

Architect Who Provided Limited Construction Management Services Had Duty to Injured Guests Based on Foreseeability

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The Court of Appeals of Texas recently held that a design architect breached a contractual duty to identify construction defects based on deviations from the contract documents that affected the structural integrity of a balcony that later collapsed and left two guests injured. [Black & Vernoooy Architects v. Smith, 2010 WL 5019659 \(Tex. App. Dec. 8, 2010\)](#). Defendant architect contracted with a homeowner to provide design services and an intermediate level of contract administration services, including visits to the site “to endeavor to guard the Owner against defects and deficiencies in the work.” Exculpatory provisions stated that the architect was not responsible for the contractor’s failure to perform the work in accordance with contract documents, had no control over the work, and was only responsible for its own negligent acts or omissions.

Two guests sued the homeowner, the contractor and the architect for injuries they sustained when a balcony at the home collapsed approximately one year after construction was completed. The homeowner and contractor settled and the case went to trial against the architect alone. At trial, progress photographs taken by the architect were introduced. The photographs clearly showed that the structure of the balcony deviated from the design. Despite testimony by the architect’s expert that even a prudent architect could have overlooked these structural defects, the jury returned a verdict for the guests.

The appellate court affirmed, finding that despite the contract’s exculpatory language the architect still had a duty to identify construction defects. This duty extended to the guests injured after construction based on the concept of foreseeability. The court focused on the language “endeavor to guard against defects and deficiencies” as creating a duty to identify observable, open and obvious deviations that implicated safety and structural integrity as was shown in the progress photographs of the balcony.

The court then applied a risk-utility balancing test, under which the breach of the duty “to endeavor to guard” created a foreseeable risk that the homeowner’s guests who stepped out on the defective balcony would be

injured. The public, the court reasoned, relies on architects to properly perform their contractual duties so that buildings are safe. Such reliance outweighed any burden to architects from owing a duty to these guests. The court rejected the architect's argument that the guests were not third-party beneficiaries of the contract between it and the homeowner, stating that foreseeability controlled over privity.

A well reasoned [dissent](#) pointed out that the majority's risk-utility analysis, which had no support in the case law, failed to recognize that the imposition of this duty based on foreseeability places a burden on architects to become the guarantors of the contractor's work and would arguably require the identification of each and every defect. The dissent predicted that an intermediate level of contract administration services would rarely be included in future agreements between architects and homeowners.

Practice Note

This decision is a substantial departure from the body of case law which holds that the scope of an architect's duty is defined by the contract it enters into with the person or entity that hires it and will not extend beyond that described in the contract. The subject contract in *Black & Vernooy Architects* clearly provided that the architect was not responsible for deviations by the contractor that built the home. This exculpatory language was overshadowed by the "endeavor to guard" phrase and the introduction of the architect's own progress photographs that showed the open and obvious nature of the defects in this balcony. This decision, which imports concepts of foreseeable risk from products liability law, if allowed to stand, will have a chilling effect on the performance of construction administrative services by architects in Texas.

Before agreeing to perform limited construction administration services, an architect should closely review the proposed contract for any language which could be interpreted as imposing an affirmative duty on its part to uncover defects in the contractor's work. Any progress photographs taken on a job site should be reviewed for content and just not archived.