SAFETY REVIEW NOT SPECIFIED IN CONTRACT

James C. Kozlowski, J.D., Ph.D.
© 2008 James C. Kozlowski

In contracting for personal services, an architect's duty depends on the particular agreement entered into with his employer. In the *Dukes* case described herein, there was no evidence in the contract between the architects and the city that the architects were required to conduct a safety review in their assessment of the city's Water Gardens renovation project. As a result, the architects owed no legal duty to report any safety hazards observed during their review of the Water Gardens. Moreover, absent a legal duty owed to park users, the architects could not be held liable for drowning deaths allegedly caused by the unreported safety hazards.

PARK WATER SCULPTURE

In the case of *Dukes v. Phillip Johnson/Alan Ritchie, Architects, P.C.* (Tex.App. 3/27/2008), Myron Dukes, Christopher Dukes, Lauren Dukes, and Juanitrice Deadmon drowned in the Fort Worth Water Gardens on June 16, 2004. The court provided the following description of the facts in this case:

> No one knows exactly how Lauren and Juanitrice initially entered the Active Water Pool. Lauren was reportedly the first to enter the water, and Juanitrice reportedly tried to help her out and either fell in or jumped in the pool. Both Myron and Christopher Dukes drowned after entering the Active Water Pool in an effort to save the girls.
>
> Since 1974, the Fort Worth Water Gardens, an outdoor urban park and water sculpture, have been an architectural favorite and a source of pride for the City of Fort Worth, The City has owned and controlled the Water Gardens since the 1970s. Prior to this accident, there had been no previous drowning deaths in the Water Gardens.
>
> The Water Gardens were originally designed by architects Philip Johnson and John Burgee and were not intended for swimming. In the 1990s, the City determined that it would engage in a restoration and renovation of the Water Gardens in conjunction with the Fort Worth Convention Center Renovation Project. The City contracted with Huitt/Keller from 1994-2000 to perform an architectural assessment of the Water Gardens. In 1999, the City also contracted with Johnson/Ritchie and Johantgen as consulting architects ["the architects"].

Shortly after the accident, Dukes filed suit against the City of Fort Worth ["the city"] and a number of architectural firms and engineering firms, as well as individual architects, engineers, and contractors. Dukes settled with the city in 2005. The remaining defendants included architectural firms, engineering firms, and individual architects and engineers who have been involved over the years with the design or restoration of the Water Gardens. Each of the

remaining defendants asserted that they owed no duty to Dukes. The trial court granted summary judgment to the architects. Dukes appealed.

NO DUTY, NO LIABILITY

On appeal, the issue was what, if any, legal duty was owed by the architects to the decedents. As noted by the appeals court, "[if no duty exists, then no legal liability for a premises liability claim can arise." For a legal duty to exist, the court found further that "plaintiff must prove that the defendant had control over and responsibility for the premises" that caused the injury.

> Ordinarily a person who does not own the real property must assume control over and responsibility for the premises before there will be liability for a dangerous condition existing on the real property.

In so doing, however, the court acknowledged that an individual "who has created the dangerous condition or who has agreed to make safe a known, dangerous condition may be liable even though not in control of the premises at the time of injury."

In this particular instance, Dukes had alleged that the architects "owed a duty to the decedents because, as professionals, they were under the ethical obligation to report any unsafe or hazardous conditions that they observed during their review of the Water Gardens." Under applicable state law, however, the appeals court found "no binding authority to support Dukes' proposition that a court must take into consideration professional codes of ethics when conducting a duty analysis." As a result, the appeals court concluded that "professional negligence law has not yet been broadened to include the evaluation of professional codes of ethics in the determination of whether a duty is owed." The appeals court, therefore, held that the architects "had no legal duty arising from their profession as architects to report safety hazards that they may have discovered in their assessment of the Water Gardens."

Dukes had also alleged that the architects owed a legal duty of care arising from their contractual relationship with the city. According to the court, "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."

> In contracting for personal services, an architect's or an engineer's duty depends on the particular agreement entered into with his employer. An engineer or an architect must use the skill and care in the performance of his duties commensurate with the requirements of his profession and is only liable for a failure to exercise reasonable care and skill commensurate with those requirements.

As noted by the court, "an architect's duty depends on the particular agreement entered into with his employer." In so doing, the court refused to consider a letter discussing possible design changes to the Water Gardens to define the architects' scope of responsibility because it did not constitute a valid contract.

> To constitute a valid contract, there must be an offer, acceptance, meeting of the minds, each party's consent to the terms, execution, and delivery of the contract with the intent that it be mutual and binding.

The court would, therefore, look to the actual contract between the architects and the city to determine what, if any, legal duty was owed by the architects to Dukes. After reviewing the contract, the appeals found "the contract did not require the architects to address safety issues."

> Although Dukes contends that the 1999 agreement was a "comprehensive review," thus making a safety review necessarily a part of the architects' responsibilities, our review of the agreement shows that it merely stated that the architects would provide "a review of existing conditions," including the "pavement, steps, and railings"; the "pools' surfaces, plumbing and lighting"; the "changes to the original Water Gardens for compliance with the ADA"; and development of "appropriate repair options and establishing of repair priorities." Nowhere does the contract specify that the architects had any contractual obligation to report or make safe any hazards that they may have detected in the Water Gardens.

Having found "no evidence that the contract required the architects to report or make safe any hazards detected," the appeals court, therefore, rejected Dukes' assertion that the architects owed a legal duty to the decedents arising from their contractual relationship with the city.

PREMISES LIABILITY

Dukes had also argued that the architects "owed a duty because they recognized that there were hazards in the Water Gardens and that drowning was a foreseeable result of such hazards." According to the court, foreseeability of harm is considered in determining the duty that an occupier of premises owes to invitees. However, under the circumstances of this particular case, the court reiterated the undisputed fact that "the City was the owner and occupier in exclusive control of the Water Gardens," not the architects. Aside from a walk-through of the Water Gardens, the court found "the architects never conducted any work at the Water Gardens, nor did the City ever contact them to implement any of the recommendations contained in the conditions survey."

Having found no evidence indicating the architects had exclusive control over the Water Gardens, the appeals court concluded that "no duty of reasonable care may be imposed upon the architects under general premises liability law." On the other hand, the court acknowledged that liability may still be imposed "if the party has agreed to make safe a known, dangerous condition on the premises and failed to do so or if the party has created the dangerous condition." However, under the circumstances of this particular case, the appeals court found "[t]he architects never expressly or impliedly agreed to make safe a known, dangerous condition, nor did they create the dangerous condition." Rather, the architects' contract with the city only required the architects to provide "a review of the Water Gardens' existing conditions so that the City could repair and restore the Water Gardens consistent with the original design and to comply with the ADA."

> The contract imposed no responsibility upon the architects to remedy the problems that they discovered in the course of their review. Thus, the contract itself demonstrates that the architects never expressly agreed to make safe a known, dangerous condition, and Dukes has not presented any competent evidence that would raise a genuine issue of material fact showing otherwise. Nor has Dukes presented any evidence raising a genuine issue of material fact that the architects impliedly agreed to remedy a known, dangerous condition or that they created the condition.

According to Dukes, in conducting their review, the architects had "observed a hazard in the form of 'algae or growth or fungus or something like this' on the stepping stones around the Active Water Pool that created a slipping risk for falls into the pool." As a result, Dukes contended that liability should be imposed because "the architect's report only made an obscure reference to cleaning of organic deposits and said nothing about a drowning hazard." The appeals court rejected this argument.

> Dukes has not raised a genuine issue of material fact that the architects ever expressly or impliedly agreed to correct any problems discovered in the course of their review. Thus, they had no duty to correct any potential hazard that they observed.
>
> After reviewing the evidence, we determine that Dukes has failed to raise a genuine issue of material fact that either the architects agreed to make safe a known, dangerous condition and failed to do so or that they created the hazardous condition. Therefore, we determine that no duty was imposed on the architects under premises liability law.

VOLUNTARY UNDERTAKING

Dukes had also alleged that the architects had voluntarily undertaken a legal duty reasonable care because the agreement between the architects and the city clearly stated that "the respective assessments were to cover all areas of the Water Gardens." Accordingly, Dukes contended that a legal "duty may be established by a showing that the architects undertook inspection of the entire park."

Citing Section 323 of the *Restatement of Torts*, the appeals court noted 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":

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Accordingly, "[i]f one undertakes to make the premises safe for others," the appeals court found that "he or she owes a duty to use due care to make the premises safe." Further, within this context, due care is defined as "that degree of care which a person of ordinary prudence would exercise under the same or similar circumstances." As a result, "to establish a negligent undertaking," the court would require a plaintiff to show the following:

> (1) the defendant undertook to perform services that it knew or should have known were necessary for the plaintiff's protection; (2) the defendant failed to exercise reasonable care in performing those services; and either (3) the plaintiff relied upon the defendant's performance; or (4) the defendant's performance increased the plaintiff's risk of harm.

Applying these principles to the facts of the case, the appeals court found Dukes had "failed to demonstrate an affirmative act undertaken by the architects that broadened the scope of their duty."

> Although Dukes argues that the architects inspection of the Water Gardens was a voluntary undertaking, they have failed to explain how such action is anything more than the architects' complying with their existing contractual obligation. We have already determined that the contractual agreement with the City defined the scope of their duty and that such a duty did not include a safety assessment.
>
> To hold that the architects voluntarily assumed a duty simply by performing an assessment of the Water Gardens, an action that was in strict compliance with their contractual obligation, does not comport with the general rule that an architect's duty depends on the particular agreement entered into with his employer.

Since "the contract that clearly defines the scope of the architects' duty," the appeals court stated that it could not ignore the plain language of the contract in order to find a voluntary undertaking to conduct a safety review. Moreover, the appeals court found no evidence that "the City relied on the architects 1999 assessment of the Water Gardens or shown that their inspection increased the risk of harm." On the contrary, the appeals court found that "the City never contacted the architects regarding any of the changes they suggested, nor did the City implement any of the suggestions or modifications contained in the 1999 conditions survey."

> Although the architects included their observation that algae or some other organic growth was detected on the concrete surfaces in the conditions survey, Dukes has not shown how the risk of harm was greater because of their observation. Nor has Dukes presented any evidence to show that the risk of harm was greater after their review than it was before the City contracted with them.

Having found "no evidence that the architects owed or assumed any duty to the decedents," the appeals court held, "as a matter of law… the architects work on the Water Gardens restoration project gave rise to no legal duty." The appeals court, therefore, affirmed the summary judgment of the trial court in favor of the architects.