

Jury Awards Against Design-Engineering Firms — Lessons From the Trenches

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It is not often that we see a jury verdict entered against a design professional. The economic loss doctrine frequently bars third-party tort claims, and also serves as a shield for a design-professional against an owner's claims for negligence when there are purely economic losses that arise out of a contractual relationship. Moreover, on a project, there may be intervening factors that destroy the causal link between the design professional's alleged conduct and the damages sustained on the project.

Despite these challenges, in the case of *Community College of Philadelphia v. Burt Hill, Inc. n/k/a Stantec Architecture and Engineering, LLC*, Case No. 120401889, the jury was persuaded that the design-engineering firms employed on a troubled project to reconfigure and construct new facilities for the Community College of Philadelphia were liable to the owner for a total of \$5.5 million in damages for breach of contract, professional negligence and negligent misrepresentation. This case has implications not only for project owners but also for the project design-engineering professionals and construction firms.

What went wrong for international architecture giant, Stantec Architecture and Engineering, LLC (formerly known as Burt Hill, Inc.) in this case? Although it is hard to measure the jury's rationale from its terse one page jury verdict sheet, the owner was successful in painting a simple theme of liability against the design-engineering firm. First, Stantec allegedly used unlicensed designers and engineers on the Project. Second, Stantec allegedly appeared to fall behind on delivering complete contract documents according to the project schedule. Lastly, it appears that both parties placed too-heavy of a reliance on the Request for Information (RFI) process to cull out conflicts with the existing structures allegedly. All of this allegedly resulted in delays to the project, concurrent operations, and increased construction costs by nearly fifty-percent over what the owner had originally budgeted.

Background

The parties' dispute arose out of a construction contract to design a new facility for the College, called the "Pavilion." The project also included a renovation to three existing buildings (called the Bonnell, Mint and West buildings) and construction of a new entrance to the Bonnell building. Although Stantec won the proposal to serve as the project's full-service design-engineering firm in June 2007, no contract was executed between the parties until September 2008. The jury appears to

have not only looked at the parties' executed contracts, but also to the construction schedules and Stantec's proposal for architectural, engineering and design services submitted in April 2007 (pre-contract award) as the basis for Stantec's liability.

Design Firm Used Unlicensed Architects

In the *Community College of Philadelphia* matter, according to court papers, Stantec represented that it would "staff the project with experienced professionals." However, court papers indicated that Stantec may have instead used unlicensed architects with no higher-education or significant project experience, including interns from Drexel University, rather than the "senior level" professionals it had promised. According to the College, Stantec "assigned new, less experienced employees not only to work on the project, but also to serve in the critical role of project architect." Stantec also allegedly represented in its response to the College's request for proposal ("RFP") that it would utilize in-house mechanical, electrical and plumbing ("MEP") engineers, to save on costs. Despite this representation, during the project it subcontracted the MEP work to PWI Engineering, whom it joined as a third-party defendant, in the case. The jury ultimately found PWI liable to Stantec for professional negligence in the amount of \$1.5 million in damages (resulting in a molded verdict against Stantec in the amount of \$4 million).

Construction Schedule Has Clout

The outcome in this case demonstrates again the clout of the construction schedule. The College's complaint alleged that due to the construction documents' design errors and omissions, and Stantec's alleged delays in furnishing these documents, its contractors were forced to proceed concurrently resulting in the project costing twice as much as estimated to complete, and the project being as much as 26 months behind schedule due to an exorbitantly high number of RFIs and change orders issued on the project. According to the College's complaint, the project experienced 623 interdisciplinary conflicts, deficiencies, errors and omissions. The project schedule drafted by Stantec in 2007, and later revised in 2008, was used in Court papers to serve as a legal grounds for breach and negligent misrepresentation, as Stantec allegedly failed to adhere to and reached the milestones mapped out for each phase of the project.

Stantec's court papers indicate that its defense was grounded on the College's alleged efforts to essentially have the design-team pay for its "wish list of add-ons"

to the project, and other significant changes to the scope of the project that resulted in the delays and increased costs. Stantec also attempted to assign some of the blame to the construction manager employed on the Project, although it was not a party to the litigation, arguing that it had failed to properly assign specific scopes of work to the multitude of prime contractors on the project, resulting in the numerous contractor change orders and claims submitted to the College.

Trial Strategies From the Trenches

Lead attorney for the Plaintiff in this matter, Ronald Williams of Fox Rothschild LLP, in an interview noted that in this case, Santec entered into a comprehensive architectural engineering agreement that allocated the risk and responsibility for all engineering services to Santec. The College called five experts to support this theme, along with other aspects of the College's theories of liability against Santec. Williams utilized simple jury instructions to explain design professional negligence as Santec's alleged failures to verify existing conditions, coordinate the work, prepare construction documents free from material errors, comply with the schedule and/or deliver the work for the agreed-upon price. Williams' team also utilized an outside consultant, Michael Cooperberg, to prepare an electronic presentation of the case and exhibits. According to Williams, in trying a lengthy case such as this, each day constitutes a building block. In addition to preparation through discovery, pre-trial proceedings, trial and post-trial motions, the College had to identify the key documents and present them effectively to the jury and to the court through fact and expert witnesses.

Jury consultant, Galina Davidoff, however, warns that such outcomes against a design firm, even on perfect facts for your client are not guaranteed. According to Davidoff, contrary to what many lawyers perceive, jurors perform their jobs very conscientiously. They have tremendous respect for the written contract and when it is explained to them in a manner they can understand, they will enforce it. Davidoff, however, notes that jurors are not equipped to judge architectural plans and often hold the contractor responsible for verifying the design prior to accepting a project and hold the owner responsible for providing accurate information concerning site conditions. Because the design professional is often the party in the middle, it is often easy for them to point the finger at either the owner or the general contractor in assigning blame for projects gone awry.

Design Professionals Increasingly Found to Have an Independent Duty in Tort to Parties who Foreseeably and Justifiably Rely on Information They Provide

An important take-away from the *Community College of Philadelphia* case is the binding nature of representations made in responding to a RFP concerning capabilities. Increasingly, jurisdictions are finding that design

professionals have an independent duty in tort to parties who foreseeably and justifiably rely on information that they provide. For example, in *Bilt-Rite Contractors, Inc. v. The Architectural Studio*,¹ the Pennsylvania Supreme Court created an exception to the economic loss doctrine for architects supplying or negligently supplying false information reasonably relied upon by third parties to their detriment. The Supreme Court of Washington, similarly, in *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, held that a design professional has an independent duty, apart from the contract, to avoid misrepresentations to the owner of a project.² However, other jurisdictions on similar facts have adopted an opposite conclusion. For example in *LAN/STV v. Martin K. Eby Const. Co.*,³ the Texas Supreme Court applied the economic loss rule to preclude a direct claim for negligent misrepresentation by a construction contractor against an owner's architect based on flawed design documents.

Unanticipated costs play a role in virtually all construction projects. Which party bears responsibility for those costs is where a well-drafted construction contract comes into play, as well as prudent bidding practices. Contractors eager to be awarded a project should make certain that their work is not underbid and their proposals can be delivered as represented in responses to RFPs. In the *Community College of Philadelphia* matter, after a two-and-a-half-week trial, the jury weighed the credibility of witness testimony, the contracts and the evidence presented by the parties, ultimately ruling in favor of the College to the tune of \$5.5 million dollars, attributing \$1.5 million of the verdict to Santec's MEP subcontractor, third-party defendant, PWI. The College's original contract with Stantec was for a little over \$2 million dollars for its services, therefore, including attorneys-fees Stantec experienced a major loss on this project. ■

Endnotes

1. 581 Pa. 454, 866 A.2d 270, 61 A.L.R.6th 739 (2005).
2. 179 Wash. 2d 84, 97-98, 312 P.3d 620, 626-27 (2013) (finding that the economic loss doctrine did not bar a negligent misrepresentation claim where the design professional allegedly promised that the project would be completed within a certain time and below a certain price).
3. 435 S.W.3d 234 (Tex. 2014).



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