

Koenig Jacobsen Appellate Victory: Court Upholds Judgment for Civil Engineer, Distinguishes *Beacon Residential*

We are pleased to advise that our firm recently prevailed on an Appeal to the San Diego Fourth District Court of Appeal confirming that a civil engineer owes no duty of care to a subcontractor with whom it is has no contractual relationship.

The subcontractor had contracted with a College District to construct an underground fire suppression system on the District's College Campus after submitting the lowest bid on the project. The civil engineering firm contracted with the District to prepare the civil engineering plans and technical specifications for the project. The District prepared the general and special conditions including the description of the onsite soils (Section HH) and put the project out for bid.

After it completed the project, the subcontractor sued the District and the civil engineer for damages it incurred as a result of allegedly unforeseen soils conditions on the project site that caused it to incur costs that exceeded the contract price. The trial court entered judgment after a court trial in favor of the District on the subcontractor's causes of action against District for breach of contract and breach of implied warranty/failure to disclose hidden conditions on project and entered a separate judgment in favor of the civil engineer after granting civil engineer's motion for judgment under C.C. P. Section 631.8 on subcontractor's causes of action for negligence and negligent misrepresentation. The judgments were affirmed on appeal.

Justice Nares, who authored the opinion, reviewed the case law evaluating the *Weseloh*, *Bily* and *Biankaja* opinions (opinions which address nine factors to

consider in determining if a duty to a remote party exists in the absence of privity) and rightly concluded that the civil engineer did not owe the subcontractor a duty of care.

Among other reasons, the court cited to the fact that the civil engineer's contract with the District was intended to benefit the District and the students and employees of the College. It was not foreseeable that the civil engineer could know that section HH, which it did not draft, would cause the subcontractor to underbid the job. The connection between the subcontractor's loss and the civil engineers' conduct was too remote.

Civil Engineer did not know that subcontractor secretly intended to finish the job early. Civil Engineer's alleged liability to subcontractor was under the District's control and a result of subcontractor's own conduct in underbidding the job and the manner in which it performed its work.

The Court goes on to analyze the recent *Beacon Residential Community Assn. v. Skidmore, Owings & Merrill* case (which we reported on in our July newsletter) at length and concluded that civil engineer did not uniquely possess knowledge and expertise about soils conditions on the project site.



The San Diego Community College District is the second-largest district in California.

Justice Nares stated that civil engineer's role on this project was different from the *Beacon* architects because they applied their specialized skill and professional judgment throughout the construction process. The imposition of designer liability to the third party homebuyers was based, in large part, on the substantial control and influence the architects exercised over the actual construction of the project. Here, civil engineer had no control over subcontractor's construction.

Even though this was an unpublished opinion, the Appellate Court has provided guidance to the design industry confirming that the *Beacon* case is limited to its facts and that a designer/engineer will not necessarily be liable for negligence in the absence of contractual privity.

KJ Wins Dismissal of Multi-Million Dollar Claim Against Real Estate Agent & Broker

Plaintiff, the purchaser of three vacant lots in an exclusive area of Orange County, brought suit against her real estate agent and broker for alleged breach of fiduciary duty, negligence and various fraud claims in connection with the purchase of the property. Koenig Jacobsen represented the real estate agent and brokerage in an extremely contentious and protracted litigation. Plaintiff claimed nearly

\$2 million in damages and was seeking punitive damages.

Prior to trial, Koenig Jacobsen successfully argued a motion to dismiss the case in its entirety based on complex procedural and jurisdictional defenses. The court granted the motion to dismiss and judgment has been entered in favor of the real estate agent and broker.

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