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TORTS—ARCHITECT'S LIABILITY IN HIS CAPACITY AS A SUPERVISOR

Contemplating the expansion of a high school gymnasium, an Illinois school district engaged the professional services of the defendant architectural firm. The contract was prepared by the architects and submitted to the school district for approval.¹ The school district then contracted with a general contractor to do the actual construction work. The plans and specifications necessary to accomplish the removal of the west wall of the gymnasium were then drawn by the architects. Late in April, 1960, the contractor determined that it was necessary to shore up certain trusses (a normal method employed in such projects).

In May, the three plaintiffs, as part of an ironworker crew in the employ of the contractor, began the removal of the trusses and two steel columns in accordance with the general expansion plan. After an outside brick wall and one of the two steel columns had been removed and the supporting scaffold put in place, the plaintiffs began the removal of the second steel column. When the last bolt on the column was removed, the roof, column and shoring collapsed, injuring the plaintiffs. They received workmen's compensation benefits from the contractor and later brought suit against the architects and the school district alleging common law negligence by the architects and a "wilfull" violation of the Illinois Structural Work Act² by both the architects and the school district. At the trial level, the jury returned verdicts against the architects and for the defendant school district. The Illinois Appellate Court affirmed but certified the case as one of such importance that it should be heard by the Illinois Supreme Court.³ The Supreme Court upheld the decision in respect to the defendant architects. *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967).

The purpose of this case note is to consider the tort liability of an architect who acts in a supervisory capacity during the construction of a building. Possible liability under a scaffolding act and the architect's right to indemnification when not in *pari delicto* are not within the scope of this note, even though, as in the *Miller* case, such questions are closely related.

An architect's liability for injury to persons lawfully present on the construction site may be said to fall within three general categories. An archi-

¹ Contracts of this nature are generally of a standard form adopted and distributed by American Institute of Architects.

² ILL. REV. STAT. ch. 48, §§ 60, 69 (1965), commonly referred to as the Illinois Scaffolding Act. "Wilfully," within the Structural Work Act, means knowingly, and a person will be deemed to have known that which he reasonably should have known. *Gannon v. Chicago, Milwaukee, St. P. & Pac. Ry.*, 22 Ill. 2d 305, 175 N.E.2d 785 (1961).

³ *Miller v. DeWitt*, 59 Ill. App. 2d 38, 208 N.E.2d 249 (1965).

tect's most usual service is that of supplying plans and specifications for a project. In this regard he may become liable to third persons under a theory of breach of an implied warranty in tort for a defect in his design.⁴ This is based upon the doctrine of *MacPherson v. Buick Motor Co.*⁵ which has been extended beyond chattels to structures erected on real estate.⁶ In addition, an architect may also be liable under the terms of a statute.⁷ Lastly, and directly in point as the topic of this case note, is the liability which the architect may incur by reason of his supervisory function.⁸

Stated simply, the problem is: If a third party is injured on the construction site, is the architect liable when he has undertaken to act in a supervisory capacity? The process the court goes through is first of all to determine what exactly has the architect undertaken by his promise to supervise? Secondly, if he has breached that promise, does liability extend to a third person not in privity with the architect? In answering the first question courts have looked at the contract between the owner and architect. The principal case has gone beyond that inquiry and looked at the owner's contract with the contractor.

The owner and architect have a contract which generally provides that the architect will furnish plans and specifications and will exercise general supervision or administration over the work to insure that the contractor performs in accordance with the contract. The agreement of the owner and contractor usually spells out the degree of authority granted to the architect. In the *Miller* case there were two such contracts and the contract of the architect and school district provided that the architect would perform such services as preliminary studies, working drawings, specifications, full size drawings for the structural work, general administration of the construction contracts, and supervision of the project. The contract also elaborated on

⁴ This is actually a form of malpractice. "The weight of authority now upholds the right of an injured party to hold accountable in negligence a contractor or architect who is not in privity with him." *Miller, Architect Liability*, 1 FORUM 28, 30 (1966).

⁵ 217 N.Y. 382, 111 N.E. 1050 (1916).

⁶ Authority can be found for the proposition that there is no reason for distinguishing between the liability of one who supplies a chattel and that of one who erects a structure. *Inman v. Binghamton Housing Authority*, 3 N.Y.2d 137, 164 N.Y.S.2d 699, 143 N.E.2d 895 (1957). See PROSSER, TORTS 517 (2d ed. 1955).

⁷ ILL. REV. STAT. ch. 48, §§ 60, 68, 69 (Illinois Structural Work Act). Both *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967), and *Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316, 211 N.E.2d 247 (1965), imposed such statutory liability.

⁸ *Senft v. Edris*, 76 York Leg. Rec. 72 (Com. Pl. 1962). "There can be no question that an architect can be guilty of negligence in the performance of his duties and held liable for that negligence. [Citation omitted.] In all of these cases which have been referred to by counsel, and which our own research has disclosed in which an architect has been held responsible for negligence, the negligent conduct involved more than the mere drawing of plans for the construction of a building."

the meaning of the required supervision by the architect and in a separate paragraph stated, "Architect will endeavor to guard the Owner against defects and deficiencies in the work of the Contractor [S]upervision is to be distinguished from the continuous personal superintendence" ⁹

By the terms of the second contract, the one between the contractor and the school district, the contractor undertook to provide "all bracing, shoring and sheeting as required for safety and for the proper execution of the work" It stipulated that the architect was to have the right and "authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the contract" between the school district and the contractor. Further, the architect was given the right of immediate access to the construction site for the purpose of inspection.¹⁰ In fact then, by reading the contracts together, it can be said that the architect was to supervise, have ready access for inspections, and, as agreed upon in the contract between the school district and the contractor, have the power to stop the work when necessary. The contractor was to be responsible for shoring up the structure during the time necessary to remove and replace the steel columns and superstructure.

It is the relevant provisions of the owner-architect contract which should be determinative of what, if any, supervision is required of the architect. In attempting to determine what supervision is undertaken the courts should not look to the owner-contractor agreement. That proposition is the thrust of the *Miller* case. Previous to the noted case, courts and juries, properly looking at the owner-architect contract have reached different conclusions as to the meaning of supervision and liability attaching thereto.

Standing for the proposition that the extent of or meaning of "supervision" should be determined by the owner-architect contract is the case of *Day v. National U.S. Radiator Corporation*.¹¹ The architects bound themselves to exercise "adequate supervision of the execution of the work" in order to achieve conformity with the working drawings. The court stated that the narrow question presented was whether the architect's contract with the owner imposed upon them the duty to be aware that a contractor was making an improper installation of a boiler.¹² The court looked to the one contract (architect-owner) to determine whether the architect was duty bound to inspect the work methods of the contractor. The *Day* case, then, can stand for the proposition that the extent of or meaning of "supervision" should be determined by the relevant clauses of the owner-architect contract.

⁹ *Miller v. DeWitt*, 37 Ill. 2d 273, 280, 226 N.E.2d 630, 635 (1967).

¹⁰ *Id.* at 282-83, 226 N.E.2d at 637.

¹¹ 241 La. 288, 128 So. 2d 660 (1961).

¹² *Id.* at 330, 128 So. 2d at 666.

Determining that the owner-architect contract should control does not end the matter. The interpretation of the word "supervision" as used therein is the next problem. Architects, as defendants, have successfully argued that the term "supervision" does not mean they have or should have the power to dictate the methods of construction used by the contractor but rather that it merely enables them to direct the contractor to the end result specified in their plans and drawings.¹³ In support of this position, architects point to their contract with the owner as defining their supervisory duty and to the fact that the contractor has assumed responsibility for the construction. Some courts have agreed with them and the following four cases are examples of the rationale used.

In *Olsen v. Chase Manhattan Bank*¹⁴ an employee of a foundation contractor was injured when a heavy drill fell from a platform on which there were vibrating air compressors. Here the trial court and jury found that the required supervision of the architects extended to a temporary platform on the construction site. The supreme court, appellate division reversed and dismissed the complaint against the architects.¹⁵ The New York Court of Appeals affirmed the decision of the appellate division, stating:

As to defendant architects . . . their sole supervisory function was to insure performance of the construction work in accordance with the plans and specifications; to see that standards of safety were met in relation to the permanent construction . . . but not the safety of temporary platforms used in connection with the permanent construction work. There being no duty, we do not reach the question of liability to a third party by reason of nonfeasance.¹⁶

In the *Day* case the provision in the architect-owner contract calling for "adequate supervision of the execution of the work" was construed by the court to mean that the architect "was to see that before final acceptance of the work, the plans and specifications had been complied with; that proper materials had been used; and generally that the owner secured the building it had contracted for."¹⁷ Here a contractor installed a boiler without a safety feature. While testing the boiler, it exploded killing a workman. The court held that under the agreement between the owner and architect, the architect was not charged with the duty or obligation to inspect the methods of the contractor and therefore there was no duty to his employee.

*Clinton v. Boehm*¹⁸ was an action in which an architect sued for fees for

¹³ *Day v. National U.S. Radiator Corp.*, *supra* note 11. Accord, *Olsen v. Chase Manhattan Bank*, 9 N.Y.2d 829, 215 N.Y.S.2d 773, 175 N.E.2d 350 (1961).

¹⁴ *Supra* note 13.

¹⁵ 10 App. Div. 2d 539, 205 N.Y.S.2d 60 (1960).

¹⁶ *Supra* note 13, at 831, 215 N.Y.S.2d at 774, 175 N.E.2d at 350.

¹⁷ *Supra* note 11, at 304-05, 128 So. 2d at 666.

¹⁸ 139 App. Div. 73, 124 N.Y.S. 789 (1910).

professional services in preparing plans and drawings for the defendant's building. Defendant counterclaimed that due to the architect's negligent supervision, the contractors were permitted to work contrary to a state statute which required barriers in front of an elevator shaft and, as a consequence, a third person fell through the shaft and was killed. The court declared the supervision clause of the contract between the owner and architect required the architect "to see that the building was properly constructed, and . . . [architects] were not called upon to watch and inspect every means adopted by the contractors in fulfilling their contract."¹⁹

*Potter v. Gilbert*²⁰ involved a claim for the wrongful death of an employee of the contractor. The architect allegedly failed "to exercise due diligence in supervising the construction." The court held that the defendant-architect, although owing a duty to the owner, had no affirmative duty to the employees of the contractor to remain on the premises and be vigilant in scrutinizing the work of the contractor. The New York court went on to declare that the "omission of a duty" owed to the owner of the building amounted to "nonfeasance" which would make him liable to the owner and not to a third person.²¹

Architects then, in strenuously contending that their supervisory capacity does not include any affirmative obligation to inspect, oversee, or control the manner in which the work is done by the contractor or his employees, have had some success. However an architect's supervisory function is more than a privilege conferred upon the architect by the contract of the owner and contractor; and, where the meaning of the supervision clause of the contracts has been more liberally defined, liability for negligent supervision has followed. In the following cases an architect's supervision was construed as including direction and control of the construction means rather than only the end which was specified in the drawings.

In *Clemens v. Benzinger*²² a negligence action for wrongful death against an architect was affirmed on appeal by the New York Court of Appeals. In

¹⁹ *Id.* at 75, 124 N.Y.S. at 792.

²⁰ 130 App. Div. 632, 115 N.Y.S. 425 (1909), *aff'd*, 196 N.Y. 576, 90 N.E. 1165 (1909). This case was cited by the defendant architects in the *Miller* case, but since *Potter* was decided on the pleadings, the Illinois Appellate Court dismissed its holdings as dicta. *Miller v. DeWitt*, *supra* note 3.

²¹ The Illinois Appellate Court in *Miller* rejected this as bad law: "We do not understand it to be the law of Illinois that an omission of duty,-nonfeasance,-can never subject a defendant to possible liability to a third party . . . but apparently that was the law of New York at least at the time of *Potter, etc. v. Gilbert.*" *Miller v. Dewitt*, *supra* note 3, at 100, 208 N.E.2d at 278.

²² 211 App. Div. 586, 207 N.Y.S. 539 (1925). The court citing, but not overruling, *Potter v. Gilbert*, *supra* note 22, declared that the *Clemens* case was not one involving mere nonfeasance for which the supervising architect would not be liable to anyone but the owner with whom he was in privity of contract. *Id.* at 590, 207 N.Y.S. at 543.

the *Clemens* case the plaintiff's husband, an employee of the contractor, was struck and killed by a falling steel column. The architect had approved the detailed construction plans of the contractor which called for the use of a particular type of bolt to be used in erecting steel columns which were bottomed in unhardened cement. The court determined the architect was negligent in approving the improper type of bolt and also in failing to properly supervise the work of the cement contractor. Here the supervision required of an architect was determined to include a duty to oversee and correct a detail of the contractor's workmanship during the construction of the building rather than the quality of the finished structure in respect to specifications for materials to be used. Likewise, in *Lotholz v. Fiedler*²³ (the only Illinois case cited as authority by any of the parties in the *Miller* case) the supervision of an architect was deemed to include affirmative steps to prevent injury. *Lotholz* did not involve personal injury but rather property damage.

Appellee [architect] was not so much employed to detect the fact that the carpenters had driven nails through the plumbing pipes as he was to prevent this being done. He was to superintend, to enforce all the conditions of the contract, and most certainly he should have seen to it that nails were not driven through plumbing pipes. Such gross carelessness and imperfect construction it was his duty to have prevented.²⁴

*Erhart v. Hummonds*²⁵ was an Arkansas case which was cited and heavily relied upon by the *Miller* court. The case held that an architect's failure to demand shoring of a wall in an excavation, after he had received notice of the dangerous condition, constituted negligent supervision which resulted in the death of three workmen when the earth wall collapsed. The contracts between the owner, architect, and the contractor in *Erhart* contained the usual provisions concerning the supervision by the architect and the authority "to stop the work whenever such stoppage may be necessary to insure the proper execution of the contract." In deciding the case, the Arkansas court held that it was a jury question as to whether the architect's failure to stop the excavation was a breach of any duty owed to the contractor's employees.²⁶ In Arkansas, then, an architect's supervision would seem to require that he shut down the construction operation where a potential danger to workmen exists.

In *Montijo v. Swift*,²⁷ a California case, the defendant-architect had con-

²³ 59 Ill. App. 379 (1895).

²⁴ *Id.* at 380-81.

²⁵ 232 Ark. 133, 334 S.W.2d 869 (1960).

²⁶ *Id.* at 138, 334 S.W.2d at 872.

²⁷ 219 Cal. App. 2d 351, 33 Cal. Rptr. 133 (1963).

tracted with a bus company to perform architectural services needed for the renovation of the stairways in a bus depot. A handrail which was on the wall originally was reinstalled by the contractor, but since new stairs had been constructed the handrail did not extend to the bottom of the stairway. The plaintiff, an invitee, used the handrail and assumed that the landing began where the handrail ended. The California court decided for the plaintiff and held that the architect's supervision of construction work had been negligent. By so doing, it defined the supervision of an architect as constituting a direct control over the construction operations of the contractor.²⁸

The question then can be limited to whether the architect, properly speaking, has sufficient control over the construction operations and methods of the contractor. That is to say, what is the extent of or meaning of the architect's supervision as determined by the owner-architect contract? This question should not be answered by a purely practical consideration of the economic situation of the contracting parties. This approach was taken by one court when it stated, "The power of the architect to stop the work alone is tantamount to a power of economic life or death over the contractor. It is only just that such authority, exercised in such a relationship, carry commensurate legal responsibility."²⁹

In *Miller v. DeWitt* the Illinois Supreme Court notes the case as one of first impression and accepted the position of the courts who recognize that the architect owes a duty to employees of the contractor.

The principal question is the extent of the architect's duties. It is clear from the evidence that the architects did not prepare detailed specifications for the temporary shoring of the gymnasium roof, nor did they compute on the plans the load that would be placed upon the shores or provide the contractor with a safety factor to be used in the shoring. It also appears that the architects did not oversee and inspect the shoring as used.³⁰

Speaking for the majority, Justice Underwood agreed with the architect-defendant that the supervision of the work "merely creates a duty to see that the building when constructed meets the plans and specifications contracted for."³¹ The court then went on to find a duty of care owed to the contractor's employees by reason of the architect's right to inspect the work site. The court noted that the contract between the school district and the contractor gave the architect the authority to stop the work. And further that it called for the contractor to provide "all necessary precautions for the safety of the em-

²⁸ *Id.* at 353, 33 Cal. Rptr. at 134-35.

²⁹ 161 F. Supp. 132 at 136 (S.D. Cal. 1958).

³⁰ *Supra* note 9, at 283, 226 N.E.2d at 637-38.

³¹ *Id.* at 284, 226 N.E.2d at 638, citing *Day v. National U.S. Radiator Corp.*, *supra* note 11; *Garden City Floral Co. v. Hunt*, 126 Mont. 537, 255 P.2d 352 (1955).

ployees on the work," and in addition be responsible for the construction of all bracing and shoring which would be required for safety and proper execution of the contract.

The court found no duty on the part of the architect to specify the method of bracing or shoring but concluded that if the architect knew or in the exercise of reasonable care should have known that the shoring was inadequate, by virtue of their right and duty to inspect the work, then they had the duty to stop the work.

It follows then that the case of *Miller v. DeWitt* does not establish a continuance of the trend which holds that an architect, acting in a supervisory capacity, is always bound by a duty of due care to the employees of the contractor.³² Rather, it decides that when an architect, acting within the authority conferred upon him by the contract documents, knows, or by exercising his contractual right and duty to inspect, has reason to know that the contractor is employing unsafe construction methods, there then devolves upon the architect the affirmative duty to stop the construction until the defect has been remedied. Such failure to act amounts to misfeasance which will be actionable by third persons who may foreseeably be injured by the architect's failure to exercise the required degree of care.³³

Once the architect's supervisory capacity is determined to include a duty to inspect the construction, then it must be determined to whom is this duty owed. Is it a contractual duty, performance of which is owed to the owner of the structure, or is it a tortious duty owed to the employees of the contractor or to third persons on the construction site?

In the *Miller* case the Illinois Supreme Court, looking to the contract of the contractor and the school district, found provisions which privileged the architect to perform on-site inspections and to stop the work. For whose benefit were such inspections to be made? In all likelihood the architect's right of inspection was for the benefit of the owner in order that the architect could determine whether the contractor's work was progressing in conformity with plans and specifications. It follows then that the court determined that these rights to inspect and to stop the work which were conferred upon the architect-defendant (by contract between contractor and school district) also carry a commensurate tort duty owed to third persons on the construction site.

In his dissent Justice House well states the reason why the case of *Miller v. DeWitt* is both topical and noteworthy:

³² *Id.* at 284, 226 N.E.2d at 638.

³³ As to the standard of care owed by architects as a professional class, see generally *Montijo v. Swift*, 219 Cal. App. 2d 351, 33 Cal. Rptr. 133 (1963); *Paxton v. Alameda County*, 119 Cal. App. 2d 393, 259 P.2d 934 (1957).

It [majority decision] imposes a legal duty on an architect not only to prepare plans and specifications but to inspect the methods employed by the contractor leading up to the completion under the general inspection clause of his contract. I cannot read into a contract a duty which is not imposed by it. The architect's contract used here is a more or less standard form generally used by architects and engineers. It provides for detailed plans and specifications, obtaining approval of various governmental agencies, issuing certificates of payment and general administration. Supervision is limited. Since there is no contractual obligation, liability is fixed by an expansion of the common law.³⁴

The right to inspect which was conferred upon the architect-defendant by the contract between the contractor and the school district must have been intended only to facilitate the performance of the architect's duty to the school district. The majority opinion translates this right into a tort duty owed to third persons. Such a result is neither consistent with general usage in the architectural profession nor contemplated by the contracting parties. The court should have confined its discussion to the terms of the contract between the owner and architect. It is unfortunate that it relied upon a contract to which the architect was not a party. It is the hope of this writer and undoubtedly that of architects that such a view is not adopted by other courts.

James Bradley

³⁴ *Miller v. DeWitt*, 37 Ill. 2d at 294, 226 N.E.2d at 642-43.

UNIFORM COMMERCIAL CODE—SECURED TRANSACTIONS— IMPLIED CONSENT TO SELL

The plaintiff bank made two loans to W. D. Bunch which were secured by livestock. Bunch, through the defendant auctioneer, sold some of the cattle covered by the security agreements. The bank had knowledge of these sales and accepted the proceeds as payment on the loans. Subsequently, the bank granted Bunch a new loan, secured by a new note and security agreement.¹ Thereafter, the cattle covered by the subsequent agreement were consigned to the auctioneer and sold by him. The proceeds were remitted to Bunch and he applied no part of them to his debt. The bank had no actual knowledge of the latter sales nor had it given Bunch any authority to sell. The bank brought suit against the auctioneer for conversion and the trial court held that the plaintiff bank had permitted, consented to, and acquiesced in

¹ The security agreement provided in part: "Debtor further represents and warrants, and agrees that . . . Without the prior written consent of Secured Party, Debtor will not sell . . . or otherwise dispose of the Collateral."