CONSTRUCTION RISK MANAGEMENT REPORTER

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E&D Authors ConsensusDOCS Handbook

BY KEVIN F. PEARTREE

In early 2012, Aspen Publishers will publish the ConsensusDOCS Contract Documents Handbook, written and edited by Ernstrom & Dreste, LLP. The ConsensusDOCS emerged in 2007 as the product of a coalition of associations representing diverse interests in the construction industry to collaboratively develop standard form contract documents that advance the construction process by seeking to serve the best interests of the construction project and the construction industry. The very name, ConsensusDOCS, was intended to promote consensus among designers (D), owners (O), contractors (C) and subcontractors/sureties (S). Since its genesis in 2007, the ConsensusDOCS coalition has grown from 22 industry associations to over thirty and has published in excess of 70 standard contract documents and forms.

The book is written as a guide to the ConsensusDOCS primary standard contract document forms. It is intended for owners, designers, contractors, subcontractors, design-builders, construction managers, attorneys, educators and others in the building industry that use, or are considering using, ConsensusDOCS standard form documents. The book examines the elements of various ConsensusDOCS standard form contract documents, including an examination of specific contract provisions and the theory

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Court of Appeals Scaffold Law Decisions: Guidance, or Not?

BY KEVIN F. PEARTREE AND NELL M. HURLEY

In prior issues of ContrACT, we have discussed the evolving scope of New York's Scaffold Law and the lack of clarity as to where the liability line is drawn. The strict liability imposed by Labor Law §240 is an ever-present concern for those in the construction industry, and understanding where strict liability begins and ends an ongoing endeavor. The unique facts of each case are, of course, a critical element of the analysis. But it is the legal analysis to be applied to those facts and the courts' shifts in emphasis of controlling principles that has caused confusion and consternation among those who must manage this risk every day.

The history of case law interpreting the scope and application of Labor Law §240(1) shows an evolution that is anything but a clear linear progression. The analysis of New York's highest court, the Court of Appeals, in particular, has experienced critical refinements in emphasis that the lower courts have at times struggled to apply. The problem for the lower courts and for those trying to manage the risk of Labor Law §240 strict liability is that court decisions that may seem to be reliable guideposts turn out to be anything but. As the Court of Appeals attempts to provide clarity to the analysis, the efforts have sometimes made the analysis of Labor Law §240 strict liability even more murky. The Court of Appeals' recent decisions in *Wilinski v. 334 East 92nd Housing Development Funding Corp.*, 2011 NY Slip Op 8446; 2011 N.Y. LEXIS 3284, 2011 WL 5040902, and *Salazar v. Novalex Contracting Corp.*, 2011 WL 5827987 are good examples of this.

Wilinski was injured during the course of demolition work when he was struck by two falling pipes. The two four inch metal, vertical plumbing pipes in question rose out of the floor on which Wilinski was working to a height of approximately 10 feet. Previous demolition of the ceiling and floor above had left the two pipes standing but unsecured, awaiting their eventual removal. When debris from the demolition of an adjacent wall struck the pipes, they toppled over striking Wilinski.

The legal issue presented for the Court of Appeals concerned what had come to be known as the "same level" rule. This "rule" was an outgrowth of the Court of Appeals' prior decision in *Misseritti v. Mark IV Construction Co.*, 86 NY2d 487 (1995), as then interpreted and applied by other courts, which precluded Labor Law §240(1) liability when a worker sustains an injury where there was no elevation differential between the worker and the base of the object which caused harm. A divided court in *Wilinski* now states that there is no such rule and that such a circumstance does not categorically bar the worker from recovery under §240.

In reaching its decision, the majority in *Wilinski* retraced two decades of its Labor Law §240(1) jurisprudence, highlighting what it viewed as the critical principles of its decisions. In *Rocovich v. Consol. Edison Co.*, 78 NY2d 509 (1991), the Court rejected Labor Law §240(1) liability when a worker was injured when his foot accidentally became immersed in hot oil in a 12-inch-deep trough, reasoning that the injury sustained was not the type of elevation-related hazard which called for any of the types of protective devices listed in §240(1). Refining that holding in *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993), the Court stated that the reach of Labor Law §240(1) is "limited to such specific gravity-related accidents as [a worker] falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured."

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The decision in *Misseritti* followed in 1995, rejecting Labor Law §240(1) liability when a worker was killed when a completed concrete firewall collapsed just after scaffolding used to erect the wall had been dismantled and prior to the completed wall being vertically braced by masons. In *Misseritti*, the Court reasoned that the firewall did not collapse due to the failure to provide protective devices contemplated by the statute. Intermediate appellate courts then cited *Misseritti* for the proposition that a claim cannot be made for injuries where the plaintiff and the base of the falling object stand on the same level, a position the defense in *Wilinski* urged the Court to follow.

But reexamining *Misseritti*, the Court in *Wilinski* stated that its earlier decision did not turn on the fact that the worker and the base of the wall that collapsed were on the same level. Instead, it was "the absence of a causal nexus between the worker's injury and a lack or failure of a device prescribed by section 240(1) [that] mandated a finding against liability." The majority in *Wilinski* Court went on to say that the "so-called 'same level' rule" was inconsistent with its more recent decisions in *Quattrocchi v. F.J. Sciame Constr. Corp.*, 11 NY3d 757 (2008), and *Runner v. New York Stock Exchange, Inc.*, 13 NY3d 599 (2009). In *Quattrocchi*, the Court stated for the first time that liability is not limited in falling object cases to those instances where the object was in the process of being hoisted or secured. In *Runner*, discussed in previous ContrACT newsletters, the Court tackled factual circumstances that involved neither a falling worker or a falling object. The worker in *Runner* was injured in the process of moving an 800 pound reel of wire down a flight of four stairs. Using a length of rope tied at one end to the reel and then wrapped around a metal bar placed horizontally across a door jamb, the worker was injured when, trying to act as a counterweight to the descending reel, he was pulled horizontally into the metal bar injuring his hands. Finding Labor Law §240(1) liability, the Court in *Runner* stated that "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." This is the so-called "force of gravity" test.

Applying this rationale to *Wilinski*, the majority found that a plaintiff might be able to recover under §240(1) even though he and the pipes were on the same level. They reasoned that the pipes fell at least four feet, which could not be considered de minimis given the force created by the fall, and plaintiff's injuries flowed directly from the application of the force of gravity to the pipes. That alone did not establish §240(1) liability as the plaintiff would need to demonstrate that the injury was the direct consequence of the defendant's failure to provide adequate protection against the particular risk.

The dissent in *Wilinski* criticized the majority's ruling as running "far afield from this Court's Labor Law §240(1) precedent," and for adding confusion and uncertainty to prior decisions of the Court. The dissent cited *Misseritti* and likened the falling vertical pipes to the completed firewall with its base at the same level as the worker and no proof that a safety device would have prevented the accident. The dissent also cited the prior decisions in *Melo v. Consolidated Edison Co. of N.Y.*, 92 NY2d 909 (1998) and *Capparelli v. Zausmer Frisch Assocs.*, 96 NY2d 259 (2001). In *Melo*, the plaintiff was injured while attempting to cover a trench with a heavy steel plate. Dismissing the Labor Law §240(1) claim, the Court explained that the statute was not implicated because the steel plate was not elevated above the work site. In *Capparelli*, liability was denied a worker injured while standing halfway up a ladder and attempting to stop a falling light fixture from hitting him. The Court reasoned that the statute did not apply because there was no height differential between the worker and the falling object. Seeing no reason to upset the "same level" interpretation of these decisions, the dissent supported a finding of no liability.

The *Wilinski* decision means that what was once viewed as a reliable benchmark of non-strict liability, the "same level" rule, does not exist. Contractor organizations have criticized *Wilinski* as a dramatic expansion of the scope of Labor Law §240(1), with impacts to be seen in more litigation and increased general liability insurance premiums. While the goal of the majority in *Wilinski* was to bring clarity to New York's Scaffold Law, the vigorous dissent suggests that clarity may still be a long way off.

Indeed, the outlook is further muddled by the Court's decision in *Salazar v. Novalex Contracting Corp.*, 2011 WL 5817987, issued just three weeks after the ruling in *Wilinski*. In *Salazar* an equally divided Court found no §240 liability, relying on *Wilinski*. The Court in *Salazar* now espouses what the dissent calls an "exception" to the statute that should not exist. Interestingly, the Justices who found no liability in the *Wilinski* dissent were joined by one Justice from the *Wilinski* majority to swing the *Salazar* decision to a no liability holding. In *Salazar*, the worker was injured stepping backwards into a 3-4 feet deep trench while in the process of raking wet concrete to fill and level a basement floor. There was no barricade or cover over the trench and the worker argued that this violated the statute.

The *Salazar* Court relied on the analysis, but not the holding, of the *Wilinski* decision to find the statute did not apply. The *Wilinski* decision had contrasted the facts of the "same level" rule cases with those in *Wilinski*, finding that the securing of the pipes was not contrary to the objectives of the work plan, since the pipes were not slated for demolition at the time of the accident. In some "same level" rule cases, the *Wilinski* decision explained, it would have been illogical to impose liability for failure to provide protective devices to prevent walls or objects from falling when their fall was the goal of the work. Because the goal of the work in *Salazar* was to fill the trenches with concrete, the Court found it was similarly illogical to require a protective device or barrier to doing that very work. The majority urged that the statute is to be "construed with common sense."

The dissent argued that the majority misapplies *Wilinski* by arbitrarily narrowing the scope of the statute with the creation of this exception. Since the *Salazar* facts meet all of the criteria required by *Runner* to correctly frame the issue, without need for examination of the goal of the work, this is precisely the type of case to which §240 was intended to apply. Moreover, the dissent urged that the statute should be "construed liberally" for the protection of workers. The dissent further took issue with the majority's conclusion that the trench in *Salazar* was being purposely filled in, which it says was a factual issue yet to be resolved. Additionally, the issue as to whether the protective device or barrier was "illogical" was premature in light of the factual issues remaining.

With this sharp division in New York's highest court, where the lines will be drawn in any given case under the Scaffold Law remains as difficult as ever to determine and even more difficult to predict. All of this is little consolation to the construction industry living with, and paying for, the consequences. E&D

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underlying the language. Further, this book examines how well the ConsensusDOCS achieve the goal of incorporating best practices and risk approaches that serve the best interest of the construction project by providing a better contractual foundation and reducing costly risk contingencies.

The treatment of the documents in this book also provides practical advice where appropriate on how to modify the documents to address project specific issues. In some instances, specific ConsensusDOCS contract provisions are compared and contrasted with relevant language in comparable standard forms, such as those produced by the American Institute of Architects. The actual language of the ConsensusDOCS documents is set forth in each chapter to assist the reader in his or her review and understanding. With the cooperation and assistance of the ConsensusDOCS organization, sample copies of each standard form are also included in the appendix to the book.

The ConsensusDOCS coalition has already updated certain of the primary documents since they were first introduced in 2007. Additional documents are now in the process of being updated, even as ConsensusDOCS continues to add to its family of standard form documents. These updates and additions will be the subject of supplements to this book. Information on ordering the book can be obtained at aspenpublishers.com. E&D

Design-Build Under Attack?

BY KEVIN F. PEARTREE

An issue has long been brewing in the New York design-build community; an issue that continues to inhibit the fuller use of this project delivery system. Recent efforts by some members of the design community appear formulated to call into question the legitimacy of design-build in the private sector.

Nearly 25 years ago, the state's highest court ruled that design-build construction contracts between a contractor/"design-builder" and an owner are not void as against public policy merely because the contractor is not licensed to practice as a design professional. The Court in *Charlebois v. J.M. Weller Associates*, 72 N.Y.2d 587 (1988), reasoned that the contract did not provide for the unauthorized practice of engineering by the contractor because the contractor had retained a specifically identified, licensed design professional to perform the design work. Since that time, many private projects have been completed in New York using the design-build approach and the contractual framework employed in *Charlebois*, namely a contract that specifically states that design services will be performed by a particular identified and licensed design professional under an express contract between the design-builder and its designer. Further, the designer's compensation, as paid to and through the design-builder, will be separately itemized in all payment application to the owner, so that there can be no concern about assertions of improper fee sharing by the designer.

Since the advent of design-build in New York, some members of the design community have continued to argue against the legality of constructor-led design-build in which the licensed design professional is a subcontractor to the design-builder. The argument is that New York's Education Law prohibits designers from playing such a role on a design-build project, and that to do so may constitute professional misconduct subjecting the designer to discipline by the Office of Professions. The prohibitions against constructor-led design-build offered by some in the design community stem from a belief that the practice results in fee splitting and the aiding and abetting of unlicensed practice.

Properly done, constructor-led design-build in New York results in neither of these. If compensation to the designer is specifically called out in the agreement between the owner and the design-builder, as well as in each payment application, the flow of payment through the constructor-led design-build entity should not be characterized as "fee splitting" under Regents Rule §29.3 (a)(6).

As for the position that a designer contracting with a constructor-led design-build entity could be charged with "aiding and abetting unlicensed practice," this argument also fails. If the highest court of New York says design-build is legal, where a design-builder contracts to furnish design services from a licensed design professional, and payment to the designer is separately delineated, then the design-builder is not "practicing" as that term is generally defined by the Education Law. If this approach to design-build is not illegal and the design-builder is not "practicing," then the designer is not "aiding and abetting unlicensed practice."

Designers have also pointed to the Education Department's Practice Guidelines for architects and engineers as a source of concerns about participating in design-build projects as a "subcontractor" to the design-builder. The Practice Guidelines, are just that – guidelines, and not rules or regulations. Those guidelines do discuss designers retained by "contractors," and although they do not expressly address design-build, designers have pointed to them as the reason for their concern about being subject to a finding of professional misconduct.

Some in the design community have proffered an addendum to design-build contracts that purports to protect design professionals from running afoul of these concerns by creating a three-way contract among owner, design-builder and designer. A three-way agreement is not itself objectionable. Such agreements are currently being employed on integrated project delivery projects. But the addendum seems to presume that typical design-build contract structure is in violation of the Regents' Rules, and is otherwise unlawful in New York, which it is not.

Recently, design professional associations successfully obtained the inclusion of a provision in legislation which enables the New York DOT and other agencies to use design-build project delivery, stating: *"The submission of a proposal or responses or the execution of a design-build contract*

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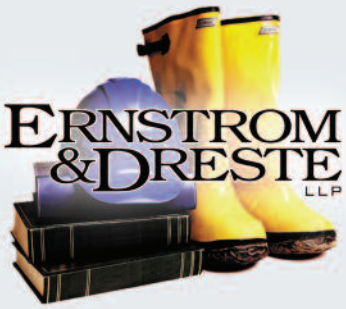

NEW YORK
180 Canal View Boulevard
Suite 600
Rochester, New York 14623

Visit us online at:
WWW.ERNSTROMDRESTE.COM

Ernstrom & Dreste also publishes the Fidelity and Surety Reporter. If you would like to receive that publication as well, please contact Mindy Moffett at mmoffett@ed-llp.com. Copies of ContrACT Construction Risk Management Reporter and The Fidelity and Surety Reporter can also be obtained at Ernstrom & Dreste's website (ernstromdreste.com).

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pursuant to this act shall not be construed to be a violation of section 6512 of the Education Law [making unauthorized practice a crime]." The primary problem with these measures is that they are wholly unnecessary. What is more troubling about the legislative language is that it may be used to argue that design-build, as currently and typically performed in the private sphere, is illegal.

Design-build is used regularly and safely around the country to the great benefit of its participants. New York needs to finally come into the 21st century and recognize without equivocation, as so many other jurisdictions have, that constructor-led design-build, properly done, is legal, ethical, and safe. E&D