used on construction site; *Hobson v. Waggoner Eng'g, Inc.* 878 So. 2d 68, 73-76 (Miss. Ct. App. 2003) - concluding that engineer owed no duty to warn or protect general contractors or subcontractors; *Welch v. Grant Dev. Co.*, 120 Misc.2d 493, 466 N.Y.S.2d 112, 114-16 (N.Y. Sup. Ct. 1983) - affirming summary judgment against worker injured on construction site because contract stripped architect of supervisory powers and placed all supervisory responsibility in hands of contractor; *Gordon v. Holt*, 65 A.D.2d 344, 412 N.Y.S.2d 534, 536-37 (N.Y. App. Div. 1979) - concluding that architect who had duty to periodically inspect construction and report to owner of property did not have duty to future owners and tenants; *Luterbach v. Mochon, Schutte, Hackworthy, Juerisson, Inc.*, 267 N.W.2d 13, 15-16 (Wisc. 1978) - affirming summary judgment against carpenter hired by general contractor because contract did not require architect to insure safety of construction site.

**No Liability: A/E Gains Knowledge of Different Safety Issue than One that Caused Injury.** *Northern Indiana Public Service Co. v. East Chicago Sanitary Dist.*, 590 N.E.2d 1067 (Ind. Ct. App. 1992) – inspecting architect not liable for injuries to two workers who were injured when crane on which they were working came into contact with an overhead power line. The fact that architect reported four other unsafe conditions to the contractor did not obligate architect to assume responsibility for work site for all workers. The court noted that

All persons on the construction site should be encouraged to report or act upon any observed hazards without the apprehension that if they do so, they will have assumed safety duties relative to the whole job site. *Id.* at 1077.

**No Liability: Even if A/E Gains Knowledge of Dangerous Condition.** *Herczeg v. Hampton Tp. Mun. Authority*, 766 A.2d 866 (Pa. 2001) – the court stated that even if the engineer knew of a dangerous condition, it cannot be held responsible for the safety of construction workers since those responsibilities were expressly undertaken by the contractor.

<sup>46</sup> **Per Se Special Relationship. Owner's Architect and Contractor.** *Normoyle-Berg & Associates v. Village of Deer Creek*, 350 N.E.2d 559 (Ill. 1976); *Davidson & Jones Inc v. New Hanover County*, 255 S.E.2d 580 cert denied 259 S.E.2d 911 (N.C. 1979); *Shoffner Industries Inc. v. W. B. Lloyd Construction Co.*, 257 S.E.2d 50 cert den. 259 S.E.2d 301 (N.C. 1979) - architect, by contracting with owner of construction project, entered into relationship with contractor and others that led to duty to those parties who necessarily relied on architect's performance of contractual obligations; and *Forte Bros. Inc. v. National Amusement Inc.*, 525 A.2d 1301 (R.I. 1987).

**Liability: A/E Gains Knowledge of Safety Issue.** *Balagna v. Shawnee County*, 668 P.2d 157 (Kan. 1983) and 720 P.2d 1144 (Kan. 1986) - where employee of defendant who was present at job site had actual knowledge of OSHA safety standards for shoring in trenching operations, as well as actual knowledge that standards were not being followed by contractor, defendant was subject to duty to take reasonable action to prevent injury to employees of contractor who was killed when unshored trench collapsed.

<sup>47</sup> **Negligent Misrepresentation.** See 5 BRUNER & O'CONNOR CONSTRUCTION LAW § 17:67 *Specific Undertakings that Pose Liability Concerns for Design Professionals – Liability for Negligent Certification – Certifications for Benefit of Third Parties.*

**Texas.** The Texas Supreme Court in *Federal Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991) recognized the following elements for a claim of negligent misrepresentation: (1) the representation is made by a defendant in the course of his business or in a transaction in which he has a pecuniary interest; (2) the defendant supplies "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation. In establishing these elements, the court relied upon Section 552 RESTATEMENT (2d) OF TORTS. That section states as follows:

§ 552 Information Negligently Supplied for the Guidance of Others

- (1) One who, in the course of his business, profession or employment, or in any transaction in which he has a pecuniary interest, supplies false information, for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
- (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered:
  - (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
  - (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
- (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Comment (h) states:

h. *Persons for whose guidance the information is supplied.* The rule stated in this Section subjects the negligent supplier of misinformation to liability only to those persons for whose benefit and guidance it is supplied. In this particular his liability is somewhat more narrowly restricted than that of the maker of a fraudulent representation (see § 531), which extends to any person whom the maker of the representation has reason to expect to act in reliance upon it.

Illustration 9 sets forth the following example regarding bids for a government construction contract:

The City of A is about to ask for bids for work on a sewer tunnel. It hires B Company, a firm of engineers, to make boring tests and provide a report showing the rock and soil conditions to be encountered. It notifies B Company that the report will be made available to bidders as a basis for their and that it is expected to be used by the successful bidder in doing the work. Without knowing the identity of any of the contractors bidding on the work, B Company negligently prepares and delivers to the City an inaccurate report, containing false and misleading information. On the basis of the report C makes a successful bid, and also on the basis of the report D, a subcontractor, contracts with C to do a part of the work. By reason of the inaccuracy of the report, C and D suffer pecuniary loss in performing their contracts. B Company is subject to liability to C and to D.

See *D.S.A. Hillsboro Ind. Sch. Dist.*, 973 S.W.2d 662, 663 (Tex. 1998) and *McCamish, Martin, Brown & Loeffler v. F. E. Appling Interests* (Tex. 1999) for a further explanation of the tort theory of negligent misrepresentation. “The theory of negligent misrepresentation permits plaintiffs who are not parties to a contract for professional services to recover from the contracting professionals.” *Id.* Section 552 of the RESTATEMENT (2D) OF TORTS “imposes a duty to avoid negligent misrepresentation, irrespective of privity.” *Id.* at 792. Liability for negligent misrepresentation “is not based on the breach of duty a professional owes his or her clients or others in privity, but on an independent duty to the non-client based on the professional’s manifest awareness of the non-client’s reliance on the misrepresentation and the professional’s intention that the non-client so rely.” *Id.* at 792.

**All Professionals?.** To date, Texas courts have extended liability for negligent misrepresentation to accountants, attorneys, auditors, lenders (banks), physicians, real estate brokers, securities placement agents, surveyors, and title insurers – but not yet to design professionals. *Smith v. Sneed*, 938 S.W.2d 181, 185 (Tex. App. — Austin 1997, no writ); *Hagans v. Woodruff*, 830 S.W.2d 732, 736 (Tex. App. – Hou. [14<sup>th</sup> Dist.] 1992, no writ); *Lutheran Bhd. v. Kidder Peabody & Co.*, 829 S.W.2d 300, 309 (Tex. App. – Texarkana 1992, writ granted w.r.m.); *Blue Bell v. Peat Marwick Mitchell & Co.*, 715 S.W.2d 408, 411-12 (Tex. App. – Dallas 1986, writ ref’d n.r.e.); *Cook Consultants Inc. v. Larson*, 700 S.W.2d 231, 234 (Tex. App. – Dallas 1985, writ ref’d n.r.e.); *Great Am. Mortg. Investors v. Louisville Title Ins. Co.*, 597 S.W.2d 425, 429-30 (Tex. Civ. App. – Ft. Worth 1980, writ ref’d n.r.e.); *Shatterproof Glass Corp. v. James*, 466 S.W.2d 873, 880 (Tex. Civ. App. – Fort Worth 1971, writ ref’d n.r.e.) courts notes as basis for its extension of liability to accountants, that other states have extended Section 552 liability to architects (*Shatterproof Glass* was cited with approval by the Texas Supreme Court in *McCamish; Abrams Ctr. Nat’l Bank v. Farmer, Fuqua & Huff, P.C.*, 225 S.W.3d 171, 177 (Tex. App. – El Paso 2005, no pet.).

Some commentators have noted that Texas law may not allow for a contractor to rely on representations contained in plans and specifications. Ryan and Santos, *The Exception to the Rule? Negligent Misrepresentation and the Economic Loss Doctrine*, 6 CONSTRUCTION LAW JOURNAL 2 (2008) based on the holding in *Lonergan v. San Antonio Loan & Trust Co.*, 104 S.W. 1061 (Tex. 1907).

However, other commentators have noted that *Lonergan* dealt with the relationship between the owner and its architect and not the relationship between the architect and the contractor. Ford and Fisk, *Negligent Misrepresentation Claims Against Design Professionals* State Bar of Texas 23<sup>rd</sup> ANNUAL CONSTRUCTION LAW CONFERENCE (2010). The following line of cases seem to imply or to assume a duty running from A/Es to contractors, the breach of which could render an A/E liable in negligence. See e.g., *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 624 S.W.2d 203, 208 (Tex. Civ. App. – Hou. [1<sup>st</sup> Dist.] 1981), *rev’d on other grounds*, 642 S.W.2d 160 (Tex. 1982) court stated “...a cause of action exists in favor of a contractor against an owner or architect who furnishes defective plans and specifications.” and upheld a substantial award of damages against the engineer whose defective plans caused the contractor to incur additional expense (the award was framed in terms of indemnifying the owner against the engineer for damages obtained by the contractor from the owner); *I.O.I. Systems, Inc. v. City of Cleveland, Texas*, 615 S.W.2d 786 (Tex. Civ. App. – Hou. [1<sup>st</sup> Dist.] 1981, writ ref’d n.r.e.); and *Associated Architects & Engineers, Inc. v. Lubbock Glass & Mirror Co.*, 552 S.W.2d 942 (Tex. Civ. App. – Amarillo 1967, writ ref’d n.r.e.).

**Other Jurisdictions.** *Bilt-Rite Contractors, Inc. v. The Arch. Studio*, 866 A.2d 270, 286 (Penn. 2005) “we see no reason why § 552 should not apply to architects and other design professionals”; and *Dufficy & Sons, Inc. v. BRW, Inc.*, 74 P.2d 380 (Colo. 2002) – Colorado extended a common law duty owed by licensed engineers to contractors despite the economic loss rule.

<sup>48</sup> **Certificates.** See 43 A.L.R.2d 1227 *Liability of Architect or Engineer for Improper Issuance of Certificate* citing *Pierson v. Tyndall*, 28 S.W. 232 (Tex. Civ. App. 1894) finding architect can be liable to owner for certifying defective work; and 2 BRUNER & O’CONNOR CONSTRUCTION LAW § 5:171 ¶ 9.4.2 -- *Limitation Upon Architect’s Certificate for Payment* (Architect) discussing AIA architect’s certificates of payment issued pursuant to A201 ¶ 9.4.2. This provision is set out in Article II.C of this paper. A201 ¶ 9.4.2 provides that the representations in the architect’s certificate is qualified by the fact that it makes no representation that it has:

1. Made exhaustive or continuous on-site inspections to check the quality or quantity of the work;
2. Reviewed construction means, methods, techniques, sequences or procedures;
3. Reviewed copies of requisitions received from subcontractors and materials suppliers or other data requested by the owner to substantiate the contractor’s right to payment; and
4. Made examination to ascertain how or for what purpose the contractor has used money previously paid under the contract.

<sup>49</sup> **Out-of-Pocket Economic Damages Recoverable by Party in Privity for Other Party’s Negligent Misrepresentation.** In *CCE, Inc. v. PBS&J Construction Services, Inc.*, 2011 WL 345900 (Tex. App. – Hou. [1<sup>st</sup> Dist.] 2011, pet. filed) the court upheld the trial court’s finding that PBS&J was liable for the \$2,423,752.20 in out-of-pocket expenses CCE incurred to a replacement contractor to complete a road project over and above the contract balance owing on its contract with TxDOT. By signing and sealing Storm Water Pollution Prevention Plan (“SW3P”) the engineer made affirmative material representations of existing facts. The *CCE* court noted that “there is no Texas case law which holds that architectural or engineering plans and specifications are primarily promises of future actions or opinions of future conditions as opposed to statements of existing facts.” *CCE* 2011 WL at 345900 at 5. The *CCE* court determined the following to constitute evidence of affirmative statements as to existing fact sufficient to defeat a summary judgment:

1. Representations made by PBS&J regarding the adequacy of the SW3P it prepared and submitted to TxDOT upon which the TxDOT contract was awarded to CCE for a specified price.
2. The TCEQ surface-water discharge permit required that a SW3P “must describe and ensure the implementation of practices that will be used to reduce the pollutants in storm water discharges associated with construction activity at the site and assure compliance with the terms and conditions of this permit.”
3. That, pursuant to the Texas Administrative Code, the “purpose of the engineer’s seal is to assure the user of engineering product that the work has been performed or directly supervised by the professional engineer named and to delineate the scope of the engineer’s work.”

4. “License holders shall only seal work done by them, performed under their direct supervision as defined in § 131.81 of this title, relating to Definitions, or shall be standards or general specifications that they have reviewed and selected. Upon sealing, engineer shall take full professional responsibility for that work.” See *CCE*, 2011 WL at 345900 at 4, 5.

<sup>50</sup> **Privity Not Element of Negligent Misrepresentation.** *McCamish v. F. E. Appling Interests*, 991 S.W.2d 787, 792 (Tex. 1999).

**Products Liability.** See Nunnally and Franklin, 1 TEX. PRAC. GUIDE TORTS § 4:64 *Products Liability – Privity Generally Not Required* stating that “In negligence products liability cases, privity of contract generally is not required and citing *Bernard Johnson, Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365, 369-70 (Tex. App. – Austin 1982, writ ref’d n.r.e.). These commentators note that “However, the Texas courts of civil appeals have reached contradictory conclusions with respect to the privity requirement in cases involving personal injury or property damage not coming within the situations stated above.”

<sup>51</sup> **Negligent Undertaking.** The Texas Supreme Court has held that “one who voluntarily undertakes an affirmative course of action for the benefit of another has a duty to exercise reasonable care that the other’s person or property will not be injured thereby.” *Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 395 (Tex. 1991) citing *Colonial Sav. Ass’n v. Taylor*, 544 S.W.2d 116, 119 (Tex. 1976); see also *Otis Engineering Corp v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983). This duty of care has evolved to include the protection of third parties. A person may owe a duty of care to a third-party simply by embarking upon an undertaking for another. See *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 837 (Tex. 2000) citing *Fort Bend County Drainage Dist.* and *Colonial Sav. Ass’n* and the RESTATEMENT (SECOND) OF TORTS §§ 323, 324A (1965) stating

While Texas law imposes no general duty to “become (a) good Samaritan, we have recognized that a duty to use reasonable care may arise when a person undertakes to provide services to another, either gratuitously or for compensation.

Section 324A of the RESTATEMENT (SECOND) OF TORTS provides as follows:

§ 324A Liability to Third Person for Negligent Performance of Undertaking

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Jeffrey A Ford and R. Carson Risk Fisk, *Negligent Misrepresentation Claims Against Design Professionals* State Bar of Texas 23<sup>rd</sup> ANNUAL CONSTRUCTION LAW CONFERENCE 1, 22 (2010), have urged in their article that A/Es should be found liable to third parties, a contractor, for damages suffered by the contractor, due to the negligence of the architect in providing construction administration services. Ford and Fisk state

If a design professional furnishes design services or administrative services for an owner in anticipation of or during the course of a construction project, it should be recognized that such services will likely be relied on by the contractor. If such services are provided without the exercise of reasonable care, it follows that such a failure should be actionable if the contractor incurs damages.

<sup>52</sup> **Economic Loss Rule.** *Tarrant County Hosp. Dist. v. GE Automation Servs.*, 156 S.W.3d 885, 895 (Tex. App. – Fort Worth 2005, no pet.). See Wren, 64 BAYLOR L. REV. 204 *Applying the Economic Loss Rule in Texas* (Winter 2012); and 5 BRUNER & O’CONNOR CONSTRUCTION LAW § 17:88 *Damage Theories Limiting Recovery: Economic Loss Rule.*

<sup>53</sup> **Texas - Defense – Third Party Action for Economic Loss Covered by Contract Damages.** In *Thomson v. Espey Huston & Associates, Inc.*, 899 S.W.2d 415 (Tex. App. – Austin 1995) the court held that the owner was merely an incidental beneficiary to the engineer’s inspection contract with the contractor. The engineer had been hired by the contractor to perform a variety of engineering and design services in connection with an apartment complex to be built on the owner’s property. The contractor and engineer entered into a second contract requiring the contractor to perform periodic inspections. After construction was completed, a number of design and construction defects were discovered. The court found that there was no evidence that the contractor and engineer had contracted directly and primarily for the owner’s benefit. The engineer’s negligence caused no injury beyond the economic loss which was the subject of the contract between the owner and the contractor. The court held that the engineer’s performance under its contract could violate only a contractual duty between the contractor and the owner, unless the negligence caused damage beyond the subject of the contract itself, which in this case it did not.

Also see *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.*, 900 N.E.2d 801 (Ind. Ct. App. 2009) - City library’s professional negligence claims against engineering subcontractors, alleging defective design and inspection of underground parking garage, were barred under economic loss doctrine even though library had not directly contracted with subcontractors and thus no privity of contract existed between parties; no exception to doctrine applied due to lack of privity. City library’s negligence claims against engineering subcontractors, arising from allegedly defective design and inspection of library’s underground parking garage, alleged only damages contained within the scope

of the garage construction project itself, and thus were barred under economic loss doctrine; various costs involving project delay settlements, additional construction management services, extra architectural and engineering services, and legal fees, were all consequential losses related to the design and construction of the project.

<sup>54</sup> **Texas – Sharyland - No Application of Economic Loss Rule to Tort Claims by a Party Not in Privity with Defendant – Except in Limited Circumstances.**

**Contractual Strangers.** Recently, the Texas Supreme Court in *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407 (Tex. 2011) held that the economic loss rule was not applicable to and did not bar a tort claim brought by an owner against a contractor hired by a city which negligently installed a sewer line to close to the owner’s water line. There was no privity of contract between the water line owner and the sewer line contractor. The only contract involved in this case was the construction contract between the city and its sewer line contractor. The court of appeals followed an absolutist approach, “one that says that you can never recover economic damages for a tort claim.” The court acknowledged that construction defect cases usually involve parties connected by a chain of contracts; *Sharyland*, however, it noted is not within that chain. The court further noted that

While it is impossible to analyze all the situations in which an economic loss rule may apply, it does not govern here. The rule cannot apply to parties without even remote contractual privity, merely because one of those parties had a construction contract with a third party, and when the contracting party causes a loss unrelated to its contract. *Id.* at 420.

Summing up its disagreement with the court of appeals in this case, the Texas Supreme Court states:

Thus, we have applied the economic loss rule only in cases involving defective products or failure to perform a contract. In both of those situations, we held that the parties’ economic losses were more appropriately addressed through statutory warranty actions or common law breach of contract suits than tort claims. Although we applied this rule even to parties not in privity (e.g. a remote manufacturer and a consumer), we have never held that it precludes recovery completely between contractual strangers in a case not involving a defective product—as the court of appeals did here. (Footnote omitted.) *Id.* at 418.

The supreme court noted that the court of appeals wrongly concluded that the economic loss rule was an absolute bar to recovery in tort claims where the recovery was for economic losses (“one that says that you can never recover economic damages for a tort claim.”). To the contrary, the supreme court noted it has repeatedly allowed tort claims to recover solely economic losses.

Among these are negligent misrepresentation, legal or accounting malpractice, breach of fiduciary duty, fraud, fraudulent inducement, tortious interference with contract, nuisance, wrongful death claims related to loss of support from the decedent, business disparagement, and some statutory causes of action. (Footnotes omitted.) *Id.* at 418.

The court continued,

Moreover, the question is not whether the economic loss rule should apply where there is no privity of contract (we have already held that it can), but whether it should apply at all in a situation like this. Merely because the sewer was the subject of a contract does not mean that a contractual stranger is necessarily barred from suing a contracting party for breach of an independent duty. If that were the case, a party could avoid tort liability to the world simply by entering into a contract with one party. The economic loss rule does not swallow all claims between contractual and commercial strangers. *Id.* at 419.

Finally, the court observed that the economic loss rule is the subject of inquiry for a Third Restatement of Torts:

The American Law Institute is at work on a section of the Third Restatement that will focus on torts that involve economic loss, or pecuniary harm not resulting from physical harm or physical contact to a person or property. Although the ALI’s Council approved the start of the project in 2004, thus far no part of the work has been approved by the Council or by the membership. See Am. Law Inst., Current Projects: Restatement Third, Torts: Liability for Economic Harm, [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=15](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=15); see also [Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH & LEE L. REV. 523, 535-36 (2009)] (noting that none of the project’s initial drafts were approved by the American Law Institute). *Id.* at FN 25 p. 419.

See 33 CONSTRUCTION LITIGATION REPORTER 5 *Economic Loss Rule Does Not Apply to Water Supply Company’s Negligence Claim Against Municipal Contractor for Installing Sewer Lines Too Close to the Water Lines* (2012); See Wren, 64 BAYLOR L. REV. 204 *Applying the Economic Loss Rule in Texas* (Winter 2012); and Ford and Fisk, *Negligent Misrepresentation Claims Against Design Professionals*, State Bar of Texas 23<sup>rd</sup> ANNUAL CONSTRUCTION LAW CONFERENCE (2010) “Federal courts interpreting Texas law have consistently determined that the economic loss rule does not apply where there is no contractual privity.... Texas courts are divided on the issue.... To allow the recovery of economic damages is entirely consistent with the language of Sections 552 and 552B of the Restatement (Second) of Torts.... There is no functional distinction between the terms”. See Acret, ARCHITECTS AND ENGINEERS (4<sup>th</sup> Ed.) § 1:16 *Negligence – Negligence and Breach of Contract*.

In a case subsequent to *Sharyland*, the court of appeals in *Arlington Home, Inc. v. Peak Environmental Consultants, Inc.*, 361 S.W.3d 773 (Tex. App. – Hou. [14<sup>th</sup> Dist.] 2012, writ filed) upheld the trial court’s judgment notwithstanding the jury’s verdict, and determined that the economic loss rule barred a homeowner’s claim that its mold inspector negligently performed a mold inspection. Additionally, the court upheld the trial court’s determination that a report that stated “it passed” was not a negligent misrepresentation to the homeowner despite the fact that the homeowner had to incur \$539,594.84 in expenses to remediate the home.

**Not Contractual Strangers But Not in Privity of Contract.** In *Martin K. Eby Construction Co. v. LAN/STV*, 350 S.W.3d 675 (Tex.App. - Dallas 2011, pet. filed) the court held that the economic loss rule does not apply to bar recovery against an A/E for a contractor's negligent misrepresentation claim for out-of-pocket expenses caused by an A/E's design defects, because the misrepresentation caused an injury independent of the contractor's contractual damages. DART hired a joint venture of two engineering firms (LAN/STV) to design, administer and supervise construction of an extension to the light rail system. Eby, the general contractor hired by DART, asserted that it suffered delays and increased performance costs because of design defects. Eby sued LAN/STV for negligent misrepresentation. LAN/STV contended that Eby's tort claim was barred by the economic loss rule. The court noted that the Texas Supreme Court in *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1, 12-13 (Tex. 2007) has stated that the economic loss rule precludes recovery in tort for economic losses resulting from the failure of a contracting party to perform under a contract, and that Texas courts had extended application of the economic loss rule in cases where the parties were not in privity. However, the *Eby* court refused to apply the defense to a negligent misrepresentation claim where the plaintiff was seeking to recover solely out-of-pocket expenses in the form of delays, changes and rework caused by the design defects. Also, the *Eby* court noted that the court of appeals decision in *Bernard Johnson, Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365 (Tex. App. - Austin 1982, writ ref'd n.r.e.) was not applicable to the facts in *Eby* because *Bernard Johnson* found that the economic loss rule barred recovery in that case and the loss arose out of the A/E's negligent administration of its contract and Eby's loss arose out of LAN/STV's negligent misrepresentations (its design defects). Finally, the *Eby* court concluded that Eby's damages, consisting of its out-of-pocket expenses caused by the misrepresentations, were to compensate it for an injury entirely independent of its contract injury. These out-of-pocket damages were, in the words of the *Lamar Homes* court, not for an "injury [that] is the subject of the contract itself." As such, the *Eby* court concluded, the contractor's damages are "not what is defined as economic loss." Some courts have recognized that the "economic loss doctrine" – a defense to tort liability based on the concept that the remedy for economic losses are contract damages not recoverable in a tort claim – does not apply to prevent A/E liability to third parties. See *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999); *Rousseau v. K. N. Const., Inc.* 727 A.2d 190 (R.I. 1999); West Key Number Digest, Negligence k1205(5). See 65 A.L.R.3d 249 *Tort Liability of Project Architect for Economic Damages Suffered by Contractor*. See discussion of the *Eby* case at 37 PROFESSIONAL LIABILITY REPORTER 6 *Economic Loss Rule Does Not Apply to Contractor's Negligent Misrepresentation Claim for Out-of-Pocket Expenses Caused by Engineer's Design Defect* (2012); and 33 CONSTRUCTION LITIGATION REPORTER 1 *Economic Loss Rule Does Not Apply to Contractor's Negligent Misrepresentation Claim for Out-of-Pocket Expenses Caused by Engineer's Design Defects* (2012). See Acret, ARCHITECTS AND ENGINEERS (4<sup>th</sup> Ed.) § 1:16 *Negligence – Negligence and Breach of Contract*; and 61 A.L.R.6<sup>th</sup> 445 *Tort Liability of Project Architect or Engineer for Economic Damages Suffered by Contractor or Subcontractor*.

<sup>55</sup> **Defense – No Causal Connection.** *Gordon v. Holt*, 412 N.Y.S.2d 534 (1979) - the defendant was employed by a mortgagee to protect its security interest in an apartment complex under construction. The plaintiffs, subsequent purchasers of the complex, alleged that the defendant negligently inspected the construction and submitted reports to the mortgagee containing the erroneous conclusion that the complex was properly constructed. The plaintiffs admitted, however, that they did not rely on the reports in deciding to purchase the complex. The court held that the defendant owed no duty to the plaintiffs with respect to the reports in view of the absence of any relationship between the plaintiffs and the defendant.

<sup>56</sup> **Other Jurisdictions – No Liability to Purchasers Where A/E's Design Not Source of Defects.** *2314 Lincoln Park West Condo v. Mann*, 555 N.E.2d 346 (Ill. 1990) - The plaintiffs sought recovery from the architect who designed their condominium building for the cost of repairing defects in the building. No personal injury or damage to other property was alleged to have been caused by the defects. The plaintiffs did not state a claim in negligence because the architect had no duty to insure the quality of the building to those who purchased from the original developer.

<sup>57</sup> **A/E Not Contractor's Guarantor.** In *Walker v. Wittenberg, Delony & Davidson, Inc.*, 412 S.W.2d 621 (Ark. 1966) the court found that the contract only required supervision to the extent necessary to insure compliance of the final building with the plans and specifications; see *Kellam and Foley*, 360 N.E.2d 199 (Ind. 1977) – the architect in the A/E agreement declined to "guarantee the contractor's performance" or to take responsibility for "construction means, methods, techniques, sequences or procedures, or for safety precautions".

<sup>58</sup> **Other Jurisdictions – A/E Not Liable Except if Have No Authority to Supervise the Contractor.** *Krieger v. J. E. Greiner Co., Inc.*, 382 A.2d 1069 (Md. 1978) – court opinion contains an exhaustive survey of cases on the issue of whether an A/E who is responsible for the day-to-day supervision of a construction project is liable to a worker for unsafe working conditions and concludes that the weight of authority is that the A/E is not in the absence of a contractual provision imposing work safety on the A/E; *Alexander v. City of Shelbyville*, 575 N.E.2d 1058 (Ind. Ct. App. 1991) – court held that a contract between the city and the engineer which provided that the engineer was to "determine compliance with the plans and specifications ... [and] all work shall be done under the direct supervision of the [engineer]. ..." did not impose a duty to protect jobsite workers; *Moundview Independent School Dist. v. Buetow & Associates, Inc.* 253 N.W.2d 836 (Minn. 1977) – A/E without supervision authority is not a "clerk of the works"; *Carter v. Vollmer Associates*, 602 N.Y.S.2d 48 (1993); *First National Bank v. Cann*, 503 F.Supp. 419 (N.D. Ohio 1980), aff'd 669 F.2d 415 (6<sup>th</sup> Cir. Ohio 1982) – Architect was not required to make continuous on-site inspections to check quality and quantity of contractor's work; *Young v. Eastern Engineering & Elevator Co., Inc.*, 554 A.2d 77 (Pa. 1989).

<sup>59</sup> **Other Jurisdiction – Scope of Inspection Contractually Limited to "Readily Observable Defects".** *470 Owners Corp. v. Richard L. Heimer, P.E., P.C.* 685 N.Y.S.2d 747 (N.Y. App. Div.2d Dep't 1999) - Engineer, who was hired to inspect "accessible and observable areas" of apartment complex, was not negligent in approving repair specifications for terraces in apartment owner's complex, without including steps to prevent pooling of water in railing postholes; water pooling inside railing postholes and rusted metal sleeves into which railings were set, which caused terraces to deteriorate due to water and ice damage, were not readily observable during inspection.

<sup>60</sup> **Other Jurisdictions - Breaking the Bonds of Privity – Finding A/Es Liable to Third Parties That Are Not Contract Parties or Third Party Beneficiaries.** The finding of A/E liability in other jurisdictions is based not on the duty of the A/E to provide the contracted for services but rather on finding a common law duty to the third party to carry out the A/E's contractual obligations in a manner that will not cause injury to others. See 16 CAUSES OF ACTION 499 *Cause of Action Against Architect or Engineer for Negligent Inspection or Supervision of Construction* § 4. See 65 A.L.R.3d 249 *Tort Liability of Project Architect for Economic Damages Suffered by Contractor*; Acret, ARCHITECTS AND ENGINEERS 4<sup>th</sup> Ed.) § 1:21 *Liability to Third Parties – Developers and Construction Lenders*, § 4:3 *Contract as Creating Duty*, 9:4 *Rejection of Privity Defense*, and § 17.1 *Privity*. Acret and Perrochet, 2 CONSTRUCTION LAW DIGESTS § 17:4 *Majority Rule: Privity Not a Defense to Negligence Action*. A/E liability has been found in the following circumstances:

**Owner of a Construction Project vs. Bank's Inspecting A/E.** *Browning v. Maurice B. Levien & Co., P.C.*, 262 S.E.2d 355 (N.C. 1980) - an architect undertook to supervise the construction of an apartment complex for the bank which loaned the plaintiff money to finance the cost of the building. The architect inspected construction at the time of each progress payment request and certified compliance with the plans and specifications. The plaintiff owner sued the architect for over-certification of payments. The court held the architect liable to the project owner as a person who would reasonably be seen to rely on the architect's services. The architect's over-certification of payments damaged the project owner.

**Developer's Lender vs. Developer's A/E.** *U. S. Financial v. Sullivan*, 37 Cal. App.3d 5, 112 Cal Rptr. 18 (4<sup>th</sup> Dist. 1974) – court found soil engineer negligent and liable to a subdivision developer's lender for the impaired value of the lender's collateral due to faulty soil test and resultant house foundation failures. But see *Mears Park Holding Corp. v. Morse/Diesel, Inc.* 427 N.W.2d 281 (Minn. Ct. App. 1988) which held that lender which acquired property by deed in lieu of foreclosure sale from developer was too remote a person to be reasonably foreseeably harmed by architect's negligent performance. This court also held that the attempted assignment of the developer's rights and causes of action to the lender was invalid due to the prohibition of assignment clause in the A/E Agreement.

**Persons Obtaining an Interest in the Construction Project After Its Completion vs. Developer's A/E.** *Parliament Towers Condominium v. Parliament Corp.*, 373 So.2d 689 (Fla. App. 1979) – purchasers of condominium unit; *Council of Co-Owners Atlantis Condominium, Inc. v. Whiting – Turner Contracting Co.*, 517 A.2d 336 (Md. 1986) purchasers of condominium unit; *Chubb Group of Ins. Cos. v. C. F. Murphy & Associates, Inc.*, 656 S.W.2d 766 (Mo. App. 1983) – tenant; ; *Shoffner Industries, Inc. v. W. B. Lloyd Construction Co.*, 257 S.E.2d 50 (N.C. Ct. App. 1979) held that an architect could be held liable to a tenant of a building, designed by the architect, that suffered a settling floor because of defective plans; and *Navajo Circle Inc. v. Dev. Concepts Corp.*, 373 So.2d 689 (Fla. App. 1979) – purchasers of condominium unit, where the court noted:

The duty owed by a defendant to a plaintiff may have sprung from a contractual promise made to another; however, the duty sued on in a negligence action is not the contractual promise but the duty to use reasonable care in affirmatively performing that promise. The duty exists independent of contract. Existence of a contract ... is not an exclusive test of the existence of that duty. Whether a defendant's duty to use reasonable care extends to a plaintiff not a party to the contract is determined by whether that plaintiff and defendant are in a relationship in which defendant has a duty imposed by law to avoid harm to the plaintiff. ... Where it is foreseeable that the plaintiff will suffer the injury sued on, the supplier of a service has a legal duty to use reasonable care to avoid unreasonable risks to that plaintiff in performance of his service. *Id.* at 691.

**Contractors and Subcontractors vs. Developer's A/E. Failure to Catch Contractor's Defective Work.** As noted by one commentator "Contractors, in fact, seldom sue inspectors (hired by the owner or its lender) for damages because of the inspector's failure to catch the contractor's or its subcontractor's defect work. The reason for this is apparent. From the contractor's perspective, it is usually more fruitful to pursue the subcontractor responsible for the defective work. It is difficult to escape the inspector's defense that the true cause of the loss was the subcontractor's own failures." 4A BRUNER & O'CONNOR CONSTRUCTION LAW § 13:30 *Inspection Liability of Owner Agents to Third Parties for Failing to Discover Another's Breaches*.

**Defective Plans.** *Donnelly Construction Co. v. Oberg/Hunt/Gilleland*, 677 P.2d 1292 (Ariz. 1984) – held that an architect could be liable for increased costs by the contractor because of the architect's defective plans relating to a school improvement project; *Davidson & Jones Inc. v. New Hanover County*, 255 S.E.2d 911 (N.C. 1979) cert den. 259 S.E.2d 911 (N.C. 1979) - the court held that where breach of a contract results in foreseeable injury to persons so situated by their economic relations and community of interests as to impose a duty of due care, liability will arise from the negligent breach of the common law-duty of care flowing from the parties' working relationship; *Forté Bros., Inc. v. National Amusement, Inc.*, 525 A.2d 1301 (R.I. 1987). **No Payment Bonds.** In *Boren v. Thompson & Associates*, 999 P.2d 438 (Okla. 2000) the court found that an architect hired by a school district to oversee construction of a library was liable to subcontractors in connection with the architect's issuance of certificates of payment where there the contractor had not posted a payment bond as required by statute on governmental projects. The court found that although an architect is not ordinarily responsible for supervising a contractor's disbursements to subcontractors, when a public entity contracts with a private party to oversee a construction project, subcontractors should be able to assume that the architect would verify the existence of the bonds before certifying payments.

**Construction Workers vs. Developer's A/E.** *Caldwell v. Bechtel, Inc.*, 631 F.2d 989 (1980); *Seeney v. Dover Country Club Apartments Inc.*, 318 A.2d 619 (Del. Super. 1974); *Balagna v. Shawnee County*, 668 P.2d 157 (Kan. 1983) and 720 P.2d 1144 (Kan. 1986); *Welch v. Grant Dev. Co.*, 466 N.Y.S.2d 112 (N.Y. 1983); *Heath v. Huth Eng'rs, Inc.*, 420 A.2d 758 (Pa. 1980); and *Duncan v. Pennington County Housing Authority*, 283 N.W.2d 546 (S.D. 1979).

Also see:

**Contractor vs. Construction Manager.** The court in *Presnell Constr. Managers Inc. v. EH Constr. LLC*, 134 S.W.3d 575, 576, 582 (Ky. 2004) held that a contractor could maintain a negligent misrepresentation claim against a construction manager who “supplied faulty information and guidance” to the contractor.

**Subcontractor vs. Construction Manager.** *John Martin Co. v. Morse/Diesel Inc.*, 819 S.W.2d 428, 429 (Tenn. 1991) – “We hold that a subcontractor, despite lack of privity, may make such a claim [for economic loss caused by negligent misrepresentations] against the construction manager based upon negligent misrepresentation, whether the negligence is in the form of direction or supervision.”

<sup>61</sup> **AIA Architect Contract Edition Litigated in *Black + Vernooy Architects v. Smith*.** The agreement entered into between BVA and the Maxwells is the 1997 edition of the AIA B151 Abbreviated Standard Form of Agreement Between Owner and Architect. The relevant provision of this form litigated in *Black + Vernooy Architects v. Smith* are set out in Article II of this article. Note that as mentioned in the first part of this article, the 1997 edition of the various AIA Architect Contracts have subsequently been replaced with the 2007 edition. The “endeavor to guard” language is no longer contained in the construction phase services provided by the Architect. The 2007 edition continues as services provided by the Architect, the obligations to visit the job site, to observe the Work, to determine if the Work observed is being performed in accordance with the Contract Documents, and to report to the Owner known deviations and defects and deficiencies observed by the Architect.

<sup>62</sup> **Texas: Privity Not an Indispensible Element to Finding a Duty to Third Parties.** *Hermann Hosp. v. National Standard Ins. Co.*, 776 S.W.2d 249, 252-53 (Tex. App. – Hou. [1<sup>st</sup> Dist.] 1989, writ denied) explaining that although contractual relationship “assures a sufficiently close nexus between the parties upon which [courts] may fairly predicate liability, it is not ... indispensable to the imposition of a legal duty of care.”

<sup>63</sup> **What is Not Involved.** *Black + Vernooy Architects v. Smith*, 346 S.W.3d 877, 880-881 (Tex. App. – Austin 2011, petition filed). The Court Majority first notes what is and is not involved:

Before addressing the issues raised on appeal, we feel it is necessary to provide a little background regarding what we are charged with deciding in this case and what decisions we are not faced with. Unquestionably, Karen and Lou Ann were injured, Lou Ann suffering what can only be described as catastrophic injuries, as a result of their innocent decision to stand on a balcony that they reasonably and justifiably believed was properly built. It wasn't. And Lou Ann's life and the lives of her family members have been irrevocably damaged as a result.

In this case, we are not being asked to make any decisions regarding whether the Smiths were entitled to recover from the homeowners, nor have we been asked to determine whether the Smiths may recover from the general contractor and subcontractor whose abysmal building practices led to this terrible tragedy. Furthermore, we stress that in this appeal there has been no allegation that the Architects negligently designed the balcony or that the Architects actually created the defects at issue. To the contrary, the Smiths allege that the defect was caused by the construction practices of the contractor and subcontractor when the balcony was not built in accordance with the design plans of the Architects. Similarly, the jury was not asked to determine whether the Architects were liable under a negligent-undertaking theory. Finally, and perhaps most importantly, we have not been asked to make any determination regarding any duty that the Architects owed to the owners of the home (the Maxfields) or the extent of that duty; instead, we have only been asked to decide whether the contractual duty that the Architects owed to the homeowners also extended to the Smiths.

<sup>64</sup> **Court Majority Opinion: Third Party Beneficiaries – A Product of Contractual Intent.** The Court Majority cites *Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002) for the proposition that third party beneficiary status occurs only if the contracting parties intend to secure a benefit to the third party.

<sup>65</sup> **Court Majority Opinion: Intent Not Present to Create Third Party Beneficiaries.** The Court Majority cites *MCI Telecomms. Corp. v. Texas Utils. Elec. Co.*, 995 S.W.2d 647, 651-52 (Tex. 1999) and *Morgan Chase*, 302 S.W.3d at 531 to support its conclusion that the AIA Documents do not evidence a contractual intent to create third party beneficiaries.

<sup>66</sup> **Dissent: Architect May Be Liable for Breach of Duty to Provide Information Even Though Architect's Agreement Provides Architect is not a Guarantor of the Work.** See also *Gables CVF, Inc. v. Bahr, Vermeer & Haecker Architect, Ltd.*, 244 Neb. 346, 506 N.W.2d 706, 710-11 (Neb. 1993). (reviewing similar “endeavor to guard” provision and holding that language stating architect is not responsible for acts or omissions of contractor “does not absolve the architect from liability for a breach of the architect's contractual duty, if one exists, to inform the owner of deviations from the building plans when the architect has agreed to make periodic observations”). This is consistent with the contract provision stating, “The Architect shall be responsible for the Architect's negligent acts or omissions, but shall not ... be responsible for acts or omissions of the Contractor”.

<sup>67</sup> **Dissent – Privity Not Required.** Privity of contract is not required in a negligence claim resulting in personal injury. See *Johnson v. Continental Constructors, Inc.*, 630 S.W.2d 365, 370 (Tex. App. – Austin 1982, writ ref'd n.r.e.): “The defense of ‘privity’ is not permitted in suits for personal injury, whether founded upon a claim of negligence or upon a claim of strict liability ....” See also *Council of Co-Owners Atlantis Condo., Inc. v. Whiting-Turner Contracting Co.*, 308 MD. 18, 517 A.2d 336, 343-344 (Md. 1986) holding that duty of architect to use due care in fulfilling its contractual duties: “extended to those persons foreseeably subjected to the risk of personal injury,” given that “privity is not an absolute prerequisite to the existence of a tort duty”. See *Dukes v. Philip Johnson/Alan Ritchie, Architects, P.C.*, 252 S.W.3d 586, 594 (Tex. App. – Ft. Worth 2008, pet. denied) in which the court recognized that the terms of an architect's contract for professional services could



give rise to tort liability for injuries sustained by a non-contracting party. *Philip Johnson* involves a wrongful-death claim resulting from drowning of four individuals in an outdoor water sculpture owned by the City of Fort Worth, the court stated that it would look to the defendant architects' contractual agreement with the City to determine whether the architects owed a duty to the decedents. The *Philips Johnson* court found that the architects in that case had not contracted to address safety issues at the fountain and thus were not responsible for the deaths of the decedents at the fountain.

<sup>68</sup> **Dissent – Balancing Test to Determine if a Duty is to Be Recognized.** *Texas Home Mgmt., Inc. v. Peavy*, 89 S.W.2d 3d 30, 33 (Tex. 2002); and *Graff v. Beard*, 858 S.W.2d 918, 920 (Tex. 1993).

<sup>69</sup> **Dissent – Contractual Disclaimers Do Not Shield a Party from Liability for Its Torts Injuring Non-Contract Parties.** *Citing Ely v. General Motors Corp.*, 927 S.W.2d 774, 781(Tex. App. – Texarkana 1996, writ denied). Although the court in *Ely* ultimately determined that GM's breach of its contractual duty did not proximately cause Ely's injuries, the court held "Neither [the franchisee] nor General Motors ... could effectively waive the negligence claims of third parties. Therefore, the disclaimer in the contract will not disclaim Ely's negligence claim." *Also see McCarthy v. J. P. Cullen & Son Corp.*, 199 N.W.2d 362, 370 (Iowa 1972) holding that while parties are typically free to exempt one another from future liability, a party cannot "by contract with a third party, lay down his own rules as to when he will be liable to those whom his negligence injures."

<sup>70</sup> **Petitioners' Brief on Appeal – Fundamental Inconsistency of Court Majority's Decision.** The Petitioners' argue

In their opening brief, Petitioners set forth a hypothetical that illustrates the inconsistent result of the en banc majority's decision: three women standing on the balcony of a vacation home are rendered paraplegics when the balcony collapses, but only one of them (the owner) is permitted to recover against the architect for her injuries, while two of them (her guests) are denied a recovery.... If the Architects' position is that they owed a tort duty to the owners, but not to third parties, then they cannot explain the inconsistent treatment of owners and guests under modern tort principles. But if the Architects' position is that they owed no tort duty to anyone, including the owners, so that the owners' remedy is limited to contract damages, then their position deprives the owners of the safety net they paid the Architects \$16,800 to provide. Neither position makes sense.

<sup>71</sup> **Petitioners' Brief on Appeal – Lack of Privity Is Not a Bar Simply Because It Is a Bar in Some Professional Liability Cases.** The Petitioners' argue

The Architects fault Petitioners for "glossing over the fact that under Texas law, a non-client third party cannot use the special relationship between a professional and its client as the basis for a tort claim against the professional."... To make their point, the Architects point to a suit against an attorney (*Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996)), and a suit against a physician (*Praesel v. Johnson*, 967 S.W.2d 391, 398 (Tex. 1998)). But these decisions demonstrate that this Court has not adopted a generalized approach to duty that is applicable to all "professionals" across the board, regardless of circumstances. Rather, this Court has engaged in particularized analyses in deciding whether the professional in question can be subjected to liability to third parties and, if so, under what circumstances....

The Petitioners then argue that the Architects' cited cases do not preclude and in fact recognize that they are not founded on an absolute bar to third party cases against professionals.

<sup>72</sup> **Petitioner's Brief on Appeal – Other Jurisdictions Confirm that Lack of Privity Not a Bar to Recovery Against an Architect.** The Petitioners cite *Council of Co-Owners Atlantis Cond., Inc. v. Whiting-Turner Contracting Co.*, 308 Md. 18, 517 A.2d 336, 338 (Md. 1986) and 5 BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 17.59 (2011). Dismissing the Architects' analysis in distinguishing *Whiting-Turner*, the Petitioners' argue

Without debating that purported distinction at this juncture, the important point is that it goes to the *nature* of the duty owed by the Architects here, not whether the duty extends to third parties under controlling tort principles.... the key point is that "privity is not an absolute prerequisite to the existence of a tort duty" in a suit against an architect.... In deciding whether to extend an architect's duty to third-parties, the Court must turn to factors of the risk-utility balancing test....

<sup>73</sup> **Petitioner's Brief on Appeal – "Foreseeability" Is the Foremost and Dominant Consideration.** The Petitioners note that the en banc majority recognized the foreseeability of the harm that occurred:

The Architects do not dispute that the most compelling case for extending an architect's duty of care to third-party visitors under the circumstances of this case is actually made by the en banc majority: "It is ... foreseeable that the risk of physical injury includes harm to third-party visitors, as it would seem to be a rare case where no person would use a structure other than the owner with whom an architect contracts." *BVA* 346 S.W.3d at 885.

The Petitioners note that "Petitioners have never argued that the 'foreseeability' factor is decisive.' Instead, they merely pointed out that this Court has described 'foreseeability' as 'the foremost and dominant consideration among the various duty factors.'" Petitioners cite *Texas Home Mgmt., Inc. v. Peavey*, 89 S.W.3d 30, 36 (Tex. 2002); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990); *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987). They then respond to the Architects by stating

Petitioners do not urge, as the Architects assert, a "'foreseeability-trumps-all analysis.'"

<sup>74</sup> **Petitioner’s Brief on Appeal – Analysis of Architects’ “Control” Cases.** The Petitioners make the following observations as to the “control” cases cited by the Architects in support of the Architects’ argument that Texas case law does not support finding that the Architects owed the Petitioners a duty to prevent their injury:

*Lee Lewis Construction, Inc. v. Harrison*, 70 S.W.3d 778, 793 (Tex. 2001). When, as in *Lee Lewis*, suit is based on a defendant’s alleged failure to *prevent* a contractor’s negligent misstep *before* it occurs, it makes sense to inquire whether the defendant had the right to control the “operative detail” of the contractor’s work so that the contractor is not free to do the work in its own way.”... 70 S.W.3d at 793... But when, as here, the injuries occur *after* the contractor *completed* the construction process, the material inquiry should be whether a defendant charged with “endeavor[ing] to guard ...against defects and deficiencies in the Work” had sufficient opportunity to discover obvious defects, and retained sufficient “control” to have the contractor *correct* his negligent work *after* he performed it but *before* injury occurred. Timing is the key. When, as in *Lee Lewis*, the negligent act (failing to wear a lifeline) and the injury (falling unrestrained to the ground) occur either simultaneously or within a short time frame, the focus must be on whether the defendant had sufficient control to prevent the negligent act before it occurred. But when, as here, the injury (suffering paraplegia when a balcony collapses) occurs long after the contractor’s original negligent act (failing to include critical support features in the balcony) the analysis must necessarily be different. The question should be whether a party charged with inspecting the balcony had sufficient control to see that any obvious defects in its construction were corrected before it collapsed and caused injury.

*Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002). *Dow Chemical* illustrates the same principal as *Lee Lewis*. There, the plaintiff-carpenter employed by an independent contractor was injured while removing plywood forms from a concrete pier when a pipe—improperly secured by another employee of the same contractor—fell on the plaintiff. 89 S.W.3d at 605. Under these circumstances, where the pipe fell on the plaintiff immediately upon his removing the plywood forms, this Court’s duty analysis properly focused on whether “the defendant [had] the right to control the means, methods, or details of the contractor’s work or ... actually exercised such control over the construction work.” Resp. BOM at 19 (citing *Dow*, 89 S.W.3d at 606). This makes sense. Unless Dow had either the right to control the acts of the contractor—including both the carpenter removing the plywood forms or his co-employee securing the overhead pipe—Dow had no way to prevent the pipe from falling and, hence, to prevent the injury to the plaintiff from occurring. But the case before this Court here is different. The balcony did not fall immediately after Rodriguez nailed it to the house. Despite its multiple defects, the balcony somehow managed to stay in place for another year and a half. The Architects had ample opportunity during their contract administration to see that any defects in the balcony’s construction were corrected before anyone was injured.

*Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 226 Tex. 1999). *Coastal Marine* involved an employee of a construction company who was killed when his head was crushed in the “pinch point” area of a crane... The Architects cite this case for the proposition that “the right to control must be more than a general right to order work to stop and start, or to inspect progress.” Resp. BOM at 31 (quoting *Coastal Marine*, 988 S.W.2d at 226). “The supervisory control must relate to the activity that actually caused the injury, and grant the owner at least the power to direct the order in which work is to be done or the power to forbid it being done in an unsafe manner.” *Coastal Marine*, 988 S.W.2d at 226. These standards make sense in a case, such as *Coastal Marine*, where the negligent act (unsafe operation of crane) and the injury (crushing of head in “pinch point” of crane occur simultaneously. In that circumstance, it does no good for the defendant to have the general right to order work to stop and start, or to inspect progress, since none of those general powers would be sufficient to prevent the negligent act that simultaneously caused the injury.... But here, in sharp contrast, if the Architects, through their inspections as part of contract administration, had determined that the balcony had been negligently constructed, they had plenty of time to get the Contractor and Subcontractor (Nash and Rodriguez) to correct the defects.... all the Architects needed to have was the power to see that the defects were corrected (which they undisputedly did have). RR 3:58.

<sup>75</sup> **Petitioner’s Brief on Appeal – the Architects Duty is Independent of the Contractor’s Duty.** The Petitioners note

But these contractual provisions regarding Nash did not relieve the Architects of their contractual obligation to “endeavor to guard the Owner against defects and deficiencies in the Work.”... Read together, the AIA Contract executed by Nash as Contractor and the AIA Contract executed by the Architects reflect a belt-and-suspenders approach to the issue of structural safety, in which Contractor and Architect each brings their own specialized expertise to the inspection endeavor.... [T]his duty was never extinguished.

<sup>76</sup> **Petitioner’s Brief on Appeal – the Architects “Endeavor to Guard” Covenant Imposed a Real Obligation on the Architects.**

First, the Architects argue that “the Court would have to remove the word ‘endeavor’ from ‘endeavor to guard,’ leaving the architect with the obligation ‘to guard.’”... The Architects are wrong because the word “endeavor” plays a key role in defining the limited, but nonetheless real, duty of an architect performing contract administration. BLACK’S LAW DICTIONARY 607 (9<sup>th</sup> ed. 2009). By exerting effort to attain a goal, an architect does not thereby guarantee to achieve the goal.... Yet, the architect nonetheless bears a real obligation to exert physical or intellectual strength toward attainment of

the goal of discovering construction defects and seeing that they are corrected...The Dallas Court of Appeals' 1987 decision in *Hunt* demonstrates the point. See *Hunt v. Ellisor & Tanner, Inc.*, 739 S.W.2d 933, 934 (Tex. App.—Dallas 1987, writ denied). In construing a form contract containing the same "endeavor to guard" language as that here, the Dallas court made clear that the duty imposed on the architect is limited, but real...But the architect nonetheless owes a real, though more limited, "nonconstruction responsibility": "to visit, to familiarize, to determine, to inform and to endeavor to guard." *Id.*... By closing their eyes, the Architects would never "know" about any construction defects. Thus, their duty to report "known deviations"—which the Architects argue is the only duty they bore—would never be triggered. These courts wisely rejected reading "endeavor to guard" out of the Contract....

77 **Respondent's Brief on Appeal – the Architects Owed no Duty Apart from its Duty to Its Clients.** The Architects argue

When, as here, the duty arises solely by contract and is solely a creation of it, the defendant's failure to perform that duty gives rise to a claim that is limited to the contracting parties and those in privity with them. It provides no basis for imposing a tort duty in favor of a third person who is neither a party nor a beneficiary of the contract. See *McClendon v. T. L. James & Co.*, 231 F.2d 802, 804 (5<sup>th</sup> Cir. 1956) (nonperformance of a contract duty owed by the agent to his principal does not give rise to tort liability against the agent, and the agent has no contract liability to a third party not in privity)...It is true that a contracting party has a duty not to create a dangerous condition independent of the contract relationship. *DeLamney*, 809 S.W.2d at 496. The law imposes upon the creator of a danger the duty to warn others of it. *Buchanan v. Rose*, 159 S.W.2d 109, 110 (Tex. 1942). But here, BVA did *not* create the danger that injured Petitioners. Nash did, and because of his tort liability to Petitioners, he paid them \$1.4 million.

78 **Respondent's Brief on Appeal – Petitioner's Hypothetical is Flawed.** The Architects argue

First, the hypothetical wrongly assumes that BVA had a duty to "inspect" and "detect" the construction work while it was still underway. Instead, BVA's duty was limited to intermittently visiting the building site during construction operations to try to guard its clients against defects in the work by reporting "known" deviations – ones it actually saw – to the clients....

Second, the hypothetical wrongly assumes the court of appeals "held" that BVA owed a "tort duty" to its clients....

Furthermore, Petitioners' hypothetical suggests that anyone in the vicinity of a person to whom the defendant owes a duty is a beneficiary of that duty. But suppose A hires B to be A's bodyguard, and B stands by and allows someone to attack A and two of A's friends. A would have an action against B because of B's duty to him. But A's two friends would not. Or suppose X's minor child and two of the child's friends are in harm's way, and X has the ability to save all three from injury, but chooses to save only his child. X would not be liable to his child's friends (or their parents) because he owed no duty to them. Or, what if Nash and Rodriguez were on the balcony when it collapsed, would BVA owe them a tort duty? Under Petitioners' tort analysis, BVA would owe a tort duty to the very person responsible for creating the danger, but under "sound tort principles" BVA clearly would not.

The hypothetical also glosses over the fact that under Texas law, a non-client third party cannot use the special relationship between a professional and its client as the basis for a tort claim against the professional. See *e.g.*, *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996) (attorney had no duty to a non-client to use reasonable care in performing a client's work); *Praesel v. Johnson*, 967 S.W.2d 391, 398 (Tex. 1998) (doctor had no duty to a nonpatient to warn a patient suffering from epileptic seizures about the dangers of driving). To recover in tort against a professional, the non-client must allege and prove that the professional created the dangerous condition that injured the non-client, exercised control over the person who did, or allege and prove that the professional made a negligent misrepresentation or engaged in a negligent undertaking. Such are separate and apart from the professional duties owed to a client. *None* of those circumstances are present in this case....

79 **Respondent's Brief on Appeal – Petitioner's Seek to Create a New Tort and In so Doing Rewrite the Contract.** The Architects argue

They (the Petitioners) would create a new tort duty that they desire by expanding the limited scope of the architect's obligation under the Architect Contract. They would have this Court interpret the Contract to require inspection, detection, and reporting of all "visible and obvious defects affecting critical safety and structural integrity aspects" of the building. This interpretation would make the architect liable for such defects that the architect *should have seen* when visiting the building site....

80 **Respondent's Brief on Appeal – There Is No Duty to Warn of Dangers That One Does Not Create.** The Architects argue

The new tort duty would violate the principle that person have no common law duty to warn others of a danger that neither they nor those under their control created. BVA did not control the contractors or create the danger that injured Petitioners. BVA agreed to try to guard its clients against defective construction work by reporting to them "known deviations" from the design plans. Petitioners overlook the fact that BVA complied with this limited obligation. They also overlook the fact that BVA was *not* the inspector or guarantor of the construction work; Nash was. Yet, they want to convert a contractual duty to provide information about deviations that the architect *actually knows about* into a duty, based on *constructive* knowledge. This new tort duty would require the architect to report information about deviations that he did not – but "*should have*" – known about because they affected structural integrity.

<sup>81</sup> **Respondent's Brief on Appeal – Liability for Defective Construction Follows Control.** The Architects argue

Making a participant in the construction process liable when he has no control over the construction work would be a major shift in Texas law. It would upset the decades-old division of control-based responsibility and risk allocation set forth in the AIA Contracts in this case. [Respondents discuss the "liability follows control" principles in *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 1001) and *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002).]

<sup>82</sup> **Respondent's Brief on Appeal – The Control Factor.** The Architects argue

This Court has held that the "right to control must be more than a general right to order work to stop and start, or to inspect progress." *Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 226 (Tex. 1999).... The control that gives rise to tort liability "must extend to the 'operative detail' of the contractor's work so that the contractor is not free to do the work in its own way and to the injury-producing activity itself." *Lee Lewis*, 70 S.W.3d at 793.